VOL. 6 - ISSUE 1 (2025)

Journal of International Criminal Law

Online Scientific Review

EDITED BY
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ISSN: 2717-1914

www.jiclonline.org

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OVERVIEW

The Journal of International Criminal Law (*JICL)* is a scientific, online, peer-reviewed journal, first edited in 2020 by Prof. Dr. Heybatollah Najandimanesh, mainly focusing on international criminal law issues.

Since 2023 JICL has been co-managed by Prof. Dr. Anna Oriolo as General Editor and published semiannually in collaboration with the International and European Criminal Law Observatory (IECLO) staff.

JICL Boards are powered by academics, scholars and higher education experts from a variety of colleges, universities, and institutions from all over the world, active in the fields of criminal law and criminal justice at the international, regional, and national level.

The aims of the JICL, *inter alia*, are as follow:

- to promote international peace and justice through scientific research and pubblication;
- to foster study of international criminal law in a spirit of partnership and cooperation with the researchers from different countries;
- to encourage multi-perspectives of international criminal law; and
- to support young researchers to study and disseminate international criminal law.

Due to the serious interdependence among political sciences, philosophy, criminal law, criminology, ethics and human rights, the scopes of JICL are focused on international criminal law, but not limited to it. In particular, the Journal welcomes high-quality submissions of manuscripts, essays, editorial comments, current developments, and book reviews by scholars and practitioners from around the world addressing both traditional and emerging themes, topics such as

- the substantive and procedural aspects of international criminal law;
- the jurisprudence of international criminal courts/tribunals;
- mutual effects of public international law, international relations, and international criminal law;
- relevant case-law from national criminal jurisdictions;
- criminal law and international human rights;
- European Union or EU criminal law (which includes financial violations and transnational crimes);
- domestic policy that affects international criminal law and international criminal justice;
- new technologies and international criminal justice;
- different country-specific approaches toward international criminal law and international criminal justice;
- historical accounts that address the international, regional, and national levels; and

- holistic research that makes use of political science, sociology, criminology, philosophy of law, ethics, and other disciplines that can inform the knowledge basis for scholarly dialogue.

The dynamic evolution of international criminal law, as an area that intersects various branches and levels of law and other disciplines, requires careful examination and interpretation. The need to scrutinize the origins, nature, and purpose of international criminal law is also evident in the light of its interdisciplinary characteristics. International criminal law norms and practices are shaped by various factors that further challenge any claims about the law's distinctiveness. The crime vocabulary too may reflect interdisciplinary synergies that draw on domains that often have been separated from law, according to legal doctrine. Talk about "ecocide" is just one example of such a trend that necessitates a rigorous analysis of law *per se* as well as open-minded assessment informed by other sources, *e.g.*, political science, philosophy, and ethics. Yet other emerging developments concern international criminal justice, especially through innovative contributions to enforcement strategies and restorative justice.

The tensions that arise from a description of preferences and priorities made it appropriate to create, improve and disseminate the JICL as a platform for research and dialogue across different cultures, in particular, as a consequence of the United Nations push for universal imperatives, *e.g.*, the fight against impunity for crimes of global concern (core international crimes, transboundary crimes, and transnational organized crimes).

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ARTICLES

Mis-Asylumation: Al-Assad's Sally Port to Impunity

by Yassin Abdalla Abdelkarim[*]

ABSTRACT: Since the original purpose of asylum is to provide weak persons who flee conflicts and other crises occurring in their homelands to foreign territories with protection, international law actors should strict themselves to the human accurate application of asylum rules to achieve the true humanitarian objective of asylum. However, practice discloses several examples of exploiting asylum for evil purposes, i.e., impunity. Perpetrators of gross atrocities against innocents that occur during conflicts in a country seek to enjoy the protection offered by asylum. This presents a severe crisis threatening the applicability and credibility of international law.

In this study, the phenomenon of exploiting the asylum notion by a perpetrator to seek impunity is analyzed by studying the case of outposted Syrian President Bashar Al-Assad and the Russian decision to grant him asylum status on humanitarian grounds, regardless of the judicial endeavors to prosecute him for the atrocities attributable to his regime in Syria. The research aims to point out the negative impacts of political influence on asylum decisions and how this interference promotes international impunity.

KEYWORDS**:** Asylum; Atrocities; Impunity; International Law; Syrian Civil Law.

I. Introduction

International legal practice reveals that the effective applicability of international law notions proves challenging. It is still far from achieving the true purposes of these notions. Several factors, such as politics, frustrate international law's endeavors to establish global peaceful cohabitation. Political intervention in international law application creates Sally ports[1] to evade the rule of law and to exploit its rules to achieve inhumane objectives. Therefore, this manifests a law abuse case and shapes a severe crisis threatening the credibility and trustworthiness of international law.

As a result of the modern influxes of seekers, asylum is a prominent international law notion in contemporary legal practice. It is a system aiming to provide innocents who flee their homelands because of well-founded fears caused by armed conflicts, natural catastrophes, epidemics…etc. Asylum's original role is to provide asylees with protection. It is a pivotal contribution to maintaining their humanity and dignity. Nevertheless, achieving the pure purpose of asylum requires a *bona fide* application of the relevant international law rules. Differently, asylum rules should be employed to protect groups who deserve protection and

DOUBLE BLIND PEER REVIEWED ARTICLE

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[1] (In a fort or the like) A gateway permitting the passage of a large number of troops at a time, https://www.collinsdictionary.com/dictionary/english/sally-port.

prevent misusing them to achieve *mala fide* purposes by persons who do not need protection. The latter category includes perpetrators of grave violations of human rights. Practices show several examples of them seeking asylum in another state to prevent being prosecuted or tried for the atrocities they are accountable for. They manage to use asylum as a Sally port to reach impunity and escape justice. As a consequence, their endeavors jeopardize the entire establishment of international law notions by creating templates of evil applications of them.

Consequently, the research aims to reveal the phenomenon of using asylum to reach impunity by studying the case of the outposted Syrian President Bashar Al-Assad who fled to Russia on 8 December 2024, where he was granted asylum, after the fall of his regime. Al-Assad is accountable for several gross human rights violations committed in Syria during the civil war. Among them torture, enforced disappearance, chemical weapons usage against civilians, and so on. Earlier, several extraterritorial prosecutions started against him but his immunity as a president deprived these judicial endeavors of efficiency. Therefore, being overthrown from the presidency, judicial endeavors to prosecute him would prove efficient. Nonetheless, his asylum in Russia frustrates this efficiency because of the judicial protection offered to him by Russia. This case constitutes a clear example of using asylum to evade justice. The research categorizes this *mala fide* practice of asylum as "mis-asylumation." The study introduced a novel concept to shed light on this practice as an independent phenomenon in international law to point out its severe impacts on the credibility and impartiality of asylum as an international law notion.

II. Asylum vs Impunity: A Contradiction

International law has emphasized the fundamentality of every human's right to seek asylum to flee suffering or persecution in his original country. Safety is the moral purpose of asylum, which achieving is stipulated by using asylum in a *bona fide* manner to prevent its exploitation. Every human is competent to enjoy this right disregarding his race, origin, religion...etc. However, because the core of seeking asylum is fleeing from home country to foreign lands, it could be used to evade domestic prosecution for severe crimes. Practice disclosed that several war criminals and perpetrators of serious human rights violations managed to seek asylum in another state to escape justice. In this case, a *prima facie* correlation between asylum and impunity appears through using asylum to realize impunity. This status deforms the true nature of asylum and its pure humanitarian purpose. Thus, the differentiation between the two concepts should be clarified clearly.

A. Asylum: A Humanitarian Approach

The aftermath of World War Two had witnessed a notable breakout of a global refugee crisis, besides the requirement to satisfy the rights included in the Universal Declaration of Human Rights (1948), invoking the urgent need to establish a firm legal structure of protection within International Law rules[2] figure out the vulnerabilities of asylum seekers that urge governments and international community actors to intervene and provide them with protection and facilitation.

[2] Isok Kim *et.al.*, *Refugees and Asylum Seekers*, in TRAUMA AND HUMAN RIGHTS (Butler, L.D., Critelli, F.M., Carello, J. eds., 2019), at 226. SUSAN FRATZKE, MEGHAN BENTON *et. al.*, THE END OF ASYLUM? EVOLVING THE PROTECTION SYSTEM TO MEET 21ST CENTURY CHALLENGES (2024).

Initially, the United Nations High Commissioner for Refugees (UNHCR) considers refugees as individuals compelled to escape their country due to persecution, conflict, or violence. Upon being recognized by the international community as refugees, they are acknowledged to possess a well-founded fear of persecution based on a certain characteristic or belonging .[3] Consequently, they are unable or unwilling to seek protection from their home country or return because of the fear of persecution. The same factors apply to asylum seekers; political persecution drives persons to flee their country to safety abroad and seek international protection.[4] Thus, they should be granted the same protection standard offered to refugees despite the legal obligation to prove their well-founded fear. According to Kim et al., the latter constitutes the mutual factor between refugees and asylum seekers, granting them a protective legal framework.[5]

Because of the universal consensus on protecting refugees and asylum seekers, a set of multilateral legal instruments has been introduced to construct the overall legal framework of this protection. The Geneva Refugee Convention (1951), along with its Protocol of 1967, is a United Nations multilateral treaty that defines who qualifies as a refugee, outlines the rights of individuals granted asylum, and specifies the responsibilities of nations that provide asylum.[6] Under this Convention, states have the duty to safeguard the fundamental human rights of their citizens. Nonetheless, when they are unable or unwilling to fulfill this duty—often due to political reasons, discrimination, conflict, violence, or other circumstances that severely disrupt public order—individuals may face such severe violations of their human rights that they are forced to leave their homes, families, and communities to seek refuge in another country, which grants refugees and asylum seekers a distinct effective protection scheme.[7] Since refugees, by definition, lack protection from their own governments, the international community intervenes to ensure their safety and protection. Countries that have signed the 1951 Convention are obligated to protect refugees within their territories and treat them according to internationally recognized standards.

In 2001, the EU introduced the Temporary Protection Directive (2001/55/EC), aimed at providing immediate, temporary protection for displaced individuals from outside the Union's external borders. This directive was intended for use in exceptional circumstances to manage a "mass influx" of refugees, requiring EU member states to accept and host refugees when invoked.[8] In the same approach, and to prevent casualties among asylum seekers, EU states began to issue humanitarian visas, which are a type of visa granted on humanitarian grounds to individuals who are in urgent need of protection. These visas allow people to legally enter and stay in an EU Member State temporarily. They are often issued to individuals facing serious threats to their lives or safety in their home country, such as those fleeing conflict or persecution.[9] Humanitarian visas are crucial for providing safe and legal pathways for those in

[3] Kim *et. al.*, *supra* note 2, at 223.
[4] UNHCR, *Asylum Seekers*, UNHCR, (Dec. 10, 2024) https://www.unhcr.org/about-unhcr/who-we-protect/asylum-seekers.
[5] Kim *et. al.*, *supra* note 2, at 229.
[6] UNHCR, *1951 Refugee Convention,* UNHCR, (Dec. 10, 2024) https://www.unhcr.org/about-unhcr/overview/1951-refugee-convention.
[7] Nell Gabiam, *Palestinians and Europe's 'Refugee Crisis' Seeking Asylum in France in the Wake of the Syrian War,* 34(2) JOURNAL OF REFUGEE STUDIES 1327 (2021), at 1328.
[8] HELLMUT WOLLMAN, LOCAL GOVERNMENT AND GOVERNANCE IN GERMANY: CHALLENGES, RESPONSES AND PERSPECTİVES (LOCAL AND URBAN GOVERNANCE) (2024), at 110.
[9] EC, *EMN Asylum and Migration Glossary*, EC, (Dec. 10, 2024), https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/humanitarian-visa_en?form=MG0AV3.

need, helping to prevent dangerous journeys, and ensuring that individuals can access international protection. However, the issuance of these visas can vary significantly across different EU countries, regardless of being organized by the EU Code of 2009,[10] The process can be complex and challenging for applicants. For instance, certain states have narrowly defined humanitarian grounds, limiting them to medical emergencies. In contrast, others have adopted a broader interpretation that includes catastrophic situations forcing people to flee their country.[11] This complexity is manifested in the narrow scope of the application of humanitarian visas in practice since the issuing EU States adopted a discretionary and exceptional basis, and the visa availability for refugees has been very limited.[12]

Remarkably, after extensive negotiations, the European Council and the European Parliament reached an agreement in 2023 to reform the EU asylum and migration system. A key provision in the new Asylum Procedure Regulation (APR) allows for the establishment of control and processing facilities at EU borders and permits member states to reject asylum applications if the "safe third country" concept applies. The European Parliament approved the new migration rules in April 2024, and they were formally adopted by the Council of the EU in May 2024. This reform aims to ensure strong and secure external borders for the Union and to prevent any EU country from facing undue pressure alone.[13] Furthermore, to maintain the functionality of the European asylum system, EU States offered notable financial aid to refugee reception states, enhancing their ability to provide refugees and asylum seekers with appropriate humanitarian living essentials.[14] This adoption concurs with scholars' endeavors to shed light on the deteriorated situation of refugees and asylum seekers in the EU.[15]

From this brief, it could be concluded that the humanitarian objective formulates the core of national asylum systems since protecting the asylee's life and dignity is the direct privilege of granting asylum status. In this point, asylum accords with fundamental human rights conceptions, labeling it with humanitarian features.

B. Impunity: Inhumane Approach

In international criminal law, the concept of impunity refers to the exemption from punishment or accountability for perpetrators of illegal acts, particularly serious crimes such as genocide, war crimes, and crimes against humanity.[16] It means that those responsible for such crimes are not held accountable, which can undermine justice and the rule of law, erode public trust in the legal system, and perpetuate a cycle of violence and abuse. It often denies justice to victims and can hinder societal healing and reconciliation. It could be achieved through several methods such as non-prosecution, diplomatic immunity abuse, and offering state protection for the perpetrator by mis-asylumation.

Impunity and justice are intrinsically linked in the realm of international law, particularly concerning serious crimes like genocide, war crimes, and crimes against humanity. Addressing

[10] EU, Regulation (EC) No. 810/2009, Establishing a Community Code on Visas (Feb. 2, 2020), (Dec. 10, 2024) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02009R0810-20200202.
[11] Gabiam, *supra* note 7, at 1332.
[12] *Id*., at 1344.
[13] Wollman, *supra* note 8.
[14] EU, Regulation No. 516/2014, Establishing the Asylum, Migration and Integration Fund, Amending Council Decision 2008/381/EC And Repealing Decisions No 573/2007/EC And No 575/2007/EC Of the European Parliament and Of the Council and Council Decision 2007/435/EC, (Apr. 16, 2014).
[15] Florian Trauner, *Asylum Policy: the EU's 'Crises' and the Looming Policy Regime Failure,* 38(3) JOURNAL OF EUROPEAN INTEGRATION 311 (2016), at 317.
[16] MANSOUR TALEBPOUR, IMPUNITY AND THE INTERNATIONAL CRIMINAL COURT (ICC) (2013), at 31-32.

impunity is a fundamental aspect of achieving justice because it involves not only prosecuting and punishing offenders but also implementing measures to prevent future violations, investigate past crimes, and repair the harm caused to victims and societies. Otherwise, humanity suffers international law pointlessness that jeopardizes international justice.[17] This comprehensive approach is essential for fostering accountability, protecting human rights, and maintaining international peace and security. Since justice is integral to peace, international law should employ all its mechanisms to achieve justice universally. Justice is the moral foundation that legitimizes international law tools.[18] Therefore, international law should intervene whenever justice is at risk. The ICC assures that fighting impunity is a shared responsibility of the international community.[19] An aim that justifies its judicial intervention under the principle of complementarity.

As Cribari-Neto and Santos indicate, impunity is a complex and multifaceted phenomenon defined as the absence of punishment for legal violations and crimes.[20] It can occur at individual, institutional, or societal levels, representing the exercise of power without accountability. Impunity arises when crimes, ranging from minor offenses to serious human rights violations, are not adequately investigated, perpetrators are not convicted, and victims do not receive reparations. This not only denies justice to victims but also undermines public trust in state institutions and the rule of law, fueling the repetition of crimes and legal violations. At its worst, impunity means crimes go unpunished which leads to jeopardizing the conceptions of justice and remedy. Furthermore, impunity permeates the structures of many societies, posing a significant hurdle to the promotion of justice and equality.[21] It fosters inequality, corruption, and crime, impeding social progress and creating an environment of insecurity and injustice. This can lead to abuses of power, widespread corruption, and the denial of basic human rights. Impunity also perpetuates injustice and inequality, as those in power do not fear repercussions for their actions. In this case, impunity is used as a tool to enhance perpetrators' status for political motivations.

Moreover, they advocate the cosmopolitan feature of impunity and its impacts on countries globally, irrespective of their economic development. Varying levels of impunity across nations challenge global governance, necessitating unified legal frameworks and strong accountability mechanisms.[22] Impunity levels are influenced by socioeconomic conditions, institutional effectiveness, and cultural factors. As previously mentioned, it can erode trust in institutions, foster corruption and crime, and create an environment of insecurity and injustice.

To sum up, impunity's contradiction to the humanitarian need for justice and remedy is undeniable. Regardless of its motivation, enabling perpetrators of serious crimes to evade justice hinders the universal establishment of justice values. This consequence invoked dozens of international agreements and treaties, as indicated in detail in the International Commission of Jurists Practitioner Guide, to suppress impunity and ensure effective prosecutions of those perpetrators.

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[17] Yassin Abdalla Abdelkarim, *Prosecuting International Law: Diagnosing the International Legal Asthenia Concerning the Gaza Crisis*, 5(1) JOURNAL OF INTERNATIONAL CRIMINAL LAW 1 (2024), at 1.
[18] *Id.,* at 7.
[19] ICC, No. ICC-01/18-310-Corr, Corrigendum of Amicus Curiae Observations by the Jerusalem Institute of Justice, (Oct. 2, 2024).
[20] Francisco Cribari-Neto, Marcelo A.F.L. Santos, *An Empirical Analysis of Worldwide Impunity*, 11(1285) HUMANITIES AND SOCIAL SCIENCES COMMUNICATIONS 1 (2024), at 2.
[21] *Id.*
[22] *Id.*

III. Mis-Asylumation

The glare differentiation and contradiction between asylum and impunity imply creating a solidification of the contradiction to defend the humanitarian theme of asylum. Seeking asylum by a perpetrator to evade justice and realize impunity proves a contemporary practice in international law. This requires a logical legal explanation by introducing this practice classified under an independent concept: Mis-Asylumation.

A. Understanding the Concept

The previous preview testifies that maintaining the humanitarian status of asylum seekers is the core objective that motivates states to endorse domestic asylum policies under the umbrella of international legal instruments, i.e., the 1951 Convention. This objective provides also the natural logical justification for enhancing domestic and regional legal asylum frameworks that operate to accomplish the true mission of asylum systems.[23] The accomplishment of this objective implies honest compliance with the humanitarian end of asylum by limiting it to persons whom granting asylum status requirements apply to them lest this humanitarian approach becomes an instrument to realize *mala fide* aims, such as trafficking or evading justice. Consequently, abuse of granting asylum states deforms the pure purpose of asylum, leading to the emergence of a novel concept in international human rights law: the mis-asylumation; an innovative linguistic formulation that combines both the prefix "mis", to reflect abuse and exploitation, and the suffix "ation" to reflect the normative conception, with the word "asylum". The research introduces this concept as "intentional abuse of granting asylum status by a state in cases that contradict the humanitarian theme of asylum conception". Then, mis-asylumation consists of these pillars:

- Obvious intention to exploit asylum,
- Issuing asylum status to a person without a clear human need,
- The chief actor is a state under international law,
- Achieving a certain purpose that hinders the peaceful humanitarian purposes of asylum, *e.g.*, providing a safe haven for a war criminal.

The phenomenon of mis-asylumation is a direct consequence of the interference between asylum conception and factors that might dominate the asylum system of a given state and drive it to grant asylum status to a seeker without compliance with the humanitarian theme and purposes of asylum concept. Regardless of the mis-asylumation causation, its severity is crystalized by achieving purposes that contradict the pure requirement of peaceful global cohabitation. However, the research purpose implies limiting the study of mis-asylumation to the political factor since it is the core contributing factor to the Al-Assad case.

B. Asylum and Politics

The question of granting asylum to persons who flee persecution and other atrocities has gained a global consensus among members of the international community. Crisp argues that this consensus reflects a universal political will to suppress the agony of refugees and asylum seekers.[24] Thus, the political factor of the state's will play a crucial role in determining the

[23] Gabiam, *supra* note 7, at 1328.
[24] Jeff Crisp, *Mobilizing Political Will for Refugee Protection and Solutions: A Framework for Analysis and Action,* 1 WORLD REFUGEE COUNCIL RESEARCH PAPER SERIES 1 (2018), at 2.

state's policy regarding granting asylum status. Politics can significantly influence asylum policies and the treatment of asylum seekers. For instance, in many European countries, the introduction of policies that restrict asylum seekers' rights and benefits often coincides with upcoming elections, especially when right-wing parties are in power.[25] These policies are sometimes used as political tools to gain electoral support by appealing to voters' concerns about immigration. Thus, the tight correlation between asylum and politics is undeniable. On a broader scale, migration and asylum policies can impact global politics and security. The flow of migrants, including asylum seekers, can affect political stability and security at both national and international levels. Han claims that politics contributes the greatest to drafting asylum policies and decisions because of the powerful impacts of political frictions concerning asylum questions in a state.[26] Furthermore, the global refugee crisis affected national asylum policies by determining the approach that a state would adopt according to its national interest, which introduces a clear manifestation of politics impacts on the asylum question.[27] This aligns with Abdelkarim's arguments about the subordination of international law application to politics.[28] The political influence on international legal practice constitutes a severe double standards dilemma because exploiting international law norms, i.e., asylum, deprives victims of human rights violations of justice and remedy. The latter is a core component of international peaceful cohabitation. Thus, states have a due diligence obligation to depoliticalize the notion of asylum to ensure the accomplishment of its pure humanitarian purpose.

The purpose of deploying asylum policies reflects the powerful connection between asylum and politics. For instance, the EU employed regional asylum policies in 2023 to support Ukrainian asylum seekers within the Member States.[29] Indeed, the EU approach in this case crystallizes its political efforts to support Ukraine by relieving the crisis caused by the Russo-Ukrainian war. The report noted that several EU countries have permitted the conversion of temporary protection status into residence permits for employment or family reunification. Additionally, some countries have expanded the scope of temporary protection to include Ukrainian nationals who were already outside Ukraine when the military aggression commenced.[30] The EU's political stance against the Russian invasion is the momentum for these supportive policies for Ukraine. This justifies Segarra's critiques of the Hungarian restrictive policies concerning the reception of asylum seekers.[31] She concludes the violation of domestic policies in this state to the fundamental principles of the EU. Hungary prioritized its national interests by imposing policies that contradicted the purposes of the EU's relevant directives.[32] An inter-EU conflict floats on the surface concerning asylum, crystallizing the prominence of politics' impacts on asylum systems since the Hungarian state's interests, e.g., national security, were the sole determinants of asylum national policies.

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[25] Kyung Joon Han, *Political Use of Asylum Policies: The Effects of Partisanship and Election Timing on Government Policies Regarding Asylum Seekers' Welfare Benefits*, 11 COMPARATIVE EUROPEAN POLITICS 383 (2012), at 388.
[26] *Id.,* at 386.
[27] Omer Solodch, *Regaining Control? The Political Impact of Policy Responses to Refugee Crises*, 75(3) INTERNATIONAL ORGANIZATION 735 (2019), at 740.
[28] Abdelkarim, *supra* note 17, at 7.
[29] EUAA, Report, Annual Report on the Situation of Asylum in the European Union: Executive Summary (2024), at 8.
[30] *Id.*, at 9.
[31] Helena Segarra, *Dismantling the Reception of Asylum Seekers: Hungary's Illiberal Asylum Policies and EU Responses,* 40(1) EAST EUROPEAN POLITICS 43 (2023), at 55.
[32] Id., at 50.

The local dimension is principal to frame asylum domestic policies as a reflection of the notion of nationalism.[33] They argue that analyzing domestic asylum systems should concentrate on the local perspective of the receptionist community. States' policies on asylum seekers' reception begin from politics rising within local communities. In addition, a centric role of politics is manifested in the competence of local authorities to implement asylum policies under the overall policy of the state; a fact supporting the *prima facie* dominance of politics over asylum policies and concluding the tight correlation between them.[34]

Uysal and others point out the direct correlation between the figures of asylum seekers and the popularity of right-wing parties in the West.[35] The increase in their figures offers powerful opportunities for those parties to broaden their ground and enhance the implementation of their anti-immigrant agendas. Furthermore, the misconception of nationalism enhances the populism of the right-wing because of the prevailing portrait of asylum seekers and migrants as aliens, which might elevate domestic hostilities against them, fueling the motion of right-wing parties and offers them a justification for utilizing political violence to achieve their objectives.[36]

Therefore, politics bear massive impacts on the status of asylum seekers within a state and contribute crucially to drafting national policies of asylum along with deciding to grant asylum status to a given seeker and deny it to another. This tight nexus elevates politics to be a chief reason for mis-asylumation since the latter presents a form of political abuse of the asylum system against its natural humanitarian purposes. States' political pragmatism should not bear influence on asylum decisions.

IV. Mis-Asylumation of Impunity Regarding Al-Assad

To explore the role of mis-asylumation in enhancing international impunity concerning Syrian President Bashar Al-Assad, the research sheds light on atrocities attributed to his regime and the global endeavors to prosecute him, along with his regime officials, then exploring the Russian situation through an evaluative lens.

A. Prosecution of Al-Assad

Earlier than the official fall of Bashar Al-Assad's regime on the 8th of December 2024, human rights advocates and official prosecution authorities worldwide initiated judicial proceedings against him and other officials for heinous crimes against the Syrian people. Bashar al-Assad has been accused of numerous crimes against humanity and war crimes during his time in power. Some of the most serious allegations include: 1) Chemical Weapons Attacks: Assad's regime has been accused of using chemical weapons, including sarin and chlorine gas, against civilians. Notable attacks include the 2013 Ghouta attack, which killed over 1,400 people.[37] 2)

[33] Lorenzo Vianelli, Birte Nienaber, *Unpacking the Local in the Study of the Reception of Asylum Seekers: The Case of Luxembourg,* 114(3) GEOGRAPHICAL REVIEW 378 (2024), at 380-381.
[34] *Id.,* at 382.
[35] Mete Sefa Uysal *et. al.*, *Populism Predicts Sympathy for Attacks Against Asylum Seekers Through National Pride and Moral Justification of Political Violence,* 15(1) SOCİAL PSYCHOLOGICAL AND PERSONALITY SCIENCE 70 (2024), at 71-72.
[36] *Id.,* at 74-75.
[37] Doniyor Mutalov, *Note To Syrian Rebels: Give Up Assad's Chemical Weapons And Prosecute Those Who Used Them,* BULLETIN OF THE ATOMIC SCIENTISTS, (Dec. 25, 2024) https://thebulletin.org/2024/12/note-to-syrian-rebels-give-up-assads-chemical-weapons-and-prosecute-those-who-used-them/?form=MG0AV3.

Extrajudicial Killings: The regime has been implicated in the killing of at least 202,000 civilians, including children and women.[38] 3) Torture and Enforced Disappearances: Thousands of individuals have reportedly died under torture, and many more have been forcibly disappeared.[39] 4) Mass Graves: The discovery of mass graves has shed light on the scale of the regime's brutality, with countless bodies found in unmarked graves.[40] 5) Sieges and Starvation: Assad's forces have been accused of besieging cities, leading to severe shortages of food and medicine, and causing deaths from starvation.[41] The severity of those atrocities motivated states and human rights advocates to initiate prosecutions against Al-Assad and his regime officials. To achieve the study purpose, a limitation to Bashar Al-Assad's prosecution efforts is imposed as he manifests a direct application of mis-asylumation.

Nonetheless, the international community failed to initiate an official prosecution process against Bashar Al-Assad through international courts, even those that were established to achieve world criminal justice, e.g., the International Criminal Court and the International Court of Justice. The European Center for Constitutional and Human Rights (ECCHR) reported that the Rome Statute, adopted in 2002, established the International Criminal Court (ICC) to prosecute war crimes, crimes against humanity, and genocide, deprived the ICC of the authority to investigate crimes in Syria because Syria is not a party to the Rome Statute, and, also, a UN Security Council referral is blocked by Russia and China several times since the break out of the civil war in March 2011.[42] Thus, unilateral prosecution efforts started by human rights centers and activities. For instance, the Human Rights Council created the Independent International Commission of Inquiry on the Syrian Arab Republic (UN CoI Syria) to investigate human rights violations in Syria simultaneously with atrocities occurrence, leading to the initiation of prosecutions and trials before domestic European courts.

France was the first jurisdiction to prosecute Syrian president Bashar Al-Assad as in November 2023 a French court issued an arrest warrant against him for war crimes and crimes against humanity committed by his regime in Syria.[43] A decision that was supported by the Paris appeals court to ensure that diplomatic immunity should never offer perpetrators of heinous crimes an approach to impunity. Under the arrest warrant, Al-Assad can be detained and brought to France for questioning as the investigation into the 2013 attacks in Eastern Ghouta and Douma continues, according to lawyers. Although Assad is unlikely to face trial in France, international warrants for a sitting world leader are extremely rare and send a strong message about Al-Assad's leadership, especially at a time when some countries have re-engaged with him diplomatically.

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[38] Syrian Network for Human Rights, *Summary of the Assad Regime's Crimes Against the Syrian People Over the Last 14 Years*, SYRIAN NETWORK FOR HUMAN RIGHTS, (Dec. 20, 2024) Shttps://snhr.org/blog/2024/12/20/summary-of-the-assad-regimes-crimes-against-the-syrian-people-over-the-last-14-years/?form=MG0AV3.

[39] *Id*.

[40] Simona Foltyn, Dan Sagalayn, *Discovery of mass graves in Syria sheds new light on brutality of fallen Assad regime*, PBS NEWS, (Dec. 25, 2024) https://www.pbs.org/newshour/show/discovery-of-mass-graves-in-syria-sheds-new-light-on-brutality-of-the-fallen-assad-regime?form=MG0AV3.

[41] Juan Carlos Sanz, *Survivors of the Douma ghetto: 'Syria will not forget the crimes of Bashar al-Assad'*, EL PAIS (Dec. 25, 2024) https://english.elpais.com/international/2024-12-19/survivors-of-the-douma-ghetto-syria-will-not-forget-the-crimes-of-bashar-al-assad.html?form=MG0AV3.

[42] ECCHR, Survivors of Assad's torture regime demand justice – German Authorities Issue First International Arrest Warrant, ECCHR, https://www.ecchr.eu/fileadmin/Q_As/QA_Syria_Torture_Complaints_Germany_2019August.pdf.

[43] France 24, *French Court Upholds Arrest Warrant for Syria's Assad,* FRANCE 24 (Dec. 25, 2024) https://www.france24.com/en/france/20240626-french-court-upholds-arrest-warrant-for-syria-s-assad.

On 8 December 2024, the world witnessed the fall of Bashar al-Assad's regime in Syria, following a major offensive by opposition forces. The offensive, spearheaded by Hayat Tahrir al-Sham (HTS) and supported by Turkish-backed factions, led to the capture of Damascus and the collapse of pro-government forces. Assad fled to Russia, where he was granted asylum along with his family.[44] This marked the end of over 50 years of Assad family rule, which began with Hafez al-Assad in 1971. The swift collapse of the regime was a significant blow to its allies, Russia and Iran, and has reshaped regional dynamics.

B. Russia's Duty to Prosecute Al-Assad

It is acknowledged that international human rights law (IHL) imposes two main categories of obligations on the state: (i) a duty to respect human rights and (ii) a duty to guarantee these rights.[45] The duty to guarantee encompasses the state's responsibilities to prevent human rights violations, investigate them, prosecute and punish the perpetrators, and repair the damages caused.[46] Consequently, the state assumes the role of a guarantor of human rights, with fundamental obligations to protect and safeguard these rights. The obligatory nature of this duty elevates it to be a *jus cogen* in international law. Under international law, states are obligated to prosecute and punish perpetrators of gross human rights violations, crimes against humanity, genocide, and war crimes through their national criminal courts and refrain from providing them a safe haven, which prevents justice. This obligation is not solely based on treaties; its recognition has a long history in international law.[47] One of the earliest case law precedents is the arbitral award issued on 1 May 1925, regarding British claims for damages caused to British subjects in the Spanish zone of Morocco.

Domestic courts have primary jurisdiction over crimes against humanity under the Rome Statute for the International Criminal Court, with the International Criminal Court having an ancillary role in the prosecution of these crimes.[48] As previously established, the lack of ICC jurisdiction in Al-Assad case imposes an obligation on Russian courts to prosecute him because his residence moved to Russia and started living within their direct jurisdiction. Thus, there is a natural obligation on Russia to prosecute Al-Assad. Rodman identifies the global "duty to prosecute" as the assertion by advocates of international criminal justice that the global community has a moral and legal responsibility to investigate and punish the most severe human rights abuses following war or oppressive regimes.[49] Despite its universalism, national courts hold great responsibility to implement this duty, which derives its legitimacy from being rooted in international criminal and human rights law.[50] Key legal sources include the 1948 Genocide Convention, the 1949 Geneva Conventions, the 1984 Convention on Torture, and the 1998 Rome Statute.[51] These laws mandate prosecution or extradition for serious crimes and have delegitimized amnesty for such violations. Customary international law solidifies this duty

[44] https://www.nytimes.com/live/2024/12/08/world/syria-war-damascus, accessed on 26 December 2024.
[45] ICJ, Guide, International Law and the Fight Against Impunity: A Practitioners' Guide No. 7 (2019), at 89.
[46] *Id.*, at 92.
[47] *Id.*, at 389.
[48] Ruairi Maguire, *Prosecuting Crimes Against Humanity: Complementarity, Victims' Rights and Domestic Courts,* 17 CRIMINAL LAW AND PHILOSOPHY 669 (2023), at 673.
[49] Kenneth A. Rodman, *Duty to Prosecute*, in ENCYCLOPEDIA OF GLOBAL JUSTICE (Deen K. Chatterjee ed., 2011), at 284.
[50] *Id.*, at 285.
[51] *Id.*

as indicated in the rules of the International Committee of the Red Cross (ICRC)[52] because states' practices established a complete legal structure of the duty to prosecute. This duty challenges the legitimacy of amnesty and non-retributive forms of transitional justice for those who commit such crimes. Granting asylum status by Russia to Al-Assad, who is accountable for severe crimes committed in Syria, contradicts Russia's duty to prosecute war criminals since it is widely accepted that individuals suspected of committing war crimes are not eligible for refugee or asylum status. This principle is supported by the Convention on the Status of Refugees and state practices.[53] In 1994, the UN Security Council emphasized that those involved in serious breaches of international humanitarian law cannot escape prosecution by fleeing their country, and the refugee convention does not apply to them. The UN General Assembly has also supported the exclusion of suspected war criminals from asylum in various resolutions and declarations.[54]

C. Al-Assad Mis-Asylumation by Russia

On 11 December 2024, Moscow declared granting Bashar Al-Assad asylum status for humanitarian reasons.[55] Granting asylum status to a war criminal supports impunity for several reasons. First, it enables the prevail of the lack of accountability; when war criminals are granted asylum, they are shielded from facing prosecution for their crimes. This lack of accountability allows them to escape justice and continue living without consequences for their actions. Second, this decision undermines justice because it conveys a message that those who commit serious violations of international law can avoid punishment by seeking refuge in another country. This undermines the efforts of the international community to uphold justice and deter future crimes and manifests a strong influence of politics on asylum. Moreover, it encourages future human rights violations by allowing war criminals to evade prosecution. It creates a precedent that others may follow, believing they too can escape punishment. This can lead to a cycle of impunity and continued human rights abuses. Last, granting serious crime suspects asylum status violates victims' rights as it disregards the rights of victims to see justice served and denies them the opportunity for closure and reparation, perpetuating their suffering. Therefore, granting asylum to war criminals not only undermines the rule of law but also perpetuates a culture of impunity, allowing perpetrators to evade justice and potentially encouraging future violations of human rights. These consequences incentivize a global consensus on prohibiting perpetrators of heinous crimes from asylum privileges.

The Russian decision to grant Bashar Al-Assad asylum status manifests a complete application of mis-asylumation according to the conception previously explained for these reasons:

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[52] ICTY, Rule 158, Prosecution of War Crimes (Nov. 1993), "States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.", (Dec. 29, 2024), https://ihl-databases.icrc.org/en/customary-ihl/v1/rule158.

[53] UN, Convention Relating to the Status of Refugees, No. 2851 (July 28, 1951), Article 1(F)(a). See, e.g., Australia, Defence Force Manual (cited in Volume II, Chapter. 44, at 636); Netherlands, Council of State, Administrative Law Division, Ahmed Case (*ibid.*, at 638); United States, Court of Appeals, Demjanjuk Case (*ibid.*, at 639); the reported practice of Netherlands (*ibid.*, at 640) and United States (*ibid.*, at 641).

[54] EU, *supra* note 14.

[55] The Gulf Observer News, *Bashar al-Assad Granted Asylum in Russia Amid Syria's Political Upheaval,* THE GULF, (Dec. 26, 2024), https://thegulfobserver.com/bashar-al-assad-granted-asylum-in-russia-amid-syrias-political-upheaval/.

- Al-Assad is accountable for several grave crimes committed against the Syrians during the civil war, e.g., torture, extrajudicial killings, chemical attacks on civilians, enforced disappearance...etc.[56] Upon the fall of his regime, he fled to Russia seeking asylum which he was immediately granted to evade prosecution. His intent to benefit from the humanitarian ends of asylum contradicts the original purpose of asylum. This constitutes an obvious *mala fide* "exploitation" of asylum.
- Furthermore, granting Al-Assad asylum status "does not stand on humanitarian grounds"; the asylee is accountable for several human rights violations and should be prosecuted and brought to justice. This fact deprives the Russian decision of its legally reasonable grounds, but it frustrates any endeavors aimed at achieving justice.
- Russia is the "state" that granted him asylum.
- It goes without saying that the chief purpose of granting Al-Assad asylum status in Russia is to offer him political protection against prosecution and trials, which "hinders international justice". This is an entirely inhumane consequence because it enroots impunity and threatens global peaceful cohabitation. Furthermore, it deprives asylum of its original humanitarian objectives and violates basic human rights.

Thus, the inability to prosecute Al-Assad for severe human rights violations occurred in Syria since the outbreak of the civil war in 2011 until he resigned in 2024. It cannot be admitted that granting Al-Assad asylum status in Russia is grounded only on humanitarian foundations because of the clear political motivations for this decision; Russia desires to protect its ally against justice. Therefore, one can conclude that the Russian decision constitutes a clear abuse of the fundamental right to seek asylum or, in other words, mis-asylumation.

V. The Non-Refoulment Dilemma

Article 33(1) of the 1951 Convention includes a principle that prevents states to which refugee and asylum seekers arrive from forcing them to return to their homeland where they fled severe threats and persecution. This is the principle of non-refoulment.

A. What is Non-Refoulment Dilemma

The Office of the High Commissioner of Human Rights (OHCHR) decides that the principle of non-refoulement is a fundamental protection under international human rights, refugee, humanitarian, and customary law. It prevents states from transferring or removing individuals from their jurisdiction or control if there are substantial grounds to believe that the person would face irreparable harm upon return, such as persecution, torture, ill-treatment, or other serious human rights violations.[57] This principle is explicitly included in various international and regional instruments, such as the Convention against Torture (CAT), the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), the Inter-American Convention on the Prevention of Torture, the American Convention on Human Rights, and the Charter of Fundamental Rights of the European Union. International human

[56] EC, *supra* note 9.
[57] OHCHR, The *Principle Of Non-Refoulement Under International Human Rights Law,* OHCHR, (Dec. 31, 2024) https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf, accessed on 31 December 2024.

rights bodies, regional human rights courts, and national courts have recognized this principle as an implicit guarantee flowing from the obligations to respect, protect, and fulfill human rights. Human rights treaty bodies, including the Committee Against Torture, the Human Rights Committee, the Committee on the Elimination of Discrimination Against Women, and the Committee on the Rights of the Child, regularly receive individual petitions concerning non-refoulement.

In the context of asylum seeker protection, the principle of non-refoulement offers complementary protection, which prevents the transfer of a person to a territory where they would face the risk of serious harm.[58] This legal norm presents an essential legal right for refugees and asylum seekers despite being originally rooted in international human rights law rather than the Refugee Convention of 1951. It applies to a broader scope of individuals seeking asylum, regardless of their specific status, e.g., race, religion, nationality, membership in a particular social group, or political opinion, extending beyond the categories covered by the Refugee Convention of 1951. The prominence of non-refoulment was enrooted in customary international law through several court rulings. For instance, the Inter-American Court of Human Rights (IACtHR) considered this principle a fundamental pillar of refugee and asylum seekers' protection.[59]

The prohibition of refoulement under international human rights law applies to any form of removal or transfer of persons, regardless of their status, if there are substantial grounds to believe that the returnee would face irreparable harm upon return, such as torture, ill-treatment, or other serious human rights violations. This principle is absolute and without exception, making it broader in scope than international refugee law. It applies to all persons, irrespective of their citizenship, nationality, statelessness, or migration status, and wherever a state exercises jurisdiction or effective control, even outside its territory.[60]

Courts and international human rights mechanisms have interpreted this prohibition to cover a range of serious human rights violations, including torture, cruel, inhuman, or degrading treatment, denial of a fair trial, risks to life, integrity, or freedom, serious sexual and gender-based violence, death penalty or death row, female genital mutilation, and prolonged solitary confinement. Additionally, severe violations of economic, social, and cultural rights, such as degrading living conditions, lack of medical treatment, or mental illness, have been found to prevent the return of persons.[61] Yatani and others argue that the principle of non-refoulement constitutes a key aspect of international refugee law, designed to prevent the return or expulsion of individuals to places where their lives or freedom would be at risk.[62] Protecting refugees and fulfilling states' obligations to provide asylum are crucial for safeguarding human rights and promoting humanitarian values.

As concluded, the broad scope and flexible applicability, along with its obligatory nature, of the principle of non-refoulment facilitates seeking asylum for wide sectors of refugees. These features might ease exploiting asylum by perpetrators to evade justice. The principle of non-refoulement applies whenever there is a genuine risk of persecution or serious harm based on various grounds, such as race, religion, nationality, membership in a particular social group, or

[58] Gabiam, *supra* note 7, at 1329.
[59] IACtHR, Opinion No. 25/2009 (Nov. 15, 2009), (Dec. 31, 2024) https://www.corteidh.or.cr/docs/opiniones/seriea_25_esp.pdf, accessed on 31 December 2024.
[60] UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (Jan. 26, 2007), at 2.
[61] IACtHR, *supra* note 60.
[62] Vincent Godana Yatani *et. al., Exclusion of the Principle of Non-Refoulement in Article 33 Paragraph 2 of the 1951 Refuge Convention*, 1(1) Ex Aequo et Bono Journal of Law 53 (2023), at 54.

political opinion. These grounds are broadly defined to encompass a wide range of circumstances that may place individuals at risk. Then, a question appears concerning the applicability of the non-refoulment on perpetrators of severe crimes, i.e., Bashar Al-Assad.

B. Non-Refoulment in Al-Assad Case

Being a guarantee that enhances the protection offered to asylum seekers and refugees, Articles 1F and 33(2) of the 1951 Convention impose exclusions from the principle of non-refoulment and the entire Convention protection. According to Yatani and others, there are exceptions to the principle of non-refoulment based on national security and public order.[63] Nevertheless, these exceptions should be applied sparingly and in line with international legal standards. They indicate that Article 33(2) of the Refugee Convention allows for exceptions to the principle of non-refoulement under specific circumstances. These exceptions include legitimate concerns about a refugee's impact on national security or if the refugee has been convicted of a grave criminal offense, e.g., crimes against humanity and war crimes.[64] However, the consistent interpretation of the exclusion clause is challenging because different states may have varying interpretations, leading to inconsistent decisions and outcomes.[65] Hence, promoting consistent interpretation through dialogue, training, and the exchange of best practices among states can contribute to greater predictability and fairness in implementing the exclusion provisions.

Jöbstl explains these exclusions by the global need to maintain peace and security, implying that perpetrators of severe crimes should never enjoy the protection offered by the Convention and the principle of non-refoulment.[66] Requirements of achieving justice and remedy for victims besides eradicating international impunity justify refusing to grant asylum status to those perpetrators and impose an obligation on the state they flee to refouler them to their country to enable the domestic jurisdiction to initiate prosecutions against them. In addition, the prohibition of returning asylum seekers to their homeland, where their safety is endangered, does not apply to those grave criminals who deprived innocents of their safety.[67] The guilt is severe, and justice requirements imply prioritizing prosecuting those criminals, regardless of the non-refoulment fundamentality. Realizing justice and remedy for atrocities victims is concrete to maintaining public order as included in Article 33(2) of the 1951 Convention.

Accordingly, upon the arrival of Bashar Al-Assad to the Russian territory, domestic authorities should have complied with the duty to prosecute under international law. Al-Assad is accountable for grave human rights violations against innocent Syrian citizens and fleeing from Syria to Russia once his regime has fallen never constitutes a well-founded fear of danger according to the 1951 Convention. Fearing justice is not a well-founded fear. It is a Sally port to reach impunity and evade justice. Furthermore, the political motivation for Russia to grant Al-Assad asylum status presents an obvious example of the negative impacts on justice when politics rule over the decision to initiate judicial procedures, which proves how mis-asylumation enhances international impunity.

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[63] *Id.*
[64] *Id.,* at 55.
[65] *Id.*, at 58.
[66] Hannes Jöbstl, *An Unforeseen Pandora's Box? Absolute Non-Refoulement Obligations under Article 5 of the ILC Draft Articles on Crimes Against Humanity,* EJIL: TALK! BLOG OF THE EUROPEAN JOURNAL OF INTERNATIONAL LAW (May. 20, 2019), https://www.ejiltalk.org/an-unforeseen-pandoras-box-absolute-non-refoulement-obligations-under-article-5-of-the-ilc-draft-articles-on-crimes-against-humanity/.
[67] Yatani *et al.*, *supra* note 63, at 58.

VI. Conclusion

While asylum passed through several stages in the history of international law to be structured as a human approach to spare lives, certain groups managed to exploit the protection offered by asylum, for political motivations, to evade justice. This practice is enrooted in international politics and bears severe legal consequences on international justice. Since the latter is enhanced by the persisting indiscriminative application of laws, granting certain privileges that enable a given person to evade justice hinders global trust in the concept of justice. Furthermore, the exploitation of a human system to achieve impunity is a direct result of the dominance of political factors over legal questions. Through studying the Russian decision to grant Bashar Al-Assad asylum status, the research points out how this political decision negatively affects justice by providing a perpetrator a Sally port to reach impunity and escape justice. This methodology introduced a novel concept in international law, mis-asylumation, to profile non-legitimate granting asylum status to perpetrators for political reasons. The description of this prevailing practice by the novel concept of mis-asylumation suits the severity of enhancing impunity through human systems' abuse. It should be highlighted that eradicating mis-asylumation is urgent to maintain the credibility and trustworthiness of international justice. This could be achieved by isolating politics from the law by ensuring that applying international law notions, such as asylum, depends solely on legal grounds and is not influenced by political objectives.

Competing Interests: The author declares that there are no competing interests, financial or non-financial, regarding this manuscript.
Funding: The authore received no funding for this work.

Rape as a Weapon of War: How It Used in the Modern-Day Armed Conflict

by Bushrat Jahan[*]

ABSTRACT: When we think about weapons of war at first glance we remember guns, bullets, and bombs, not rape or sexual violence. But Rape does more than just wound which is a military strategy used to deny and destroy the identity of a targeted community. Historically, sexual violence in armed conflicts was considered a byproduct of war, simply as unrestrained sexual behavior amid lawlessness and a breakdown of societal infrastructure. When one digs deeper into the aims and intentions, sexual violence came out as a strategic tool of discrimination and hate, and a weapon of warfare, largely targeted at humiliation, torture, demoralization, and individual or collective shaming. In many recent conflicts, like in Afghanistan, Iraq, Sudan, Myanmar even in Ukraine rape and sexual violence were used as a weapon of terrorizing and showing of power to the enemy group by targeting civilians. But as history remains silent about punishing the perpetrators the same is happening today. Most of the time perpetrators go away with it. This study will discuss why it is important to consider rape or sexual violence in armed conflict as a weapon of war to separate them from generalized and to determine how it can be prosecuted. There will be a discussion on how perpetrators exploit sexual violence as a tactic of war in modern-day armed conflicts exemplifying some recent atrocities. By spotlighting these atrocities, this study will also underscore why international accountability fails to prosecute perpetrators and how justice will be served to the victims.

KEYWORDS: Armed Conflict; Sexual Violence; Strategy of War; Victims.

I. Introduction

Wartime rape and sexual violence are the greatest silence of the history and one of today's most extreme atrocities. It displaces, terrorizes, and destroys individuals, families, and even entire communities. It can leave the survivors with emotional trauma and psychological damage coupled with physical injuries, unwanted pregnancies, and STDs like HIV. The consequence lasts for generation by generation Even after direct indication of the prohibition in International Criminal Law and International Humanitarian Law sexual violence remains widespread and prevalent during armed conflicts these days, used by the militants as a tactic or strategic means of we akening the opponent directly or indirectly, by targeting the civilian population.

But what happens with the rapists? Well, history shows that most of the time they got away with it because the rape and sexual violence against women in armed conflicts are yet to be acknowledged as a war crime by the international instruments. In 2008, the UN recognized as a crime against humanity. Even though recent developments in International Criminal Law include prohibitions on any form of sexual violence through the elements of war crime in Rules

DOUBLE BLIND PEER REVIEWED ARTICLE

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and Procedure. But the wars have continued and so have the rapes, will justice be served? Will the perpetrators be held accountable, and most importantly when the world stops using rape as a weapon of war?

II. Background

To gain a better understanding of the background of rape as a weapon of war, it is necessary to start by looking at the conflict where it occurred. For this purpose, there would be no better example rather than the Democratic Republic of Congo which referred to as a "rape capital of the world".[1] Tens of thousands of women raped all within past decade have been called an epidemic situation. This large-scale magnitude of sexual violence has potentially made eastern Congo the worst place on earth to be a woman.

The conflict was generated since the DRC gained independence from Belgium in 1960. The first Congo War began aftermath of the Rwandan genocide, in which ethnic Hutu extremists killed an estimated one million minorities of ethnic Tutsis and moderate Hutus in Rwanda. Nearly two million refugees crossed the Congolese border and settling in refugee camps. Pressure intensified when Tutsi militias began organizing with the backing of Rwandan Patriotic Fronts. The reality that many Congo women faced that time during 1996-1997 is frightening and difficult to imagine. Even though the main agenda was to protect the Tutsi ethnic group but the involvement of various groups only added the complexities and increased the number of attacks on civilians. What is important to note that, rape and other forms of sexual violation were first noticed as cross-border hostilities in the Rwandan genocide. In Rwanda, more than half a million women were raped during the genocide in 1994.

Later on the atrocities also witnessed the sexual violence, for example, up to 60,000 Bosnian women were raped by Serb forces in the camps between 1992-1995. And rape is being used as a weapon of war by Myanmar soldiers again today, against the Rohingya Muslims in Myanmar described by the UN this situation as a textbook example of ethnic cleansing.

III. Defining Sexual Violence in Armed-Conflict

For defining the sexual violence or rape in armed conflict referring Akayesu's case is a must, which is the very first case delivering charge on the ground of sexual violation. During the case International Criminal Tribunal for Rwanda (ICTR) held that, "sexual violence is any act of sexual nature is committed on a person under coercive circumstance".[2] This definition includes a broader picture that includes not only physical force but also threats and intimidation for rape or sexual violence. And there is a question arise understanding the gravity of sexual violence and when it will consider as a war crime?

To answer this question, the Statute of International Criminal Court should be referred which criminalizes specific acts consider as a crime under its jurisdiction, such as sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any form of sexual violation of comparable gravity. The doubt also can arise here with the term "gravity" that, what actually mean the minimum gravity for an act considered as sexual violence?

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[1] Justine Limpitlaw, *Democratic Republic of Congo*, in MEDIA LAW HANDBOOK ON SOUTHERN AFRICA (2024), at 397-449, https://www.kas.de/documents/285576/285625/MLHSA+2021+Volume+2+-+EBOOK.pdf.

[2] ICTR, *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4, Trial Chamber, Judgment, (Sept. 2, 1998), para. 688, https://casebook.icrc.org/case-study/ictr-prosecutor-v-jean-paul-akayesu

There is no clear-cut answer to that rather case laws and legal writings provide a number of additional examples of sexual violence. For example: trafficking for sexual exploitation,[3] mutilation of sexual organs,[4] forced abortion,[5] enforced contraception, [6] forced inspection for virginity,[7] forced public nudity[8] have been qualified as sexual violence. For a more concluding and refined definition the Rule and Procedure of ICC 'elements of crimes' are more considerable. Article 8(2)(b)(xxii-1) says that an act is considered as rape if: 1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.[9]

Despite clear and vast historical nightmare experiences and legal prohibitions, sexual violence remains widespread during armed conflicts these days, used by the militants as a tactic or strategic means of weakening the opponent directly or indirectly, by targeting the civilian population. Political theorist Francis Fukuyama proclaimed that the end of the cold war between the United States and the Soviet Union would be marked as a triumph of capitalist, liberal democracy over competing ideologies.[10] It was believed that the 21st century would be a globalized post-conflict society moving toward collective peace and prosperity. However, Fukuyama's theory was profoundly challenged by the 9/11 attacks and the subsequent US war on terrorism, open warfare between armies became increasingly rare in the post-Cold War environment.

IV. How Rape Used as a Weapon in Modern-Day Armed-Conflict

Rape is understood as a gendered violent act not only against the female sexed body but against the enemy as such through the logics of gender in which conceptualization of "weapon of war makes sense. Wartime rape is a military tactic, serving as a combat tool to humiliate and demoralize individuals, to tear apart families, and to devastate communities".[11] In today's political climate claiming that wartime rape is a strategy or tactic of war is seemingly to state obvious.

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[3] UN, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, (Nov. 15, 2000), at 2237. UNTS 319 (Protocol), art. 3. https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons

[4] ICTR, *Prosecutor v. Théoneste Bagosora*, ICTR-96-7, Trial Chamber, Judgment, (Dec. 18, 2008), para. 976, https://www.refworld.org/jurisprudence/caselaw/ictr/2008/en/92006.

[5] M. Bastick, K. Grimm, R. Kunz, *supra* note 14, at 19; WHO, *supra* note 14, at 149.

[6] *Id*., at 5.

[7] *Id*., at 5.

[8] See ICTR, *Prosecutor v. Jean-Paul Akayesu*, cit.

[9] ICC, Elements of Crimes (2011), art. 8(2)(b)(xxii)-1, https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf.

[10] Ray Michael, *8 Deadliest War of the 21st Century*, ENCYCLOPEDIA BRITANNICA (Apr. 18, 2023), https://www.britannica.com/list/8-deadliest-wars-of-the-21st-century.

[11] Office of the Special Representative of the UN Secretary General, *UN Action against Sexual Violence in Conflict*, in UN ACTION ANNUAL REPORT (2021), https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2022/10/report/auto-draft/UN-Action-Annual-Report-2021-Final.pdf.

Why it is important to prove rape as a weapon of war? In answering this doubt, it is important to comprehend a critical reading for revealing and interrogating the limits of using it in particular framing of wartime and to begin imagining a slightly different picture of rape in general. Describing wartime rape as a weapon of war offered up as it is self-explanatory simultaneously characterization and explanation of a violent act by itself. The discourse of Rape as a weapon of war mainly revolves around four interrelated points, which organize its narratives: 1) Strategic ness, 2) gender, 3) culpability, and 4) avoidability.[12] Among these four points, the strategic ness is more unraveling and credible key in unfolding the cohesive storyline.

When we look at the discourse of rape as a weapon of war is always rendered as a feminist storyline in global media reporting and academic literature which is embedded with sexed-gendered analysis. In order to better grasp how rape may be a weapon of war, it needs to focus upon some hidden assumptions, and logic based on strategies. Because strategic ness is found as subject imparting the sense to the discourse making rape as a weapon of war. As it is very generalized view which clearly comprises that rape as a weapon of war discourse woven out of certain assumption about gender and the gender thread entwined the other threads emerging from other nodal points. However, in this point we therefore sideline the generalized gendered story and weave in a discussion of the relationship among strategicness, gender, culpability and avoidance in order to exploring the storyline of rape as a weapon of war.

A. Rape as a Strategic of War

The most openly described acts of war are terrorism, torture or bombing. In particular, it is shrouded one pervasive atrocity in the conspiracy of silence, which is a military tactic of mass rape. Being absent from the ceasefire agreements and rarely mentioned in the peace-table, it is a war tactic that lingers long after the guns fall silent. During this decade, the number of victims crossed over 200,000 since conflict erupted in Eastern Congo.[13]

Unlike any other injuries, its scars are invisible, which is reason behind not to find the victims on the official link of "War wounded". In the armory of any armed group, this is the only weapon of mass destruction for which societies blame the victims, rather than the attackers. Despite of recognition as war crime it is hard to bring the perpetrators to the prison.[14] This discussion can covey that, war time rape is intentional strategic or tactic of war. A report on Sierra Leone sexual violence atrocities renders this generalized truth that "Rape as a weapon of war serves a strategic function and acts as an integral tool for achieving military objectives".[15]

With the interview in The Nation Magazine, Margot Wallström, the former UN special Representative of Secretary General describes sexual abuse as a weapon of war not only targeting women and girls but also men and boys as planned and systematic, designed to control the territory to install fear by terrorizing the population.[16] By evaluating the widespread

[12] Maria Eriksson Baaz, Maria Stern, *Sexual Violence as a Weapon of War? Perceptions, Prescriptions*, in PROBLEMS IN THE CONGO AND BEYOND (2013), https://uu.diva-portal.org/smash/get/diva2:1148245/FULLTEXT01.pdf

[13] *Supra* note 3.

[14] ELEANOR O'GORMAN, *Review on UN Action Against Sexual Violence in Conflict* (2013), Cambridge, UK. https://www.stoprapenow.org/uploads/advocacyresources/1401281502.pdf

[15] HUMAN RIGHTS WATCH, (2003), NCJRS Virtual Library, NCJ no. 199392.

[16] Crossette Barbara, *A New UN Voice calls for Criminalizing Conflict Rape*, THE NATION (Sept. 10, 2010). https://www.thenation.com/article/archive/new-un-voice-calls-criminalizing-conflict-rape/.

instances of sexual violence in DRC Wallström added in his statement that, the atrocities those are committed daily against women and children will leave a devastating imprint on the Congo for years in future. This case sexual violation is the only tactic of war which consequences spill over the peace over the years. Children accustomed to rape and violence grow up with that trauma and accepting such behavior, which is enough to shatter the community values to the future generation.[17]

The academic research and literature outlines the perception of the strategic effect of sexual violence as a weapon of war in two dimension, as it reaffirms militaristic masculinity and secondly, attacking the ethnic, religious or political identity by victimizing the identity of the women is seen to embody. In the regard of achieving the political purpose wartime rape described as a martial weapon in the context of different armed conflicts.[18] Generalizing political purposes can also achieved by the sexual violence by various viewpoints like, first, it encourages ethnic cleansing by making it more attractive to escape; second, it demoralizes the adversary; third, it conveys a desire to disintegrate society; fourth, it causes trauma and helps the other side inflict psychological harm; fifth, it provides psychological advantages to the offenders; and sixth, it strikes at a group that has great symbolic significance, delivering a blow against the collective enemy.

Even though here we are talking about rape as a weapon of war but not only rape but also other sexual violence used as a systematic way of war as like genocide. Making pregnant by soldiers intentionally so that the babies carry even after the war is a tactic of making a certain nation controlled over the blood chain. In some other picture, sexual torture to women or men by making them sexually impairment from giving birth can stop the growth of any nation. Without a doubt, evidence of the widespread and strategic aspects of sexual violence in Rwanda and Bosnia-Herzegovina in rape camps has been well established in both international tribunals and excellent academic and policy research. However, in general, the empirical evidence used to support the notion that rape is strategic is frequently its widespread occurrence. The apparent logic is that the occurrence of mass rapes' must indicate that they are systematic and strategic. In the DRC, evidence supporting this allegation is, if anything, primarily anecdotal.

V. Review on Recent Atrocities

In the first twenty years of the century, fifty-four countries have been through involvement in war and most of those continue today. Around sixty states and a hundred armed groups were actively making war in 2020.[19] Many other States support these wars in principle and practice as diplomatic, financial, and arm-trading allies. Since 2003, wars in Muslim-majority countries came out on featuring because of Islamist revolutionary movements- like Al Qaeda, and also against authoritarian Muslim governments like Iraq, Syria, and Sudan, Muslim population also resisted oppressive non-Muslim governments in Palestine, Myanmar, and Thailand.

In this section of the article, author is intending to approach some relevant war situations where rape and sexual violence used as a tactic in a systematic way. By examining these the case studies, this article aims to highlight the unique and shared dimensions of sexual violence in different conflict zones, explore the underlying motives of perpetrators, and assess the international responses to these crimes.

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[17] *Id*.
[18] Lucy Fiske, Rita Shackel, *Ending Rape in War: How Far Have We come?*, in 6(3) COSMOPOLITAN CIVIL SOCIETY JOURNAL (2014).
[19] ICRC, *Annual Report 2020*, https://www.icrc.org/en/document/annual-report-2020

A. Sudan

As conflict summery in Sudan, it is obvious to mention that because of inheriting a huge ethnic and religious diversity it has been in near constant conflict since its independence in 1956 over natural resources between Sudanese government and southern rebel groups. Even though the conflict erupted in 1993 and peace was agreed in 2002 but some fighting continued till 2004. In 2003, two armed groups took up arm against the government demanding end of political, social and economic marginalization of Darfur and more protection to its population.[20] The government responded with military group and allegedly encouraged militia to fight the insurgents in Darfur region by giving impunity to their action. Grave human rights violation continued in Darfur since 2004, despite UN Security Council Resolution 1556 and the presence of an African Union protection force.[21]

The scale and severity of sexual abuse in the Darfur region have shocked the globe. The Janjaweed militia and Sudanese government forces have committed the majority of sexual violence, although other armed organizations have also engaged in it. Sexual violence occurs primarily during attacks on villages by Janjaweed forces, which rape women and girls as they go from house to house, during flight, or at roadblocks and checkpoints.[22] Women and girls have been kidnapped, sexually assaulted, and coerced into becoming rebel wives, helping to plunder communities, or performing subsistence work by the Janjaweed militia of Arab active in Sudan.[23] After raping their victims, some militia have mutilated their female genitalia, and rape victims who became pregnant have been imprisoned and fined for being unmarried. Additionally, both inside and outside of camps, there has been a rise in sexual abuse against internally displaced people (IDP) and refugees.[24] Surprisingly, most of the sexual violence occurred in cease fire situation in Sudan as a silenced war tactic or strategy.

B. Afghanistan

Afghanistan's tumultuous history, marked by civil wars, authoritarian regimes, and foreign invasions, has resulted in widespread and systematic human rights violations, including acts recognized as international crimes. This legacy has left millions as victims and inflicted deep societal scars. In 1996, the Taliban, a group of Islamic scholars adhering to a stringent and fundamentalist interpretation of Islam, took control of the country. Their decrees severely curtailed women's rights, regulating nearly every aspect of their lives, including their movement, behavior, and attire. The grave circumstances confronting Afghan women were used as justification for the U.S. military invasion in 2001. Following the events of September 11, the situation deteriorated further when the Taliban refused to surrender Osama bin Laden,

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[20] Amnesty International, *Sudan, Darfur: Rape as a Weapon of War: Sexual Violence and Its Consequences* (July 2004), https://www.amnesty.org/en/documents/afr54/076/2004/en/.
[21] *Id.*
[22] Megan Bastick, Karin Grimm, Rahel Kunz, *Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector, Geneva Center for the Democratic Control of Armed Force* (2007), https://www.academia.edu/6451259/Sexual_Violence_in_Armed_Conflict_Global_overview_and_implications_for_the_security_sector.
[23] U.S. Department of State, *Documenting Atrocities in Darfur, State Publication 11182* (Sept. 2004), https://2001-2009.state.gov/g/drl/rls/36028.htm.
[24] *Id*., at 23.

the leader of Al-Qaeda, for prosecution. This refusal allowed the U.S. to frame its military actions as part of a broader "war on terror." However, harassment, violence, and extreme repression against women, particularly those living outside Kabul, continue to persist.[25]

In 1978, the Soviet Union occupied Afghanistan under the pretense of friendship and internationalism, leading to the emergence of sexual violence as a significant issue in the country. During the Soviet-backed regime, sexual torture was utilized as a strategy to humiliate and demoralize countless male and female detainees. Additionally, numerous incidents of rape by Soviet soldiers against women in rural areas were reported. The rise of the Mujahideen during the civil war further intensified the situation.[26] Rape and gang rape and other sexual assault also continued in the time of the Taliban to the Tajik and Hazara ethnic groups.[27]

Some survivors' testimonies and reports of human rights organizations show that Mujahideen groups, regardless of ethnicity, treated all Kabul residents as enemies, because Kabul city, during the fourteen years of the Soviet Union war, was under the domination of the Soviet-supported regime. The Mujahideen government in the first days of its power announced an amnesty law, based on this amnesty they forgave crimes of sides involved in the conflict.[28]

In 2006, the Afghanistan Independent Commission on Human Rights recorded 1,651 cases of sexual and gender-based violence, including 41 instances of girls being traded and 634 cases of wartime rape, alongside various other severe violations of human rights. Women in Afghanistan faced significant gender discrimination, and the ongoing conflict further exacerbated their struggles. In 2020, the United Nations Assistance Mission in Afghanistan (UNAMA) documented 271 cases of sexual and gender-based violence, with 18 of these confirmed as conflict-related sexual violence, impacting nine boys, five women, and four girls. Notably, acts of conflict-related sexual violence against three girls were attributed to members of the Taliban. Additionally, involvement in these violations was also noted among the Afghan National Army, the Afghan National Police, and the Afghan local police.

C. Russia

Since the beginning of its aggression toward Ukraine in 2014, the Kremlin has committed actions widely recognized as international crimes, including acts of sexual violence. Following the full-scale invasion in 2022, the prevalence and severity of sexual violence perpetrated by Russia have increased significantly. Although this is a disturbing subject, the documented crimes include a range of atrocities such as rape, gang rape, sexual slavery, physical assault, mutilation of genitalia, castration, threats of rape, and coercion of family members to witness the abuse of their loved ones.[29]

Russia used sexual violence or atrocities as a means of warfare. Giving impunity to the Russian military on their activities worked like blowing the fire. At the same time, Russia pardons rapists in return for joining the war against Ukraine, and military recruits undergo brutal and pervasive hazing in the Russian army. Soldiers heading to the front are also aware

[25] Fatima Ayub, Sari Kouvo, Yasmin Sooka, *Addressing Gender Specific Violation in Afghanistan*, (2009), www.ictj.org.
[26] Bastick, Grimm & Kunz, *supra*.
[27] *Id*., at 22.
[28] *Id*., at 22.
[29] Kateryna Busol, *Russia's Weaponising sexual violence and Ukraine's response, reveals a grim war of values*, THE GUARDIAN (Mar. 25, 2024), https://www.theguardian.com/commentisfree/2024/mar/25/russia-weaponising-sexual-violence-ukraine-values.

that the majority of the crimes committed in Chechnya, Moldova, Georgia, Syria, and Mali were not held against the military and Wagner mercenaries.

According to the UN Commission of Inquiry on Ukraine, the Russian military committed sexual abuse "at gunpoint, with extreme brutality," including torture and summary executions. Victims range in age from four to eighty years old and include both boys and girls, men and women. Civilian women and girls are primarily targeted in the occupation. Victims in custody include both civilians and prisoners of war, the majority of whom are men. The offenders do not spare pregnant women, some of whom have miscarried or are afraid that their newborns will be deported to Russia. Attacks on LGBTQ+ individuals are exacerbated by Russia's severe homophobia. such sexual violence might be considered a crime against humanity, a war crime, or a flagrant violation of human rights. Additionally, it may reflect Russia's intention to commit genocide against Ukrainians as a national group or constitute a component of genocidal activities.[30]

According to the United Nations Human Rights Monitoring Mission in Ukraine (HRMMU) reported, total of 376 cases of sexual violence have been documented during Russia's full-scale war against Ukraine. The figure includes 262 men, most of whom were tortured in detention on occupied territories or in Russia, more than hundred women, as well as children- ten girls and two boys, according to the report.[31]

D. Myanmar

In the months following Myanmar's independence from Britain in 1948, civil war erupted. Since then, conflicts between the military government and various ethnic insurgency groups have persisted. Government forces have conducted large-scale anti-insurgency campaigns, targeting civilians through looting, the destruction of homes and property, forced relocations under military surveillance, and acts of torture, extrajudicial killings, and sexual violence.[32] In 2017, the military committed ethnic cleansing against the Rohingya Muslim minority in Rakhayin state, which included widespread sexual violence. By the end of 2023, there were more than 2.6 million internally displaced people, in addition, 1.3 refugees and asylum seekers from Myanmar hosted in other countries, including nearly 1 million stateless Rohingya refugees got shelter in Bangladesh. As estimated 70,000 child soldiers serve in the national army and child recruitment continues.[33]

Systematic sexual violence by the military, police and border gauds utilized as a weapon of war. Acts of sexual violence often perpetrated or ordered by military commanders who were acting with total impunity. Women and girls from different ethnic groups report similar stories of sexual violence, including rape and gang rape, sexual slavery, forced marriage, forced pregnancy, genital penetration with knives and other objects, and mutilation of breasts and

[30] *Id*., at 29.
[31] Kateryna Denisova, *UN has recorded 376 sexual violence cases related to Russian War against Ukraine*, THE KYIV INDEPENDENT, (Dec 10, 2024), https://kyivindependent.com/un-records-over-370-sexual-violence-cases-related-to-russian-war-against-ukraine/.
[32] Women's League of Burma (WLB), *System of Impunity: Nationwide patterns of sexual violence by the military regime's army and authorities in Burma* (2004), https://burmacampaign.org.uk/media/SYSTEM_OF_IMPUNITY.pdf
[33] Human Rights Watch, *Child soldier use 2003: A briefing for the 4th UN Security Council open debate on children in armed conflict* (Jan. 2004), at 27-28, https://www.hrw.org/reports/childsoldiers.pdf.

genitals.[34] Primary and secondary sources confirmed that sexual and gender-based violence, including rape, were repeatedly perpetrated in interrogation center and other formal detention settings against women, men and LGBTQ community members, as well as in villages during military raids.

VI. Justice Delayed is Justice Denied

In 2002, the Rome Statute established the International Criminal Court (ICC), since then it has functioned as an independent court of last resort for the investigation and prosecution of individuals responsible for four core crimes of international law: genocide, war crime, crime against humanity and crime of aggression. ICC works as a last resort in the sense of the complementarity principle, which means domestic courts are unable or unwilling to provide legitimate judgment. For suspected criminals who are citizens of a non-party state, a United Nations Security Council resolution is necessary in order to proceed with the case. As ICC has no police force of its own, it needs to rely upon national police service and state cooperation to make arrests and transfer them to ICC, or wait until the accused's surrender to try them. The court suffered from constant criticism ever since it was created.

The ICC has been regarded as a necessary institution for advancing international justice to the victims of atrocities or violence they suffered. However, in reality, criticism has been leveled regarding the limited engagement with civil society and the victims' after-conflict situation.[35] On the one hand the court has been criticized for not having done enough to raise awareness about its work, because of lack of effective communication with the affected communities, victims, or the general public. Numerous individuals living in the war-affected zone are uninformed about the ICC's victim-centric mandate and unaware of how to get access to its services. This lack of communicativeness and outreach can prevent victims from coming forward to report violations that occurred against them and to seek justice for the harm suffered, which resulting the undermining by and large the credibility of the work of ICC. As a result, the victims remain unheard and deprived of their right of justice. on the other hand, the lack of transparency of court activities raises the question of bias and unfairness. Trials and investigations at the ICC take place in a quiet private phenomenon and the public has little access to information about the active cases.[36] Due to such a closed-door operating, the ICC strategy lead to suspicions and mistrust regarding the activity of the institution as a whole.[37]

Two other main areas where ICC faced criticism is its high costs and slow pace of justice. as we discussed before court runs by the contribution of the member states but the cost and

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[34] Jeanne Ward, *If not now, when? Addressing Gender-based Violence in Refugee, Internally Displaced, and Post conflict Settings: A Global Overview*,' (2002), at 10-21, https://www.womensrefugeecommission.org/research-resources/if-not-now-when-addressing-gender-based-violence-in-refugee-internally-displaced-and-post-conflict-settings/.

[35] Kjersti Lohne, *'Global civil society, the ICC, and legitimacy in international criminal justice*' in THE LEGITIMACY OF INTERNATIONAL CRIMINAL TRIBUNALS, (2017), https://www.researchgate.net/publication/312530054_Global_Civil_Society_the_ICC_and_Legitimacy_in_International_Criminal_Justice

[36] Sabina Grogore, *Justice Delayed, Justice Denied: Bias, Opacity and Protracted case Resolution at the International Criminal Court*, JUST ACCESS (2023), https://just-access.de/bias-opacity-and-protracted-case-resolution-at-the-international-criminal-court/#.

[37] Ignaz Stegmiller, *'The International Criminal Court and Mali: Towards More Transparency in International Criminal Law Investigations?,'* 24(4) CRIMINAL LAW FORUM 475 (2013), https://www.proquest.com/docview/1461628586?sourcetype=Scholarly%20Journals

budget has been evaluated as very high. In addition, the investigation and trials process can take years to complete which is leading to delays in justice for victims. When the victims are in need for immediate or fast verdict from the court to survive in the post-war society, the court takes lengthy process. Which resulting the lack of reliability from the victims and loosing hope of entertaining the right of getting justice. as the Rules and Procedure of ICC describes the initiation of trial in ICC must go through lengthy pre-trial process and wait until the accused get presented to court,[38] that in reality takes test of patience of the victims who actually in need for such redress. For example, the case of Afghanistan relates in this scope of discussion. In almost 20 years since the prosecutors of ICC first considered opening the investigation into the crime occurred in Afghanistan, there has been almost "no" effective measures shown or hope toward bringing justice to Afghan victims. Nonetheless, the conflict and crimes have continued to occur throughout the whole time and even after the case came under the attention of the ICC.[39] As such limited by its own mandate and regulation, justice has not yet been delivered to the victims affected by the war in Afghanistan.

Moreover, since 2009 the legitimacy of the ICC has been shaken by a gradual disinterest of African countries in the court, when it issued an arrest warrant against Sudanese President Omar Al Bashir, whose country is not a signatory to the Rome Statute. In 2015, the South African government refused to arrest Omar Al Bashir, while his visiting to South Africa to attend the African Union meeting. As a state party, South Africa was legally required to arrest Bashir. Yet, the government allowed him to leave the country claiming that he had immunity as ahead of state during the summit meeting. The ICC issued an immediate judgment on that issue saying that the immunity of Al Bashir has been superseded by UNSC Resolution (2005) which referred Darfur to the ICC. In addition, ICC added that, a sitting head of state can be held responsible for his committing international crime in their individual capacity, so that Al Bashir could have been arrested and tried by ICC. Most of the African countries including South Africa expressed dissatisfaction on this judgement and consider it as a tool of western imperialism.[40] As a result, Burundi was the first country to withdraw its membership from ICC in 2017.[41]

Most recently, the same thing happened again which created a very legitimate question on the credibility of ICC in global phenomenon regarding the arrest warrant of Vladimir Putin. In 2023, the pre-trial chamber II of ICC issued an arrest warrant for Russian president Vladimir Putin, in connection with international crimes occurred in Ukraine in connection with the deportation and transfer of children as a force-displacement.[42] On basis of the reference of 24 state parties ICC started a rapid investigation on this matter resulted on issuing arrest warrant immediate assessing the matter of war in Ukraine.[43] After this the Court faces another wave of criticism regarding its practices of prioritization and resource allocation among the cases. Even

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[38] ICC, *How the Court Works.* https://www.icc-cpi.int/about/how-the-court-works

[39] Elizabeth Evenson', *International Criminal Court Should Reach Decision on Afghanistan: Ruling Could Allow Investigation on Taliban Abuses*', HUMAN RIGHTS WATCH (Sept. 12, 2022), https://www.hrw.org/news/2022/09/12/international-criminal-court-should-reach-decision-afghanistan.

[40] NORIMITSU ONISHI, *'South Africa Reverses Withdrawal From International Criminal Court,'* THE NEW YORK TIMES, (Mar. 8, 2017). https://www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html

[41] TIMOTHY JONES, *'Burundi becomes first country to leave International Criminal Court*,' DEUTSCHE WELLE (Oct. 27, 2017). https://www.dw.com/en/burundi-becomes-first-country-to-leave-international-criminal-court/a-41135062.

[42] ICC, *'Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova',* (Mar. 17, 2023), https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and.

[43] MAARTEN ROTHMAN, LONNEKE PEPERKAMP, SEBASTIAAN RIETJENS. REFLECTIONS ON THE RUSSIA-UKRAINE WAR (2024), http://www.jstor.org/stable/jj.13760045.

though, Ukraine was a signatory for long time but the ratification did not take place on their behalf. ICC opened an investigation into crimes committed during the conflict in Ukraine, which created many challenges, as a lack of access to the conflict zone, as Ukraine was not a party state, in reality, it was erratic to cooperate with the court. finally, Ukraine ratified the Rome Statute in 2023 and became the 125th member of ICC.

Even after taking an immediate interest in the Ukraine matter, the ICC yet to start the trial procedure, because of incapable bringing Putin in front of the court. as Russia is not even a signatory or ratifying country to ICC, getting cooperation from the Russian police force is near to impossible. However, Putin's recent visit to Mongolia, a state party of the ICC, caused controversy about the acceptance of the ICC once again. As a party-state, Mongolia must cooperate with the ICC arrest warrant, but the Mongolian government said it could be a difficult choice for the country to arrest the Russian head of state, showing the reason that Russia holds a significant role in Mongolia's energy security.[44] This recent incident has shaken once again the whole mandate of an obligation of state parties regarding cooperating with ICC and accelerated a suspicious view on ICC's credibility and reliability in terms of ensuring justice, whether ICC can do justice to the victims or it is just an institution for setting an example?

VII. Conclusion

Despite facing significant criticism, the International Criminal Court (ICC) remains a crucial organization for promoting international justice in cases of violations of international criminal law. The importance of the ICC's efforts in investigating the crimes committed in Ukraine cannot be overstated. To improve its effectiveness and gain wider acceptance, the ICC must address the criticisms directed at its operations. This includes tackling perceptions of bias, expanding its jurisdiction to include non-member states, and enhancing the speed, transparency, and overall effectiveness of its investigations and trials. Additionally, the ICC should improve its outreach to victims and engage more effectively with civil society.

[44] Aloka Wanigasuriya, *Putin Travels to Mongolia: What Prevents His Arrest?*, OPINIO JURIS (Sept. 4, 2024), https://opiniojuris.org/2024/09/04/putin-travels-to-mongolia-what-prevents-his-arrest/.

Journal of International Criminal Law [Vol. 6 – Issue 1]

Does Crossfire Between Armies Killing Civilians Break the Causation in International Criminal Law? An Argument

*by Philip Lau Kwong Yui**

ABSTRACT: In wars and armed conflicts, it is not uncommon that members of opposing armies shoot at each other, leading to "crossfire" killing civilians in the process. In cases before the International Criminal Court (ICC), crossfire has been employed as a defence by lawyers of the accused to abdicate responsibilities. A prominent example is Prosecutor v. Dominic Ongwen, in which the Defence contends that there was crossfire by member of the LRA and the Ugandan army, or at least remains a possibility. Therefore, the accused cannot be held liable for certain charges such as murder. Unfortunately, in all of these ICC cases, the Courts failed to address this issue of crossfire. This Article challenges this defence and argues that crossfire does not break the chain of causation of murder under International Criminal Law (ICL). Hence, inducing a crossfire knowingly with an intent to kill civilians would constitute murder under the Rome Statute. It builds its arguments by examining 1) provisions related to the crime of murder under the Rome Statute and other ICC statutes; 2) the jurisprudence of international criminal courts and tribunals; 3) customary international law, including international humanitarian law and 4) jurisprudence of common law and civil law countries, as well as Islamic Criminal Law. The Article seeks to inspire the ICC to develop the law of causation under ICL.

KEYWORDS: Crossfire; Dominic Ongwen; Causation; Intervening Cause; Murder; International Criminal Court; International Criminal Law; Lord's Resistance Army.

I. Introduction

Picture the following scenario: There is an armed group, who named themselves the "Revengers", which has long been fighting against the government. One day, the armed group has made a plan to attack some civilian camps where the ordinary citizens of the country reside at. However, the commanders or "heads" of the Revengers plan to teach the residents of the camps a lesson, that they should not be residing in these government facilities. By their past experience, they knew that if they employ guns and machineries to shoot at these camps, there will be some members of the government army who came out to defend themselves and the civilians. As a matter of certainty, the heads of the Revengers knew that *some* civilians will be killed either by the bullets of the Revengers or the government army or both, amidst the crossfire between them, even though they do not know for certain *which* civilians will be killed

DOUBLE BLIND PEER REVIEWED ARTICLE

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in the process. Despite this, they launched an attack to shoot at the civilian camps, leading to a crossfire between the group and the army. Some civilians died under the bullets fired by the army when they were defending themselves.

A criminal trial at the International Criminal Court ensued, where the Prosecutor charged the commanders of the Revengers with murder as a crime against humanity and murder as a war crime, pursuant to Article 7(1)(a) and Article 8(2)(c)(i) of the Rome Statute respectively. The Defence's lawyers contend that the civilians were killed at the crossfire, or at least remain a *possibility*. Henceforth, the Prosecutor fails to prove beyond reasonable doubt that the civilians were killed by the accused. The accused were "innocent", so they say. Judges of the ICC found that the issue before the Chamber is one of causation, namely whether when the *mens rea* and *actus reus* were found to be present with the accused, they can be held guilty for the offence of murder in a situation of crossfire.

This Article addresses this issue, namely whether crossfire would break the chain of causation for murder under international criminal law (ICL). It uses the facts in *Prosecutor v. Dominic Ongwen* as the main case study and contend that crossfire does not cut the chain of causation, or *legal* causation, under ICL. If you intend to kill civilians and caused their death, you are *guilty* of murder in the eyes of ICL. As it will be elaborated in this Article, evidence shows clearly that the defendant Dominic Ongwen has the intent to kill civilians, and the defence of crossfire has been pleaded by the Defence lawyer in many instances where civilians were shot dead. It therefore serves as a perfect example of discussing the issue of whether a defendant can be held responsible for causing death of civilians, even if there has been crossfire between different armies and/or armed groups. Further, the ICC as a permanent international criminal court, needs to decide by itself the law of causation to iron out the wrinkles, independent from and different to other *ad hoc* criminal tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY).

The issue of determining the responsibility of a defendant for crimes under ICL has been the subject of intense debate and scrutiny amidst academic literature. For instance, generalised theories such as that of Professor Eramus Mayr debate whether criminal responsibility under ICL should be regarded as a causal notion,[1] whereas scholars such as Javid Gadirov advocate for the use of models of probabilities in finding causation.[2] This Article, instead of advancing arguments on normative theories of causation, develops *legal* arguments on how the international criminal courts and tribunals should rule in cases involving crossfire between armies killing civilians.

The problem of opposing armies shooting at each other and killing not only members of armies but civilians is commonplace. Instances include but are not limited to, the crimes against humanity allegedly committed by the "FDLR", an anti-government armed group in the North and South Kivu Provinces of Democratic Republic of the Congo (DRC) since early 2009, which led to the prosecution in *The Prosecutor v. Bosco Ntaganda*.[3] Civilians were trapped in camps controlled by FDLR, either killed by the FDLR or killed amidst the crossfire between FDLR on the one hand and the DRC and Rwandan armies on the other.[4] Crossfire is also employed as

[1] Erasmus Mayr, *International Criminal Law, Causation and Responsibility*, 14 INTERNATIONAL CRIMINAL LAW REVIEW 855 (2014).
[2] Javid Gadirov, *Causal Responsibility in International Criminal Law*, 15 INTERNATIONAL CRIMINAL LAW REVIEW 970 (2018).
[3] ICC, The Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06-36-Red, Decision on the Prosecutor's Application under Article 58, July 13, 2010), at 49-52.
[4] *Id*., at 8.

a clever defence in some ICL cases, including by the Defence lawyer in *Prosecutor v. Sefer Halilovic* and in *Prosecutor v. Dominic Ongwen*.

In *Prosecutor v. Dominic Ongwen*, the Defence raised the argument that as a matter of possibility, the civilians might have been killed in the crossfire between the Ugandan army and the Lord Resistance Army (LRA) in the civilian camps during the attacks.[5] It was an unfortunate event that the civilians were killed, not to anyone's responsibility. The Prosecution, nonetheless, failed to demonstrate that the fires were caused by the LRA and not by crossfire of tracer (stretcher) bullets or the battle light used by the Ugandan army, argued by the Defence.[6]

However, the Trial Chamber of ICC failed in *Prosecutor v. Dominic Ongwen* to address the issue of crossfire, namely whether an armed group or its commander can be held guilty for murder when civilians are killed during crossfire between members of an army and that armed group. Instead, it conveniently bypasses the issue by looking at the overwhelming evidence that Dominic Ongwen and the LRA killed civilians and did have such intent, ruling against the evidence of crossfire.[7] However, regrettably the ICC did not take the opportunity to develop and clarify the law on crossfire, leaving the issue unresolved instead. As will be covered in this Article,[8] the international criminal tribunals did not provide a sophisticated analysis on the issue of crossfire in various cases.

Domestic courts which enforce ICL face similar issue in failing to address the issue of crossfire. In the *Prosecutor's Office of Bosnia and Herzegovina v. Marko Radić and others*, the accused Dragan Šunjić was charged with Crimes against Humanity before the Court of Bosnia and Herzegovina under a domestic criminal statute.[9] Despite the fact that Šunjić was found to have forced prisoners to perform labour at the front-line, thereby exposing them to crossfire and many of them were killed.[10] The Court found Šunjić guilty of murder by such acts of exposing the civilians to crossfire, without analysing the legal issue of causation.[11]The structure of this Article is as follows: Section II of this Article provides the necessary backdrop for the case of *Prosecutor v. Dominic Ongwen*. It i) explains the rise of the Lord Resistance Army (LRA) and Dominc Ongnwe as a commander thereof; ii) breaks down the necessary elements of successfully prosecuting a crime before the International Criminal Court (ICC), whereby in this Article the crimes in issue are murder as a war crime and murder as a crime against humanity; iii) contends how an accused will be held criminally responsible for his actions or the actions of his subordinates, namely the law on modes of responsibility under the Rome Statute.

The article ventures into explicating the laws of murder and causation, including the issue of crossfire in section III. Section IV consults the Vienna Convention on the Law of Treaties (1969) to interpret the crime of murder as a war crime and crime against humanity, adopting a purposive approach thereto. In Section V, reference is made to applicable treaties and the principles and rules of international law, including customary international law of international humanitarian law to solve the puzzle of crossfire. The Article then proceeds to discuss and analyse the law of domestic courts, including common law, civil law and Islamic criminal law

[5] ICC, The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15, Trial Judgment (Public Redacted) (Feb. 4, 2021), at 1445, 1745.
[6] *Id*., at 1725, 1741.
[7] *Id*., at 1476, 1492, 1733.
[8] See Section III of this Article.
[9] Appelate Chamber, The Prosecutor's Office of Bosnia and Herzegovina v. Marko Radić and others, X-KR-05/139, Second-Instance Verdict, (March 9, 2011), at 28-29.
[10] *Id*., at 274, 276, 989.
[11] *Id*., at 989.

jurisprudence, in deducing general principles of law of causation from domestic law systems of the world. In the final section, Section VII, it encourages the ICC to further develop the law on causation, and discusses the applicability of the arguments in this Article to other scenarios of war and armed conflict.

II. *Prosecutor v. Dominic Ongwen*: a Case Study

"Dominic Ongwen and his subordinate commanders ordered LRA soldiers to target everyone they find at Odek IDP camp, including civilians, and also instructed them to loot food and abduct civilians" – Trial Judgment, *Prosecutor v. Dominic Ongwen*.[12]

To set the stage in order to analyse and discuss the case *Prosecutor v. Dominic Ongwen*, this section outlines the background of the accused, Dominic Ongwen, including his status within the Lord Resistance Army, the attacks he commanded on the IDP camps and the charges brought against him. Then, it further breaks down the elements required in general for being held guilty for a crime under the ICL: namely *actus reus*, *mens rea* and modes of liability. These elements equally apply to the charges at issue, *viz*. the crime of murder.

On 4th February 2021, the Trial Chamber IX of the ICC delivered its trial judgment in the case of *The Prosecutor v. Dominic Ongwen*. With over 70 counts of charges brought against Dominic Ongwen, the Chamber found him guilty of 61 charges,[13] which are offences of crimes against humanity and war crimes.[14] This brought an end to a highly controversial case, with a trial of nearly 5 years since the confirmation of charges laid against Mr Dominic Ongwen in 2016.

A. A Brief History of the Lord Resistance Army and the Rise of Dominic Ongwen

Dominic Ongwen was formerly a member of the LRA, which has been active in Uganda since the 1980s.[15] As an essential part of the background, the LRA is an armed group in Uganda, led by Joseph Kony at the time.[16] The seed for the conflict in Uganda has a long root, of which LRA was part of. In the 1850s, armed traders and adventurers brought destructions in the land of Uganda-South Sudan border zone.[17] After Uganda's independence from British rule, the heads of state had undergone coup d'état, including the first head of state Multon Obote overthrown by his army commander Idi Amin.[18] Amin was overthrown himself in 1979, with Obote returning to power in 1980, following flawed elections.[19] Opponents of Obote such as Yoweri Museveni were unwilling to accept the election outcome, with Museveni waging a guerrilla campaign against the government with alliances from the southwest and central south of the country.[20] There were, furthermore, widespread aversion to what was perceived as

[12] *Id*., at 2920.
[13] *Id*., at 1068-1076.
[14] *Id.*
[15] *Id.,* at 1.
[16] *Id.,* at 10, 11. *See* also Professor Tim Allen (P-0422)'s report, UGA-OTP-0270-0004, Independent Background Report on the Situation in Northern Uganda, for further historical background of the LRA.
[17] Tim Allen, *Joseph Kony and the Lord's Resistance Army*, in AFRICAN HYSTORY (Oxford Research Encyclopedias, 2018), at 1-2.
[18] *Id.,* at 2.
[19] *Id*.
[20] *Id*.

northern domination.[21] Museveni with his National Resistance Army (NRA) successfully seized power in Uganda, which inspired another wave of opposition from leading figures such as Alice Auma.[22] Despite Auma's failure in her armed actions,[23] she inspired a number of groups which continued to oppose the Ugandan government, one of which being the LRA, led by Joseph Kony,[24] which is the armed group leading to the trial of *The Prosecutor v. Dominic Ongwen.* In short, the LRA pursued an objective of armed rebellion against the Government of Uganda.[25]

The protagonist of the trial, Dominic Ongwen – the accused, was abducted to join the LRA when he was no more than 11 years old.[26] He has been charged by the International Criminal Court with leading or taking part in four attacks against civilian camps in Uganda. The attacks took place against the Pajule IDP ("internally displaced persons") Camp, the Odek IDP Camp, the Lukodi IDP Camp, the Abok IDP Camp on 10th October 2003, 29th April 2004, 19th May 2004 and 8th June 2004 respectively.[27]

Was Dominic Ongwen responsible for the attacks? The chamber answered in the affirmative. First, Ongwen's position at the LRA merits explanation in understanding the roles he played with the attacks. The Chamber found that Dominic Ongwen was a battalion commander at the time pertinent to the charges, in charge of the Oka battalion of Sinia brigade on 1st July 2022.[28] As to his rank, Dominic Ongwen was promoted from the rank of captain to the rank of major on 1st July 2022.[29] His rank in the LRA further progressed over time. Joseph Kony appointed Ongwen as second-in-command of the Sinia brigade on 17th September 2003, and further promoted him to lieutenant colonel on 15th November 2004.[30] On 4th March 2004, Ongwen became brigade commander of Sinia brigade;[31] On 30th May 2004, Ongwen was promoted to the rank of colonel, and sometime in late 2004 to the rank of brigadier.[32] He was found to have led the four attacks. However, to be criminally responsible for an ICC crime, further elements must be satisfied, namely *mens rea* (also known as "material elements") and *actus reus* ("mental elements") of the crime concerned. The accused must also be liable to the crimes under the requisite modes of responsibility, which has its own *mens rea* and *actus reus* to satisfy. These will be examined each below in turn.

B. Elements of Committing a Crime under International Criminal Law: A Break-Down

For a person to be held responsible for committing a crime in ICL, the Rome Statute being its creation, different elements are required.

To hold one culpable for a crime, first, the court needs to find the applicable offences relevant to the acts. For the ICC, it needs to consider whether the act falls under the applicable law of the Rome Statute, namely one of genocide, crimes against humanity, war crimes or the

[21] The Prosecutor v. Dominic Ongwen, *supra* note 5, at 2.
[22] *Id.,* at 3, 4, 5.
[23] *Id.,* at 4.
[24] *Id.,* at 5.
[25] *Id.,* at 372.
[26] *Id.,* at 29.
[27] *Id.,* at 18 -19.
[28] *Id* at 350. The LRA is divided into 4 brigades: Sinia, Stockree, Gilva and Trinkle. There is an additional division called Jago starting from 2003. The brigades were divided into battalions and further into "coys", with each of the units led by a commander. *See* further The Prosecutor v. Dominic Ongwen, *supra* note 5, at 977.
[29] The Prosecutor v. Dominic Ongwen, *supra* note 5, at 1016.
[30] *Id.,* at 367.
[31] *Id*., at 369.
[32] *Id*., at 370.

crime of aggression.[33] Second, the court must find that the individual has committed both the *actus reus* (material elements) and *mens rea* (mental elements) of the crime, for one to be held guilty of the offence. It is insufficient that a person only took an action or omission without the requisite intent, and *vice versa*. Article 30 of the Rome Statute defines that one has *intent* where that person means to engage in the conduct, and he means to cause that consequence or is aware that it will occur in the ordinary course of events.

Third, the modes of liability (also known as "modes of criminal responsibility") need to be considered. Essentially, this relates to what *role* the actor(s) played for the crime, or the *modus operandi* of committing them: is it one of principal or accessorial liability, or a commission of the crime with others ("joint criminal enterprise"), or through another person ("indirect perpetration")?[34] These are only a few examples out of the large pool of modes of liability under ICL.[35] Article 25 of the Rome Statute clearly defines the modes of liability applicable under the statute. It should be noted that the modes of liability can be further broken down into its own *actus reus* (material elements) and *mens rea* (mental elements).[36]

Fourth, there must be a finding of causation, in that the act must cause the result. In the words of David Ormerod and Karl Laird,

> [w]here the definition of a crime includes a result or consequence flowing from D's conduct, it must be proved that D caused that result. An act done with intent to cause the result may be an attempt to commit the crime but it will not be the full offence unless it actually causes it.[37]

To quote Johannes Keiler, "[i]n the realm of criminal law causation plays a crucial role in the attribution of criminal liability".[38] To find causation in law, to use Hart's words, is to *ascribe* responsibility.[39]

The ICC, alongside other international criminal tribunals, do not necessarily consider or examine "causation" individually from other criminal elements such as *actus reus* and *mens rea*, or mode of liability. In *The Prosecutor v. Dominic Ongwen*, the Chamber did not consider causation independently. That said, causation in general is innate in the idea of criminal law and ICL[40], especially for murder.

The legal issue that the author attempts to address regards the issue of *causation*:

Had Dominic Ongwen and other members of the LRA *caused* the death of the civilians in the four IDP camps and whether or not they can be held responsible for it?

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[33] Rome Statute, Article 6, 7, 8 and 8 bis.

[34] For reading the different mode of responsibility under ICL, *see*, for instance, ROGER O'KEEFE, INTERNATIONAL CRIMINAL LAW (1st ed., 2015), at 166-209.

[35] Modes of liability of international crimes can be further divided into modes of liability under customary international law and treaty law such as the Rome Statute. For a short introduction, *see* O'KEEFE, *supra* note 34, at 167-168.

[36] The Chamber in the Trial Judgment of *Prosecutor v. Dominic Ongwen* did not break down the mode of liability in which Dominic Ongwen committed the crime into the two categories of *mens rea* and *actus reus* for the analysis thereof. However, traditionally under domestic and international criminal jurisprudence, the two categories of *mens rea* and *actus reus* are commonly used in the analysis of criminal offences. For instance, Professor Roger O'Keefe contends that as the most basic mode of criminal responsibility known to customary international law, an accused must satisfy both *mens rea* and *actus reus* of the crime charge to be held guilty. *See* O'KEEFE, *supra* note 34, at 168-169.

[37] DAVID ORMEROD, KARL LAIRD, SMITH, HOGAN, & ORMEROD'S TEXT, CASES, & MATERIALS ON CRIMINAL LAW (13th ed., 2020), at 38.

[38] JOHANNES KEILER, DAVID ROEF, COMPARATIVE CONCEPTS OF CRIMINAL LAW (Intersentia Ltd, 2016), at 103.

[39] H.L.A. Hart, *The Ascription of Responsibility and Rights*, 49 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY, NEW SERIES 171(1948 - 1949), at 187.

[40] *See*, e.g., Mayr, *supra* note 1 at 855.

C. Modes of Responsibility

How did Dominic Ongwen conduct the attacks and thereby commit crimes prohibited by the Rome Statute? To understand this, we need to first take a step back to explicate the modes of responsibilities thereunder.

Under the Rome Statute, Article 25(3)(a), a person can be criminally responsible for a crime under the jurisdiction of the ICC where the person commits the crime as an individual ("direct perpetration"),[41] through another person who executes the crime by subjugating their will ("indirect perpetration"),[42] or jointly with another person with an agreement or common plan of executing a crime, having control over the person(s) who execute the crimes by subjugating the will of the direct perpetrators ("indirect co-perpetration").[43]

The modes of responsibility for the four attacks must be analysed separately. Since the present article deals with the murder charge of Ongwen ("Murder"),[44] only the modes of responsibility of committing *murder* will be considered.

With the attack launched against the Pajule IDP camp, the Chamber found that Ongwen, jointly with other LRA commanders and through LRA soldiers, committed murder as a crime against humanity pursuant to Article 7(1)(a) of the Rome Statute (Count 1) and murder as a war crime Article 8(2)(c)(i) of the Statute (Count 2).[45] Similarly, for the attack on Odek IDP camp, the Chambers convicted Ongwen of both committing murder as a crime against humanity and as a war crime, jointly with Joseph Kony and other Sinia brigade leaders.[46]

Convicted of the crimes of Murder launched at Lukodi IDP camp, the mode of responsibility therefor, however, was one of indirect perpetration.[47] Likewise, for the crimes of Murder committed against the civilians found at Abok IDP camp, it was too committed through other LRA soldiers.[48]

Nonetheless, the Defence's cross-examination of witnesses indicated the possibility that some, if not all, of the civilians shot dead might have been caught in the crossfire between the Ugandan Government soldiers and the LRA fighters.[49] The Chambers, however, rejected this argument. It found that the witnesses, despite some of them raising the possibility of crossfire, no one saw that the civilians were shot dead when the Ugandan army was shooting back at the members of the LRA.[50] On the contrary, there was overwhelming evidence that the LRA members killed civilians intentionally.[51] Taking the Odek IDP Camp attack launched by the LRA as an example, Dominic Ongwen and his subordinate commanders ordered the LRA soldiers to target everyone they found at the Odek IDP camp, including civilians, and also ordered them to loot food and abduct civilians.[52] After the attack, Ongwen communicated the results of the attack via the military radio to other LRA commanders and Joseph Kony,

[41] The Prosecutor v. Dominic Ongwen, *supra* note 5, at 2782.
[42] *Id.,* at 2783-2785.
[43] *Id.,* at 2786-2788,
[44] Murder is one of the charges that is brought against Mr Ongwen in the four camps, under article 7(1)(a) as a crime against humanity and under article 8(2)(c)(i) as a war crime. ICC, The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15, Document Containing the Charges, (Dec. 22, 2015), at 12.
[45] The Prosecutor v. Dominic Ongwen, *supra* note 5, at 2874.
[46] *Id.,* at 2927.
[47] *Id.,* at 2973.
[48] *Id.,* at 3020.
[49] *Id.,* at 452 n. 2877, 1477.
[50] *Id.,* at 1487, 1492.
[51] *Id.,* at 1493.
[52] *Id.,* at 2920.

reporting that his fighters successfully launched an attack on Odek IDP camp, shooting people amongst other acts.[53] On this basis, the Chamber found that Dominic Ongwen meant for civilians to be attacked during the attack on Odek IDP camp, and meant for civilians to be killed.[54]

The one hanging legal question which hence remains unresolved: where members of an armed group or army purposely induce crossfire between them leading to civilian deaths, does this still constitute murder?

III. The Law: An Overview

Has Dominic Ongwen and other members of the LRA *caused* the death of the civilians in the four IDP camps and whether or not they can be held responsible for it?[55]

To develop an argument on the law of causation in ICL, the sources of law for the ICC need to be examined. Article 21 of the Rome Statute provides for a hierarchy of law for ICC: (a) in the first place, the Court shall apply the Rome Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) in the second place, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; and (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime. Despite the descending system of applicable law enunciated in the Rome Statute, scholars have noted that the "interrelationship of sources is more complex than Article 21's apparently rigid hierarchy implies" as "the overlap between the sources is too complex to be reduced to simple formulae, including by reference to hierarchy".[56] Hence, this Article will apply Article 21 of the Rome Statute, albeit not in a straightly hierarchical order, and reference will be made to other sources of international law.[57]

Before deciding if intentionally inducing crossfire can constitute murder under ICL, this part thus examines the crime of murder under the Rome Statute and the Elements of Crimes, providing the foundational legal framework. The section further reviews the jurisprudence of ICC in defining the *mens rea* of murder, particularly the "virtual certainty" test, which is crucial for deciding whether there is intent in complex combat situations. It ventures into providing an overview of how international criminal tribunals such as the ICTY and the ICC approached crossfire scenarios, often without directly addressing the causation issue. It critically assesses ICL's underdeveloped causation jurisprudence, such as the "substantial cause" test, highlighting existing gaps in the law.

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[53] *Id.*
[54] *Id.*
[55] KEILER, ROEF, *supra* note 38, at 103.
[56] Robert Cryer, *Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources*, 12(3) NEW CRIMINAL LAW REVIEW (2009), at 390, 393–94.
[57] For instance, Article 38(1) of the Statute of the International Court of Justice is widely accepted as a provision that enumerates the "well-established sources of international law": *See* ICTY, Prosecutor v. Kupreškić et al., IT-95-16-T, Trial Judgment (Jan. 14, 2000), at 540. The ICC has also referred to case law from other international courts such as the ICJ. *See*, for example, ICC, Prosecutor v. Katanga and Ngudjolo Chui, ICC-01/04-01/07-717, Decision on the Confirmation of Charges (Sept. 30, 2008), at 238.

test, which is crucial for deciding whether there is intent in complex combat situations. The section, then, ventures into providing an overview of how other international criminal tribunals approached crossfire scenarios, often without directly addressing the causation issue. Finally, it critically assesses ICL's underdeveloped causation jurisprudence, such as the "substantial cause" test, highlighting existing gaps in the law. The case law of other international courts is often considered by the ICC, in certain cases as "indicative of a principle or rule of international law", outside the realm of Article 21.[58]

A. Definition of Murder under International Criminal Law (ICL): The Rome Statute & the Elements of Crimes

How would an accused be held guilty of murder by the ICC? Under Article 7(1)(a) of the Rome Statute, murder is a crime against humanity whereas murder is captured as a war crime under Article 8(2)(c)(i). Nonetheless, murder is not defined under Article 7 or Article 8, nor the *mens rea* and *actus reus* thereof. Reference could be made to Article 30 of the Rome Statute which defines the requisite mental element of all crimes under the Statute. To establish the *mens rea* of a crime, a person must commit the crime "with intent and knowledge".[59] For the purpose of Article 30, a person has intent where "that person means to engage in the conduct"[60] while in relation to consequence, "that person means to cause that consequence or is aware that it will occur in the ordinary course of events".[61]

In the Elements of Crimes, an ancillary document assisting in the interpretation of the Rome Statute, Article 7(1)(a)(1) defines the *actus reus* of the crime against humanity of *murder*: "The perpetrator killed one or more persons", in which "killed" means "caused death". Article 8(2)(c)(i)-1(1) also stipulates that in a war crime of murder, "[t]he perpetrator killed one or more persons".[62] But can an accused "cause" the death of the victim when the bullet that shatters his/her skull was fired by a soldier from the other side? Where does the law stand on this point? To answer the questions, we will first turn to the jurisprudence of ICL.

B. Jurisprudence of the International Criminal Court (ICC) on *Mens Rea* of Murder

"The Court may apply principles and rules of law as interpreted in its previous decisions", stipulated in Article 21(2) of the Rome Statute. Hence, we will refer to the relevant case law. The Court made additional comments to the *mens rea* of murder under the Rome Statute. The ICC has construed Article 30(2) of the Rome Statute in different cases, which provides the definition of intent applicable to all crimes under the Statute. The latest jurisprudence of the ICC in *Lubanga*[63] confirmed the view established in *Bemba*, that "the standard for the

[58] ICC, Prosecutor v. Ruto et al., ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the ICC Statute (Jan. 23, 2012), at 289.
[59] Rome Statute of the International Criminal Court [hereinafter the "Rome Statute"], Article 30(1).
[60] Rome Statute, Article 30(2)(a).
[61] Rome Statute, Article 30(2)(b).
[62] The definition of "kill" means "cause death". The footnote under Article 8(2)(a)(i)(1) states that the term "killed" is interchangeable with the term "caused death". This footnote applies to all elements which use either of these concepts. *See* ICC, the Elements of Crimes, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002, ICC-ASP/3/Res.1, United Nations publication, Sales No. E.03.V.2 and corrigendum, part II.B (Oct. 4, 2004), at 9.
[63] ICC, The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction (Public redacted version) (Dec. 1, 2014), at 447. Court of Appeal, R v. Ransford Delroy Nedrick, [1986] 1 WLR 1025, Decision (July 10, 1986) and Court of Appeal, R v. Woollin, [1998] 3 WLR, Decision (July 21, 1998), in support of its interpretation. These cases set out the "virtual certainty"

foreseeability of events is virtual certainty", in order to establish the *mens rea* of an accused in a murder case.[64]

The Appeals Chamber in *Lubanga* explained that in Article 30(2)(b), the verb "occur" is used with the modal verb "will", and not with "may" or "could".[65] By "virtual certainty", the Chamber meant "certainty about the future occurrence"[66] But virtual certainty is not absolute certainty, as absolute certainty of a future event can never exist, as the Chamber recognised.[67]

In *Bemba*, the Pre-Trial Chamber (PTC) III adopted a textual (literal) interpretation of Article 30, espousing that "the words '[a consequence] will occur' serve as an expression for an event that is 'inevitably' expected".[68] "[T]he words 'will occur', read together with the phrase 'in the ordinary course of events', clearly indicate that the required standard of occurrence is close to certainty".[69] By "virtual certainty", the Chamber meant "practical certainty: namely that the consequence will follow, barring an unforeseen or unexpected intervention that prevent its occurrence".[70]

The Chamber in *Bemba* has also set out elaborate tests on defining "intent" and "knowledge" under Article 30(2) and (3) of the Rome Statute. "Intent" and "knowledge" therein reflect the concept of *dolus*, "which requires the existence of a volitional as well as a cognitive element".[71] The Chamber classified *dolus* in three categories: 1. *Dolus directus* in the first degree, or direct intent; 2. *Dolus directus* in the second degree, also known as oblique intention; 3. *dolus eventualis*, known as advertent or subjective recklessness.[72] In the view of the Chamber, *dolus eventualis* or recklessness is not captured by Article 30 of the Statute,[73] whereas the first two categories are included.

> *Dolus directus* in the first degree (direct intent) requires that the suspect knows that his or her acts or omissions will bring about the material elements of the crime and carries out these acts or omissions with the purposeful will (intent) or desire to bring about those material elements of the crime.[74]

In contrast,

> *[d]olus directus* in the second degree does not require that the suspect has the actual intent or will to bring about the material elements of the crime, but that he or she is aware that those elements will be the almost inevitable outcome of his acts or omissions, i.e., the suspect 'is aware that [...] [the consequence] will occur in the ordinary course of events' (article 30(2)(b) of the Statute).[75]

In *Katanga and Ngudjolo Chui*, PTC I similarly held that the offence of murder "encompasses, first and foremost, cases of *dolus directus* of the first and second degree".[76]

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test as the *mens rea* of a murder charge, which will be further elaborated in the latter part of this memo. The Chamber also footnoted other English journal articles on "oblique intention" in English law. *See* The Prosecutor v. Thomas Lubanga Dyilo, *supra* note 65, at 160.

[64] ICC, Prosecutor v. Bemba, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (June 15, 2009), at 362.

[65] Lubanga, *supra* note 65, at 447, 449.

[66] *Id.*, at 447.

[67] *Id.*, at 447.

[68] Prosecutor v. Bemba, *supra* note 66, at 362.

[69] *Id.*, at 362.

[70] *Id.*

[71] *Id.*, at 357.

[72] *Id.*

[73] *Id.*, at 360.

[74] *Id.*, at 358.

[75] *Id.*, at 359.

[76] ICC (Pre-Trial Chamber I), The Prosecutor v. Germain Katanga, ICC-01/04-01/07-717, Decision on the Confirmation of Charges (Sept. 30, 2008), at 423.

The Court found in *Prosecutor v. Dominic Ongwen* that there was intent on the part of the accused to kill civilians in the four IDP camps. Evidence showed that Dominic Ongwen and his subordinate commanders ordered LRA soldiers to target everyone they find at the four IDP camp (Pajule, Odek, Lukodi, Abok), including shooting civilians.[77] The Court did not classify whether the *mens rea* in the case falls into first- or second-degree intent, however. Based on the available evidence, it was shown that the accused meant for civilians to be attacked during the four attacks and for the civilians to be killed.[78]

C. Jurisprudence on Crossfire from the ICTY

> The jurisprudence of other international or hybrid tribunals is not, in principle, applicable law before the Court and may be resorted to only as a sort of persuasive authority, unless it is indicative of a principle or rule of international law.[79]

It should be noted that the case law of other international courts is often considered by the ICC, in certain cases as "indicative of a principle or rule of international law".[80] We, therefore, refer to the jurisprudence of other international courts and tribunals as a source of reference, albeit not binding to the ICC.

A similar issue of crossfire was encountered in the ICTY case *Prosecutor v. Sefer Halilovic*.[81] The case concerns the Supreme Commander Sefer Halilovic's responsibility over the Main Staff of the Army of the Republic of Bosnia and Herzegovina (ABiH)'s murdering of civilians,[82] charged with one count of murder under Article 3 of the Statute of the Tribunal, which is also part of Article 3(1)(a) of the Geneva Conventions of 1949.[83] In Uzdol, there was a crossfire between units under ABiH command and the Croatian Defence Council (HVO) during the ABiH's attack on 14 September 2993, as recognised by the Chamber.[84]

However, the Chamber found that the civilians were intentionally killed on evidence such as two victims killed in their beds, one of whom was bedridden[85]; that some victims were beaten to death with an axe-like weapon or mutilated before being killed;[86] several victims were shot at contact or close range, or in the back.[87] Considering all the evidence, the Chamber reasoned that

> not only the most reasonable, but in fact the only conclusion is that the direct perpetrators had the intention to kill or to wilfully cause serious bodily harm which they should reasonably have known might lead to the death of the victims.[88]

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[77] For the *mens rea* of Ongwen killing civilians at the Pajule IDP camp, *see* The Prosecutor v. Dominic Ongwen, *supra* note 5, at 1001; the *meas rea* of Ongwen killing civilians at Odek IP camp, *see* The Prosecutor v. Dominic Ongwen, at 1015; for *mens rea* of Ongwen killing civilians at the Lukodi IDP camp, *see* The Prosecutor v. Dominic Ongwen, *supra* note 5, at 624; finally, for the *mens rea* of Ongwen killing civilians at the Abok IDP camp, *see* The Prosecutor v. Dominic Ongwen, *supra* note 5, at 705.
[78] *Id.,* at 624, 705, 1001, 1015.
[79] The Prosecutor v. Ruto et al., *supra* note 60.
[80] *Id.*
[81] ICTY (Trial Chamber I), Prosecutor v. Halilovic, IT-01-48, Judgment (Nov. 16, 2005).
[82] *Id.,* at 1-3.
[83] ICTY (Trial Chamber III), Prosecutor v. Sefer Halilovic, IT-01-48-PT, Prosecutor's Pre-Trial Brief Pursuant to Rule 65ter (E)(i), Trial Judgment (Oct. 13, 2004), at 2.
[84] Prosecutor v. Halilovic, *supra* note 83, at 734.
[85] *Id*., at734.
[86] *Id.*
[87] *Id.*
[88] *Id.*

First, it should be noted that Sefer Halilovic was not convicted in the case as the Prosecution failed to establish beyond reasonable doubt that he has effective control of the ABiH units,[89] even though members of the units had committed murder, as analysed above. In terms of the jurisprudence on crossfire, the Chamber did not directly address the question or legal issue of crossfire in its ruling, namely besides the victims murdered by the ABiH, whether civilians killed or if killed in the crossfire between the ABiH and HVO would still constitute murder of the ABiH. But if we apply the jurisprudential logic in *Halilovic*, disregarding whether some civilians might have been killed in a crossfire, if evidence substantiates that a perpetrator killed even only one person, it would still be a murder given the existence of *mens rea* and *actus reus*. Indeed, under Article 7(1)(a)(1) and Article 8(2)(c)(i)(1) of Elements of Crime, the "perpetrator killed one or more persons" constitutes the *actus reus* of murder. Notwithstanding this, this paper seeks to establish whether Mr Ongwen would be responsible for murder for those who may have been accidentally killed by the government soldiers defending themselves.

D. Jurisprudence on Crossfire of the International Criminal Court

In the *Prosecutor v. Germain Katanga*,[90] an argument of crossfire was raised between the armed groups therein causing the death of civilians.[91] The case concerns an armed conflict between the FRPI and FNI combatants on the one hand and the UPC soldiers on the other,[92] the ICC ruled that the combatants had intentionally killed civilians,[93] taking consideration of the evidence as a whole. It was found that as the people, including the UPC combatants, were fleeing towards Waka mountain at the time, they could not have died in the crossfire.[94] The Chamber admitted that even though the UPC soldiers may have constituted a military target for the attackers, the loss of human life subsequent to the shots fired at the group of fleeing persons was excessive in relation to the military advantage that the attackers could have expected, given that the soldiers were already fleeing.[95] Other evidence pointed to the fact that unarmed civilians who reside at the Institute, taking refuge inside the camp, including women, children and elderly persons, were intentionally killed primarily by machete.[96] It was held that

> by shooting indiscriminately at fleeing persons, the Lendu and Ngiti showed scant regard for the fate of the civilians among the UPC soldiers in the mêlée and knew that their death would occur in the ordinary course of events."[97] "The Chamber finds that they thus intended to cause their death.[98]

The accused in the case, Germain Katanga was convicted by the Chambers of guilty as an accessory to the crimes committed on 24 February 2003 of murder as a crime against humanity under article 7(1)(a) and murder as a war crime under article 8(2)(c)(i) of the Rome Statute.[99]

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[89] *Id.*, at 752.
[90] ICC (Trial Chamber II), Prosecutor v. Germain Katanga, ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute (March 7, 2014).
[91] *Id.*, at 433.
[92] *Id.,* at 719.
[93] *Id.,* at 864.
[94] *Id.,* at 865.
[95] *Id.*
[96] *Id.,* at 864.
[97] *Id.,* at 865.
[98] *Id.*
[99] *Id., at* 658.

In light of the facts and ruling in *Katanga*, it serves as a useful reminder that the excessive killing of civilians, even where the opponent armies were at the scene, would constitute murder where military advantage is insignificant and the death of civilians is foreseeable in the ordinary course of events. However, the ICC still regrettably did not address the causation issue of crossfire in the case.

E. ICL Jurisprudence on the Law of Causation for Murder

Without direct precedents on the issue of crossfire from the international criminal courts or tribunals, attention can be drifted to how the international criminal courts rule on the law of causation for murder under ICL.

More recently, in 2022, the Kosovo Specialist Chamber (KSC) gave its view on the legal components of the war crime of murder in *The Prosecutor v. Salih Mustafa*.[100] The case itself concerns a non-international armed conflict in Kosovo, between the BIA Guerrilla unit (belonging to the Kosovo Liberation Army, KLA), of which the accused was the commander,[101] and on the other, forces of the Federal Republic of Yugoslavia and the Republic of Serbia.[102] The Chamber in the case faced a scenario where a victim who was arrested by members of the BIA and was held by the BIA members in captivity.[103] There were gunshot wounds caused by bullets, which the Chamber could not conclude whether shot by the BIA members or the Serbian forces.[104] However, due to the denial of medical aid to the victim and his severe mistreatment by the BIA members, of which the accused had knowledge, the victim died as a consequence.[105]

The Chamber held that to establish a conviction of murder, there must be material elements (*actus reus*) and mental elements (*mens rea*).[106] The material elements require that the actor commit an act or commission resulting in the death of a person.[107] The Chamber did not use the word "causation", but further explained that the conduct of the perpetrator does not have to be the sole cause of death of the victim, but at a minimum it must have contributed substantially thereto.[108] The acts of the BIA members such as severe mistreatment and denial of medical care to the victim constitute substantial causes of the murder of the victim, found by the Chamber, and therefore held that the material element of the war crime of murder is satisfied.[109]

Other international criminal tribunals' judgments point towards their agreement in the "substantial cause" theory in establishing a causation relationship in murder cases, that the *actus reus* need only be the substantial cause of the victim's death, but does not have to be the sole cause thereof. The ICTY has made consistent rulings in this regard. First in 1998, in *Prosecutor v. Mucic et al.* (also known as the *Čelibići* case),[110] the Chamber held that for the commission of murder and wilful killing, concrete actions as well as omissions can satisfy the *actus reus*

[100] Kosovo Specialist Chambers (Trial Panel), The Prosecutor v. Salih Mustafa, KSC-BC-2020-05, Further redacted version of Corrected version of Public redacted version of Trial Judgment (Dec. 16, 2022).
[101] *Id.,* at 22.
[102] *Id.,* at 23.
[103] *Id.*, at 691-692.
[104] *Id.,* at 689.
[105] *Id.*
[106] *Id.,* at 686.
[107] *Id.,* at 687.
[108] *Id.*
[109] *Id.*, at 689.
[110] ICTY (Trial Chamber), Prosecutor v. Mucic et al., OT-96-21-T, Judgment (Nov. 16, 1998).

element and, further, that the conduct of the perpetrator must be a substantial cause of the death of the victim.[111] After that, in the *Prosecutor v. Naser Oric*,[112] the Chamber likewise held that "[t]o establish the *actus reus* of murder, the Prosecution must prove beyond reasonable doubt that the perpetrator's conduct contributed substantially to the death of the person."[113] The case the *Prosecutor v. Kupreškić et al*. also found that the constituent elements of murder comprise the death of the victim occasioned by the acts or omissions of the accused, where the conduct of the defendant was a substantial cause of the death of the victim.[114]

Other international criminal tribunals have defined the constituent elements of murder in their own formulations, some of which do not explore causation nor the substantial cause test. The Extraordinary Chambers in the Courts of Cambodia (ECCC), in the case *Kaing Guek Eav alias Duch*, reasoned that the conduct of the perpetrator must have contributed substantially to the death of the victim.[115] However, in the case of Special Court for Sierra Leone (SCSL), *Prosecutor v. Issa Hassan Sesay*,[116] as well as the ICTR case of *The Prosecutor v. Jean-Paul Akayesu*,[117] the courts did not discuss the issue or law of causation, including the substantial cause test.

F. A Critique of the ICL Jurisprudence on Causation

Despite various international criminal tribunals' attempt to formulate the test of causation, the underlying analysis of the formulation lacks in depth and critical evaluation. For the KSC, it did not make elaborate analysis on the law or issue of causation, merely citing cases of other international criminal tribunals such as that of ICTY and ICTR in support of the substantial cause test, including *Prosecutor v. Orić* and *The Prosecutor v. Jean-Paul Akayesu*, both of which have been discussed above.

Many ICTY cases refer to the classic *Prosecutor v. Mucic et al.* judgment. If we read the supporting arguments made by the ICTY in the case, nonetheless, we discern the problem: the Court's substantial cause test is supported with a footnote commenting briefly the tests of causation of various domestic legal systems, include that of England, Australia, the United States, Canada, Norway, Germany and the Netherlands.[118] An argument can effortlessly be raised that the citation lacks in a close study of the judicial approach of these different countries, citing only one or at maximum, a few cases in support of its finding, lacking in depth and quantity. In any event, the case was decided in 1998, and we must deep track of the latest jurisprudence since then. Other ICTY cases such as *Prosecutor v. Naser Oric* and *Prosecutor v. Kupreškić et al.* also fail to review and analyse comprehensively on the law of causation, merely citing other cases in support of its employment of the substantial cause test.

Notably, the jurisprudence of other international criminal tribunals is not binding, albeit arguably persuasive, to the ICC. Due to a necessity to rule on the issue of crossfire afresh from the perspective of the ICC, we need to critically and independently review the law by referring to other sources of law under the Rome Statute.

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[111] *Id.,* at 424.
[112] ICTY (Trial Chamber II), Prosecutor v. Naser Oric, IT-03-68-T, Judgment (June 30, 2006).
[113] *Id.,* at 347.
[114] ICTY (Trial Chamber), Prosecutor v. Kupreskic et al., IT-95-16-T, Judgment (Jan. 14, 2000), at 560.
[115] ECCC, Co-Prosecutors v Kaing, 001/18-07-2007/ECCC/TC, Judgment (July 26, 2010), at 331.
[116] SCSL (Trial Chamber I), Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao, SCSL-04-15-T, Judgment (March 2, 2009), at 142.
[117] ICTR (Chamber I), Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Judgment (Sept. 2, 1998), at 589.
[118] Prosecutor v. Mucic et al., *supra* note 112, at 155 n. 435.

IV. The International Law of Treaty Interpretation Under the Vienna Convention on the Law of Treaties (VCLT)

It is not set in stone whether the issue of crossfire would constitute murder, reading from the plain text of the Rome Statute or studying case law as we did in Section III. Assistance is therefore required from other sources. The ICC has held that, as tools of interpretation, the Vienna Convention on the Law of Treaties (VCLT) can be applied in construing the Rome Statute.[119] In particular, applying Article 3 of the VCLT, focus shall be on literal, contextual and teleological considerations.[120] In line with Article 32 of the VCLT, the *travaux préparatoires* of the ICC Statute can be used to confirm interpretations made based on literal, contextual and teleological constructions.[121] Article 31 and 32 of the VCLT have long been recognised by the ICJ to be customary international law.[122] For the interpretation of treaties, Article 31(1) is most relevant which requires a treaty to be read "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The task of this chapter is to employ the VCLT for the interpretation of the crime of murder and its causation, both as a war crime and a crime against humanity under the Rome Statute.

The ICC and other international criminal courts do not have abundant case law on the issue of causations, exactly because they would usually read the provisions of respective statutes in light of their plain and ordinary meaning. Soldiers directly shooting civilians by aiming them are, no doubt, committing murder as a war crime or alternatively as a crime against humanity.[123] In these simple cases, the Courts do not and rightly so, need not other sources in the application of the Rome Statute. As previously explained in Section III(A.), murder as a crime against humanity and war crime simply means "causing death", written explicitly in the Elements of Crimes. This is equivalent to the English approach to the law of causation, applying "common sense", which is the ordinary understanding of causation used in daily language, in determining causal issues.

However, in a "hard case" such as *The Prosecutor v. Dominic Ongwen*, the Court is entitled to and should apply Article 31(1) of VCLT in full and explore into the "object and purpose" of the crime of murder. This is because a plain and ordinary reading of it does not solve the puzzle of whether someone can murder someone else with the potential intervention of a third party, or other parties or factors. In defining such "object and purpose" of a crime, including its underlying issue of causation, the Spanish Courts' approach of objective imputation can be referred to.[124] We can ask if the purpose or scope of protection is within the violated provision, and if there are any prohibited risk intended by that provision. It should be stressed, nonetheless, that this is but one approach to finding out the object and purpose of a particular crime or provision.

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[119] ICC, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, Decision (July 24, 2006), at 33.
[120] *Id.*
[121] *Id*., at 40–41.
[122]ICJ, Territorial Dispute (Libyan Arab Jamahariya/Chad), ICJ Rep 6, Judgments (Feb. 3,1994).
[123] *See* e.g. ICTY (Trial Chamber I), Prosecutor v Sefer Halilovic, IT-01-48, Judgment, (Nov. 16, 2005).
[124] The Spanish Courts' ruling on causation is further discussed in section VI of this Article.

A. The Object and Purpose of War Crimes

In seeking to find out the "object and purpose" of the founding of war crimes, further sources need to be consulted. The Rome Statute, in its definition of war crimes, clearly provided that they mean "[g]rave breaches of the Geneva Conventions of 12 August 1949"[125] and "[o]ther serious violations of the laws and customs applicable in international armed conflict"[126] The four Geneva Conventions and international humanitarian law in general are the cornerstones of war crimes under the Rome Statute, as well as other statutes under other international criminal tribunals such as the ICTY and ICTR. According to Alexander Schwarz,

> [u]nder the law of international armed conflict including the four Geneva Conventions and its Additional Protocol I, any wilful direct attack against 'protected persons' (ie wounded and sick, shipwrecked persons, prisoners of war, civilians and inhabitants of occupied territories), not justified by military necessity (proportionality), amounts to a war crime.[127]

War crimes are clearly drafted for the protection of civilians from violence and direct effects of military operations in an armed conflict.[128] Schwarz calls this object "one of the cornerstones of international humanitarian law", as attacks may only be directed against combatants.[129]

Under Article 43 Additional Protocol I of the Geneva Conventions, applicable in international armed conflicts, all members of the armed forces of a party enjoy the legal status of a combatant, who have the right to take a direct part in hostilities and therefore to kill, harm, or destroy.[130] "In contrast, civilians have no right take a direct part in hostilities and shall, under all circumstances, be protected from military operations."[131] Hence, launching direct attacks against the civilian population or against individual civilians are, where they do not take a direct part in hostilities, considered a grave breach by Article 85 (3) (a) Additional Protocol I.[132] Furthermore, under the principle of distinction, which is found under Article 51 (4) of the Additional Protocol I, armies must at all times distinguish between civilian populations and combatants as well as between civilian objects and military objectives.[133] Consequently, indiscriminate attacks constitute war crimes in international law.

In essence the "object and purpose" of war crimes are to protect civilians from violence and direct effects of military operations in an armed conflict, and in particular intentional killing of civilians. The intentional or reckless killing of civilians, in other words, is the "mischief" that the rules of war crimes seek to remedy.[134] In light of such purpose, it should not matter that there is an involvement of a third party, or other parties, in the chain of causation. Their involvement should neither an intervening event which breaks the chain. Suppose that some soldiers X take civilians as shields to protect themselves from the shootings of soldiers Y, rendering those civilians killed in the process. Soldiers Y did not foresee this coming and therefore shot the civilians unintentionally. This would be murder on the part of soldiers X,

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[125] Rome Statute, Article 8(2)(a).
[126] Rome Statute, Article 8(2)(b).
[127] Alexander Schwarz, *War Crimes,* PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2014), at 43.
[128] *Id.,* at 44.
[129] *Id*.
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.,* at 46.
[134] The "mischief rule" is one of the rules of interpretation adopted by the English Courts. It could be employed to ascertain the object or purpose of a law. *See* GARY SLAPPER, DAVID KELLY, THE ENGLISH LEGAL SYSTEM 101 (13th edn., 2012).

provided that there are the necessary *mens rea*, the intent and knowledge that the civilians would be killed, and *actus reus*, that they be killed. It does not even matter that soldiers X did not shoot, and the third-party soldiers Y were the last persons "causing death" in the chain of causation.

B. The Object and Purpose of Crimes against Humanity

Crimes against Humanity first came into place in the Draft Code of Crimes against the Peace and Security of Mankind, drafted by the International Law Commission and adopted in 1996.[135] Guido Acquaviva and Fausto Pocar noted that Article 7 of the Rome Statute, which prescribed against crimes against humanity, adopted the definition in the ILC Draft Code with minor variations, and that it is in line with crimes against humanity as defined in the ICTY and ICTR Statutes.[136] However, the crimes against humanity have existed before such codifications. In the *Einsatzgruppen Case* before the Nuremberg Military Tribunal II in 1949, the Court has defined and discussed in depth the "crimes against humanity".[137] The Court found that the law of the crime applies without being restricted to events of war,[138] which means that unlike war crimes, it applies both in war time as well as peacetime. The Court listed murder, torture, enslavement as examples of the crimes, albeit the list itself is infinite.[139] The crimes are also not restricted to the nationals of a particular country but all mankind.[140] In theory, this means that stateless individuals can be victims of the crimes against humanity. According to the Court: "[c]rimes against humanity are acts committed in the course of wholesale and systematic violation of life and liberty."[141] The Court has also explored the interrelation between murder under crimes against humanity and murder under war crimes, that the latter can potentially inform the former on deciding issues of murder.[142] In that case, the defendants are charged with war crimes and crimes against humanity, including murder, *inter alia*.[143]

Jurisprudence from other courts also confirm that, at least concerning murder and other counts of crimes that both appear under the heading of war crimes and crimes against humanity, war crimes and crimes against humanity are interdependent concepts. In *Public Prosecutor v. Karl Hass and Erich Priebke*, the Military Tribunal of Rome in Italy recognised in *obiter dictum* that certain conduct qualifying as war crimes might also be termed crimes against humanity.[144] In the *Eichmann case* decided by the Israel Supreme Court, it was found that war crimes, genocide, and crimes against humanity are interdependent notions.[145] Moreover, with respect to murder, the ICTY stated that its elements mirror the elements of the war crime of unlawful killing, premeditated or not.[146]

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[135] Guido Acquaviva, Fausto Pocar, *Crimes against Humanity*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2008), at 12.
[136] *Id.,* at 18.
[137] The Einsatzgruppen Case, Case No. 9, United States v. Ohlendorf et al., Opinion and Judgment (April 8, 1948).
[138] *Id.,* at 496.
[139] *Id.*
[140] *Id.*
[141] *Id.,* at 497.
[142] *Id.,* at 458.
[143] *Id.,* at 410.
[144] [22 July 1997] (1998) 38 Cassazione penale 689.
[145] Israel Supreme Court, Attorney General of the Government of Israel v. Eichmann, 36 ILR 277, Judgment (May 29, 1962).
[146] ICTY, Prosecutor v. Kupreškić, ICTY-95-16-T, Judgment (Jan. 14, 2000), at 560.

This Article contends that the development of "crimes against humanity" as an international crime serves the purpose of protecting civilians from inhumane treatment, be it murder, torture, persecution or other acts, by any organs or institutes, including the government, the state and any non-governmental organs. As Dr Guido Acquaviva and Professor Fausto Pocar found, "the very concept of crimes against humanity was introduced by the victorious powers of World War II out of concern for civilians rather than for combatants".[147] Under this finding, intentionally causing the death of civilians must be held as murder. It does not matter that there is an innocent third party involved, where in the case of *Dominic Ongwen*, being the Ugandan soldiers, being forced into shooting for their self-defence and the protection of the civilian population in the camps.

Interpreting the object and purpose of the crime of murder under the Rome Statute, however, does not lead to an undisputed conclusion. One problem of deducing the "object and purpose" of the prohibition of murder under the Rome Statute or ICL in general by reading their legislative process and history is that war crimes and crimes against humanity, despite their general humanitarian purpose, is multifaceted and could be overly idealistic or literal, therefore possibly turning a blind eye to the chaos of armed conflicts and wars. The Defence would wisely plead the principle of *nullum crimen sine lege* under Article 22 of the Rome Statute, that "[i]n case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted." The quest for deciding conclusively on the issue of crossfire must not end here.

V. Application of Treaties and Principles of International Law: Section 21(1)(B) of the Rome Statute

> The Court shall apply… (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict

Reading the Rome Statute and the Elements of Crimes as we did in Section III, does not yield a simple answer for the issue of crossfire. Invoking section 21(1)(b) of the Rome Statute, can we refer to further sources of law for references?

The ICC has given its view in different cases on when would be *appropriate* to consult "applicable treaties and the principles and rules of international law". The Chamber in *Prosecutor v. Ruto et al*., reasoned that the opportune moment of "where appropriate" takes place where there is a lacuna in the Rome Statute, Elements of Crimes and its Rules of Procedure and Evidence.[148] "In other words, the Chamber should not resort to applying Article 21(l)(b), unless it has found no answer in paragraph (a)."[149] In another case, *Prosecutor v. Katanga and Ngudjolo Chui*, the Chamber commented that sources of Article 21(l)(b) would be employed "only when the statutory material fails to prescribe a legal solution".[150] The Chamber, making a finding with respect to modes of liability, remarked that the Rome Statute regulates in detail the applicable modes of liability, and hence it is unnecessary to consider whether customary international law admits or abandons some modes of liability.[151]

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[147] Acquaviva, Pocar, *supra* note 137, at 11.
[148] Prosecutor v. Ruto et al., *supra* note 60.
[149] *Id*.
[150] Prosecutor v. Katanga and Ngudjolo Chui, *supra* note 58, at 508.
[151] *Id.*

In *Prosecutor v. Lubanga*, the ICC Trial Chamber held that Article 21 of the Rome Statute requires the Chamber to first apply the Statute, Elements of Crimes and Rules of the ICC. Thereafter, if ICC legislation is not definitive on the issue, the Chamber should apply, where appropriate, principles and rules of international law.[152] The criterion "where appropriate" emphasises that judges have discretion in the use of external legal sources.[153] It is at least contestable that the Rome Statute and its interpretation by way of recourse to the VCLT do not give us a determinative answer on whether crossfire would cut the chain of causation under ICL. We need to consult further sources.

Article 21(1)(b) of the Rome Statute allows recourse to "applicable treaties" and "principles and rules of international law". We shall first address applicable treaties. What does the article mean with "applicable treaties", then? Scholars debate the meaning of the word "applicable",[154] which relates to whether one employs a wider interpretation which would include "relevant" treaties, whereas a narrower reading would encompass only "applicable" treaties.[155] Applicable treaties should include those to which the ICC is a party,[156] viz. the Negotiated Relationship Agreement between the International Criminal Court and the United Nations (2004) and the Headquarters Agreement between the International Criminal Court and the Host State (2007). However, the former agreement relates to cooperation mechanisms between the ICC and the United Nations,[157] whereas the latter relates to matters relating to or arising out of the establishment and the proper functioning of ICC in the host State.[158] Simply put, they are completely irrelevant to substantial or procedural criminal law matters.

More relevant to the law of causation would be "principles and rules of international law". Most scholars agree that principles and rules of international law include customary international law (CIL).[159] In Jean-Marie Henckaerts and Louise Doswald-Deck's seminal work Customary International Humanitarian Law,[160] four particularly relevant rules of CIL need to be mentioned. For one, murder is prohibited.[161] State practice establishes this rule as a norm of CIL applicable in both international and non-international armed conflicts.[162] Second, "[t]he parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians."[163] The

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[152] ICC, Prosecutor v. Lubanga, ICC-01/04-01/06-1049, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial (Nov. 30, 2007), at 44.
[153] MARK KLAMBERG, COMMENTARY ON THE LAW OF THE INTERNATIONAL CRIMINAL COURT (2017), at 245.
[154] Gudrun Hochmayr, *Applicable Law in Practice and Theory—Interpreting Article 21 of the ICC Statute*, 12 J.I.C.J. (2014), at 655, 666; *See* also Margaret McAuliffe deGuzman, *Article 21 – Applicable Law*, in OTTO TRIFFTERER (ED.), COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE (2nd ed. 2008), at 701, 705-706.
[155] deGuzman, *supra* note 156, at 705. Relevant treaties for the ICC are arguably the International Covenant on Civil and Political Rights and European Convention on Human Rights.
[156] As the lawyer Pellet notes, it is difficult to see how inter-governmental treaties in general would be applicable as treaty law before the ICC: *See* Alain Pellet, *Applicable Law*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY (Antonio Cassese, Paola Gaeta and John R.W.D Jones eds, 2nd ed., 2002), at 1051, 1068–69. As a fundament of public international law, treaties are only binding for those States that have ratified them.
[157] *See*, for instance, ICC, Article 3 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, ICC-ASP/3/Res.1 (Oct 4, 2004).
[158] ICC, Article 2, ICC-BD/04-01-08 (March 1, 2008).
[159] KLAMBERG, *supra* note 155, at 246.
[160] JEAN-MARIE HENCKAERTS, LOUISE DOSWALD-DECK ET AL., CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME 1: RULES (International Committee of the Red Cross, 2005).
[161] *Id.,* at 311.
[162] *Id*.
[163] *Id.,* at 3.

rule, as the first rule, is applicable both in international and non-international armed conflicts.[164] In light of these rules, intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities are war crimes in both international and non-international armed conflicts.[165]

As a matter of CIL, furthermore, indiscriminate attacks are prohibited.[166] Indiscriminate attacks, by definition, are those: (a) which are not directed at a specific military objective; (b) which use a method or means of combat which cannot be directed at a specific military objective; or (c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and as a consequence, in each case above, are of a nature to strike military objectives and civilians or civilian objects without distinction.[167] The last pertinent rule is that it is prohibited to launch an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive with respect to the concrete and direct military advantage anticipated.[168] These rules also apply to both international and non-international armed conflicts.[169]

Customary international law, even though mirrors a purposive approach to the interpretation of murder defined by the Rome Statute, nevertheless, does not give a definitive guide on the issue of crossfire.

VI. General Principles of Law Derived from National Laws of the World's Legal Systems

> The Court shall apply […] (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

The Rome Statute, Article 21(1)(c), allows the ICC to apply "general principles of law derived by the Court from national laws of legal systems of the world". Reference to case law, in Section III of this Article, does not yield conclusive answer to the issue of crossfire breaking the continuum of causation. As this section will establish, there are two general principles of law deducible from the national laws of the world's legal system in legal causation, applicable to the issue of crossfire: (a) The principle of *Novus Actus Interveniens* or Intervening Cause; and (b) the jurisprudence that the cause of death of an accused does not have to be the sole cause for his action or omission to be guilty of murder: I call this the principle of non-exclusivity of a cause.

This comprehensive survey of national laws demonstrates broad support for holding perpetrators liable despite complex causal chains in combat situations. By identifying these general principles, the section provides robust grounds for the ICC to develop its causation jurisprudence in crossfire cases. The comparative analysis, in addition, emphasises the importance of drawing on diverse legal traditions to resolve novel ICL questions, setting up the conclusion's synthesis of all examined sources.

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[164] *Id*.
[165] For armed conflicts, Article 8(2)(b)(i) of the Rome Statute is applicable, whereas Article 8(2)(e)(i) thereof is applicable in non-international armed conflicts.
[166] HENCKAERTS, *supra* note 162, at 39.
[167] *Id.,* at 40.
[168] *Id.,* at 46.
[169] *Id.,* at 40, 46.

Before diving into the municipal criminal law of nations, a close reading of Article 21(1)(c) is required to ensure that the clause itself is triggered – allowing us to invoke these general principles. Consideration first has to be given to what constitutes "failing that". Mark Klamberg regards this as where the ICC cannot find a solution to a legal question in its own internal sources of law or in the applicable treaties and the principles and rules of international law, then it may seek for the solution in general principles of law derived from national laws of legal systems of the world.[170] The Court should have wide discretion to define what constitutes "failing that", akin to the choice of word 'where appropriate' in Article 21(1)(b) of the Rome Statute where the Court has a wide margin of appreciation.

Second, as Margaret M. deGuzman commented, Article 21(1)(c) does not direct the ICC judges to apply the national laws of any particular State directly, but rather to apply principles underlying the laws of "the legal systems of the world".[171] Previous practice at the ICTY has recognised the necessity to examine the laws of both common law and civil law countries, in consulting the "general principles of law recognized by civilized nations".[172]

Judges McDonald and Vohrah of the ICTY in their Joint Separate Opinion in *Prosecutor v. Erdemovic*, noted that this did not require a comprehensive survey of the legal rules of all domestic systems but rather an analysis of those jurisdictions that were practically accessible to the court to deduce the general principles underlying the specific rules of those jurisdictions.[173] Not without its criticisms, it is impracticable, if not impossible that the Court conduct a universal survey to find commonality across all the countries' criminal systems, given the time, resources, time constraint and knowledge of the Court.[174]

Scholars such as Alain Pellet made the remark that the inquiry into domestic criminal laws as a source of law should include the principal legal systems of the world, including at least representatives from civil law countries and common law countries, and probably some Islamic law countries.[175] Recent practice at the ICC reveals that in some cases, the Prosecutors analyse both sources of civil law, common law countries, and some Islamic countries.[176] For the purpose of completeness, this Article will analyse the criminal jurisprudence of causation of countries of common law origin, civil law countries and Islamic criminal law.

In the case *Prosecutor v. Erdemovic*, two of the ICTY judges made the following statements regarding their tasks:

> [O]ur approach will necessarily not involve a direct comparison of the specific rules of each of the world's legal systems, but will instead involve a survey of those jurisdictions whose jurisprudence is, as a practical matter, accessible to us in an effort to discern a general trend, policy or principle underlying the concrete rules of that jurisdiction which comports with the object and purpose of the establishment of the International Tribunal.[177]

This Article follows this approach in delineating whether there are general trend, policy or principle underlying the various countries' criminal law of causation, especially that which sheds light on the issue of crossfire.

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[170] KLAMBERG, *supra* note 155, at 247.
[171] deGuzman, *supra* note 156, at 709.
[172] ICTY, Prosecutor v. Erdemovic, IT-96-22-A, Judgment, Appeals Chamber (Oct. 7, 1997), para 57, at 40.
[173] ICTY, Prosecutor v. Erdemovic, IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, (Oct. 7, 1997) at 41–55, 57-58.
[174] *Id.*, at 133.
[175] Pellet, *supra* note 158, at 1073–74.
[176] ICC, Situation in the Democratic Republic of Congo, ICC-01/04-168, Appeals Chamber, Judgment (July 13, 2006).
[177] ICTY, Prosecutor v. Erdemovic, IT-96-22-A, Judgement, *supra* note 174, at para. 57.

A. The English Jurisprudence — Criminal Law of Causation

General principles of law of legal systems of the world include the laws of the State where the crime was committed and the laws of the State of which the defendant is a national.[178] In *The Prosecutor v. Dominic Ongwen*, the accused Ongnwen was born in Uganda,[179] hence subject to the law thereof. The charges were, again, about crimes committed in the four IDP camps in 2003 to 2004 in different regions of Uganda.[180] One of the applicable national laws is therefore the laws of Uganda. Uganda is a former colony of the United Kingdom, and despite its independence in 1962, the English Common Law remains a source of law of the state.[181] The English Courts have uniquely developed jurisprudence on the issue of legal causation in a scenario of crossfire causing death, which merits close examination.

In determining causation in crimes, a common approach of the English Courts is that issues of causation are to be answered by the application of common sense.[182] Unlike some other jurisdictions such as the U.S. and Germany, the English Court do not apply unified theories in determining issues of causation. However, the common sense approach to causation is by no means determining causal issues intuitively. As H.L.A. Hart explains

> [c]ommon sense is not a matter of inexplicable or arbitrary assertions, and the causal notions which it employs, though flexible and complex and subtly influenced by context, can be shown to rest, at least in part, on statable principles; though the ordinary man who uses them may not, without assistance, be able to make them explicit.[183]

It worths to be noted that Hart attempts to theorise the common sense approach to causation. The definition of "cause" under the approach is the human action by which a person produces some desired effect by the manipulation of an object in the environment, an interference in the natural course of events which *makes a difference* in the way these develop.[184] "[T]he first stages of this process consist of movements of our own body or parts of it, and consequently movement of things or parts of the things which we manipulate".[185]

1. English Case Law on Criminal Causation: *R v Pagett*

In the case *Regina v. David Keith Pagett*,[186] the accused took the victim with his shotgun round the victim's waist and used her as a shield.[187] The police officers came to the scene, shouted to the accused to stand still, but the accused fired his shotgun.[188] This led to the officers firing back instinctively, killing the victim.[189] The accused was charged with murder and alternatively manslaughter, *inter alia*. The Court of Appeal dismissed the appeal of the accused, upholding

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[178] ICC, Prosecutor v. Lubanga, *supra* note 155, at 710
[179] ICC, The Prosecutor v. Dominic Ongwen, *supra* note 6, at 26.
[180] *Id.*, at 34.
[181] Henry Onoria, *Uganda* in INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS: INCORPORATION, TRANSFORMATION, AND PERSUASION (Dinah Shelton ed., 2012), at 594-619.
[182] ORMEROD, *supra* note 37, at 52. See also United Kingdom House of Lords, Environmental Agency (formerly National Rivers Authority) v. Empress Car Co. (Abertillery) Ltd, 1 All ER 481, HL., Appeals Chamber, Judgement (Feb. 5, 1998).
[183] HERBERT L.A. HART, TONY HONORE, CAUSATION IN THE LAW (2002), at 26.
[184] *Id.*, at 29.
[185] *Id.*, at 29, 30.
[186] England and Wales Court of Appeals, Regina v. David Keith Pagett, 76 Cr. App. R. 279, Judgement (Feb. 3, 1983).
[187] *Id.*, at 280, 282.
[188] *Id.*, at 282.
[189] *Id.*

his conviction of manslaughter by the jury. It must be noted that in this case, the jury was satisfied that the accused caused the victim's death, as the *actus reus* of manslaughter and murder is the same in the case.[190] However, under the directions of the trial judge,[191] the jury did not find the necessary *mens rea* of the accused in the particular circumstances of the case to commit murder. In other words, the jury did not find that the accused *knew* or *foresaw* that it was probable that his unlawful acts would result in the victim's death or in really serious bodily harm to her. This is different to the facts in *The Prosecutor v. Dominic Ongwen*, where the Chambers found that Dominic Ongwen had the intention to kill civilians on multiple fronts.

The Court of Appeal quoted the view of Professor Smith and Hogan's Criminal Law that "[c]ausation is a question of both fact and law".[192] To establish the crime of murder, the act of the accused has to be a *causa sine qua non* of the death of the victim,[193] but it need not be the sole cause or even the main cause of the victim's death.[194] It is sufficient that his act contributed significantly to that result.[195] Hence in *Dominic Ongwen*, while the immediate and main cause of the death of victims caught in crossfire and struck by bullets, even if they were fired by the UPDF, these shots were the inevitable consequence of the LRA attack to which the UPDF soldiers were responding. Those attacks, ordered by Dominic Ongwen, was clearly a *causa sine qua non* of those deaths.

The causation, however, would break if there is a *novus actus interveniens*, namely the intervention of a third party which would relieve the accused of criminal responsibility.[196] The question was therefore if the police constables in shooting the accused back instinctively could be considered as such. In the *ratio decidendi* of the Court which dismissed the second ground of appeal, it was held that 'a reasonable act performed for the purpose of self-preservation, being of course itself an act caused by the accused's own act, does not operate as a *novus actus interveniens*.[197] The Court cited *R v. Pitts*[198] and *R v. Curley*[199] in which the victim acted in a reasonable attempt to escape the violence of the defendant and died which was caused by the act of the accused.[200] It was held that there is no distinction in principle between an attempt to escape the consequences of the accused' acts in those cases, and a response which takes the form of self-defence in the present case, which was involuntary.[201]

On dismissing the third ground of appeal, the Court followed *Hyam v. DPP*[202] that the test of murder is "a subjective test of what was the state of mind of the accused".[203] For a murder to stand, the act must "aimed at someone" and must be an act committed with one of the following (subjective) intentions: 1. The intention to cause death; 2. The intention to cause grievous bodily harm; 3. "Where the defendant knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as the result of those acts […]".[204] The

[190] *Id.*, at 291.
[191] *Id.*, at 284.
[192] *Id.*, at 287.
[193] *Id.*, at 288.
[194] *Id.*, at 284.
[195] *Id.*
[196] *Id.*, at 290.
[197] *Id.*, at 289.
[198] R. v. Pitts (1842) C&M 284.
[199] R. v. Curley (1909) 2 Cr App R 96.
[200] England and Wales Court of Appeals, *supra* note 188, at 289.
[201] *Id.*
[202] United Kingdom House of Lords, Hyam v. DPP, AC 55, Appeals Chamber, Judgement (Mar. 21, 1974).
[203] *Id.*, at 292.
[204] *Id.*

Court stated that for the accused murder conviction to stand, the jury only have to be satisfied that either the appellant fired at the police officers and thereby caused them to fire back, or that "he used Gail Kinchen as a shield by force and against her will".[205]

Applying the test in *Pagett* to the *Ongwen* case, it is submitted that there is no *novus actus interveniens* which breaks the chain of causation between the shooting of the LRA fighters and the death of civilians. The government soldiers were not just firing back in reasonable self-defence, but they were there at the camps to defend the civilians from harms. Their self-defence in shooting back is also a reasonably foreseeable event.

2. *R v. Gnango*: Supreme Court's Decision on Issues of Crossfire

Another English case that can be referred to is *R v. Gnango*.[206] The case involves a man covered with a bandana (*Bandana Man*). He pulled out a gun in a car park and shot at the appellant. The appellant returned the fire, crouched down behind a red Polo, and shot two or three shots over the roof of the car.[207] As a consequence of the shooting between them, an innocent passer-by was killed.[208] Both were convicted of murder, and the Supreme Court dismissed the appeal. The case concerns the correctness of the judge's direction of the jury at the Court of Appeal, under doctrines of common law such as transferred malice and parasitic accessory liability which are not relevant to the current case.[209]

Especially worth noting and relevant to the present analysis is Lord Clarke's *obiter dictum* on causation in *Gnango*. Judge Clarke remarked that once the respondent became aware that Bandana Man had a gun and was willing to use it, "it was undoubtedly foreseeable that, if the respondent continued shooting at Bandana Man, he would shoot back with intent to kill him or cause serious harm".[210] Therefore, "it was open to the jury to conclude that the respondent's firing at Bandana Man was a cause of the latter shooting back".[211] As Atli Stannard analysed it, the approach can be broken down into three steps:

> (i) D1's actions (shooting at D2) were a foreseeable consequence of D2's actions- be they telling D1 to come to the shoot-out or shooting at D1; (ii) D2's actions were therefore an operative clause of V's harm; (iii) D1's response, being caused by D2, was not therefore a *novus actus interveniens*.[212]

The foreseeability test for *mens rea* in Lord Clarke's remark can be put aside first, as the test will be analysed in the next chapter. But importantly, under the test, D1's action, which is caused by D2, would not be an intervening act that excuses D2's responsibility. It is submitted that the same applies to the *Ongwen* case.

In *Gnango*, Lord Clarke also cited Lord Wright's remark on causation in *The Oropesa*.[213]

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[205] *Id.*, at 291.
[206] Supreme Court of the United Kingdom, R. v. Gnango, [2011] UKSC 59, Judgement (Dec. 14, 2011).
[207] *Id.*, at 7.
[208] *Id.*, at 8.
[209] The doctrine of "transferred malice" is only applicable under the Common law. The doctrine dictates that "[w]here a defendant intends to kill or cause serious injury to one victim, V1, but accidentally kills another, V2, he will be guilty of the murder of V2." *Id.*, at 16. It is extremely doubtful, if not impossible, to apply this doctrine under the Rome Statute, where the ICC explicitly ruled that the test for *mens rea* is virtual certainty.
[210] *Id.*, at 89.
[211] *Id.*
[212] Atli Stannard, *Securing a Conviction in "Crossfire" Killings: Legal Precision Vs. Policy*, JOURNAL OF COMMONWHEALT CRIMINAL LAW 299 (2011).
[213] England and Wales Court of Appeal, The Oropesa, [1943] 1 All ER 211, Judgement (Dec. 17, 1942) at 32.

> To break the chain of causation it must be shown that there is something which I will call ultroneous, something unwarrantable, a new cause which disturbs the sequence of events, something which can be described as either unreasonable or extraneous or extrinsic. I doubt whether the law can be stated more precisely than that.[214]

On the facts of the case, two steam vessels, *the Manchester Regiment ('M.R.')* and *the Oropesa* ('*O.*') came into collision due to the fault of the latter.[215] The master of *M.R.* launched a lifeboat with sixteen men on board, but it capsized and nine of the men were drowned. The Court of Appeal held that the accident and the people's death were caused by O's negligence and thus there was no break in the chain of causation.[216] In the words of the Court, "[t]here was an unbroken sequence of cause and effect between the negligence which caused the Oropesa to collide with the Manchester Regiment, and their action, which was dictated by the exigencies of the position."[217]

Furthermore, other comments made by the Law Lords in *Gnango* merit consideration. In the joint opinion of Lord Philips and Lord Judge (with whom Lord Wilson agrees), one piece of their remarks is worth being quoted in full:

> On the jury's verdict the defendant and Bandana Man had chosen to indulge in a gunfight in a public place, each intending to kill or cause serious injury to the other, in circumstances where there was a foreseeable risk that this result would be suffered by an innocent bystander. It was a matter of fortuity which of the two fired what proved to be the fatal shot. In other circumstances it might have been impossible to deduce which of the two had done so. In these circumstances it seems to us to accord with the demands of justice rather than to conflict with them that the two gunmen should each be liable for Miss Pniewska's murder.[218]

In *Prosecutor v. Dominic Ongwen*, it is likewise a matter of fortuity how many civilians will be killed *even if* some were shot dead by bullets from the other side (and not by the perpetrators LRA directly), even though it is certain that civilians will be killed as a result. Moreover, Lord Brown in *Gnango* made a warning that regardless of whether the appellant be held liable for the victim's murder in either in accessory terms or as a principal, "A's liability for C's murder seems to me clear and I would regard our criminal law as seriously defective were it otherwise". The international criminal legal system would suffer from such serious defectiveness if killers make the conscious decision to take the risk to engage in massive shooting, foreseeable in the ordinary course of events, and victims die as a result; at the same time, other parties at the scene exercise their legitimate rights of self-defence and protection of civilians by shooting back the killers. The people who initiate the shooting, who expect the other parties to return fire, must be held guilty of murder if they foresee the death of the victims will occur in the ordinary course of events.

In Professor David Ormerod's essay[219] which commented on the *Gnango* case at its Court of Appeal stage, *Pagett* was also discussed. "The decision in *Pagett* seems to be heavily dependent on the acts being those of police officers fulfilling a duty",[220] he remarked. It is contended that in *Ongwen*, the government soldiers are precisely fulfilling their duties of protecting the civilians. The purpose of the IDP Camps under the guardianship of soldiers is exactly for the protection of civilians. Hence, their action of firing back the LRA must not be

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[214] *Id.*, at 39.
[215] *Id.*, at 37.
[216] *Id.*, at 32, 37.
[217] *Id.*, at 37.
[218] *Id.*, at 61.
[219] Tom Rees, David Ormerod, *Joint Enterprise: 'R. v. Gnango'*, 2 CRIMINAL LAW REVIEW 151 (2011).
[220] *Id.*, at 157.

taken to be a willing act which cuts the chain of causation between the LRA's attack and the death of civilians.

3. Potential Objection of No Intent to Harm a Specific Person

In a case of genuine crossfire happening between two or more groups of armed groups or army, the Defence Devil's Advocate may potentially raise the argument that the accused did not intend to kill *specific* civilians. The accused might not even know how many and which civilians will be killed, if any. But this is not a tenable argument at all. First, Article 30 of the Rome Statute does not require that the requisite *mens rea* to be the intent to kill specific persons. It only requires that a person commits the crimes in the Statute with intent and knowledge, in that they mean to engage in the conduct, and "that person means to cause that consequence or is aware that it will occur in the ordinary course of events." A person will have *knowledge* where he is aware "that a circumstance exists or a consequence will occur in the ordinary course of events". Second, to use the example given in the English case *R v. Hancock and Shankland*, a terrorist who places a bomb causing injury,[221] or worse, death, to someone in the vicinity or someone who attempts to defuse it, it is untenable to say that they did not commit murder since they did not aim at a specific person, but in the knowledge that it will cause death to someone as a matter of virtual certainty.

B. The Principle of Non-Exclusivity of a Cause: The Cause of Death Does not have to be the Sole Cause

In determining the issue of causation, different jurisdictions have developed and adopted a wide range of distinct tests and law. A common principle on the law of causation can be deduced from both common law and civil law countries: the act of the accused which caused the result, be it death or otherwise, need not be the *exclusive* cause, or the sole cause, in the chain of events. This is what the author calls the "non-exclusivity of causes" principle. The principle is not only accepted by the English Courts, but as a common law principle, is adopted in Canada,[222] Australia[223] and New Zealand.[224] The current chapter further explicates this principle by studying the laws of other civil law countries, namely Germany, Spain, Japan and the Netherlands.

1. Germany

Academics appear to have different views on the prevailing approach adopted by the German Courts on determining issues of causation in criminal law. On the one hand, H.L.A. Hart, Tony Honore and Paul K. Ryu found that the Criminal Courts in Germany have been adopting the

[221] United Kingdom House of Lords, R v. Hancock and Shankland, [1986] AC 455, Appeals Chamber, Judgement (Feb. 27, 1986), at 465.
[222] Supreme Court of Canada, Smithers v R, [1978] 1 SCR 506, Judgement (May 17, 1977), at 519. See also Terry Skolnik, *Causation, Fault, and Fairness in the Criminal Law*, 65 (1) McGill Law Journal 1 (2019).
[223] Australia's Supreme Court of Victoria approved the English Court of Appeal's approach to the non-exclusivity of causes adopted in *R v Pagett* (1983) 76 CAR 279. See Victoria Supreme Court, R v McLachlan, [1999] VSC 516, Judgement (Aug. 25, 1999), para. 5.
[224] "The law relating to criminal causation is well-settled. It is a fundamental requirement for liability that a defendant's conduct must contribute in some material way to the consequence alleged. That conduct need not be the sole cause of the consequence – but the contribution must be significant." Victoria State Court of Appeal, Hudson v R, (2013) 26 CRNZ 657, Judgment (Dec. 9, 2013), para. 27.

"theory of conditions" to be the test applied by German Criminal Courts.[225] "The theory of conditions, described in the last chapter, has been accepted by the criminal courts of Germany and several other countries for the last hundred years."[226] On the other hand, academics such as Markus Dubber, Tatjana Hörnle and Michael Bohlander stated that German legal commentators and the Courts either subscribe to the theory of adequate causation ("*Adaquanztheorie*") or the approach of objective ascription ("*objektive Zurechnung*").[227]

The contemporary academics' view on German jurisprudence on criminal causation are more inclined towards objective ascription.[228] It should be noted that, despite its importance and prominence in the academia of Hart and Honore's work on the law of causation, it was published in the 1950s. Bohlander observes,

> [t]he courts do formally still adhere to the *Äquivalenztheorie*, but have admitted a number of normative correctives within that framework which in substance means that they are moving towards a form of *Adäquanztheorie*, which is the prevailing approach in civil law, or a version of objective ascription.[229]

Further, in the German majority view on the doctrine of causation, is that all relevant causes are equal in causal value (*Äquivalenztheorie*).[230] This means that a fact amongst several need not be the sole or even main cause of a result: it is sufficient that it is one of the number of causes.[231]

a. The Theory of Condition

Tarnowski has provided an effective definition of the theory of condition:

> The theory of condition takes as its starting point the proposition that all *conditions* of a consequence, which cannot be eliminated in thought without eliminating the consequence also, are equivalent and therefore each single one of these necessary conditions can be regarded as a *cause* of the consequence.[232]

The theory was classically formulated by von Liszt, and adopted by both the Reichsgericht and Bundesgerichtshof: "A cause of a criminally relevant effect is every condition which cannot be assumed absent without failure of the effect."[233] Professor Ryu suggested that the theory is similar, if not equivalent, to the *sine qua non* or 'but for' test of the American common law.[234]

In one case, the accused left a wine bottle containing a solution of arsenic on the window-sill and left the house, although she should have foreseen that her husband who was addicted to drinking might taste it.[235] The husband died due to this, and the accused was convicted of negligent killing.[236] The Court held that "without her act of putting in position and leaving the bottle of poison, the husband of the accused would not have been killed, hence the occurrence

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[225] HART, HONORE, *supra* note 184, at 465. See further Paul K. Ryu, *Causation in Criminal Law*, 106 (6) UNIVERSITY OF PENNSYLVANIA LAW REVIEW 773 (1958).
[226] Ryu, *supra* note 227, at 465.
[227] MICHAEL BOHLANDER, PRINCIPLES OF GERMAN CRIMINAL LAW (2009), at 47.
[228] *See* also MARKUS D. DUBBER, TATJANA HORNLE, CRIMINAL LAW: A COMPARATIVE APPROACH (2014), at 291.
[229] BOHLANDER, *supra* note 228, at 47.
[230] *Id.*, at 47.
[231] BGHSt 39, 137, cited in BOHLANDER, *supra* note 229, at 47.
[232] HART, HONORE, supra note 184, at 444.
[233] *S v. H* (II Strafsenat), Sept. 28, 1951, 1 Entscheidungen des Bundesgerichtshofes in Strafaschen (BGHSt), cited in Ryu, *supra* note 227, at 787.
[234] Ryu, *supra* note 227, at 787.
[235] RGSt 1 (1880) at 373, 374, cited in HART, HONORE, *supra* note 184, at 444.
[236] *Id.*

of the whole consequence was conditioned by this conduct on her part and therefore her conduct was fully *causal*."[237]

An exploration of two other cases would provide the reader with a more clear picture of how the Courts could apply the test.[238] In *S. v. W.*, the police constable stopped and ordered the accused, who drove a truck at night without proper lights in violation of traffic regulations, to drive to the next gas station and told him that he would follow him with his police car.[239] Before placing the police car behind the truck, the constable removed the red light which was intended to warn approaching cars.[240] At this short interval between removal of the light and placing the police car, another truck drove into that of the accused and crashed.[241] The Bundesgerichtshof held that the act of the police did not break the chain of causation between the illegal driving and the death caused by the collision.[242] The Court further held that the accused should have foreseen that he might be stopped by a police car and that the danger would therefore be increased.[243] The Court said that the actual course of the accident, was by no means outside any probability.[244]

In *S. v. D.*, the Court held that the accused who fell on a motorway while drunk caused the death of his rescuer hit by a negligently driven car, although the rescuer had at the time of the incident completed his rescue and was standing on the motorway pondering what further help can be done for the accused.[245] According to the Court, causation was established in the case, as the Court found that the defendant should have foreseen both the act of the rescuer and the presence of negligent drivers on the motorway.[246] However, the Court denied his guilt as he could not have foreseen the peculiar combination of the two factors.[247]

If we apply the theory of condition to determine the liability of an armed group in the killing of civilians in a crossfire in a scenario such as that of *Prosecutor v. Dominic Ongwen*, their shooting of the soldiers is definitely a *sine qua non* of the death of civilians, without which the effect would not have been brought about. Furthermore, they should have foreseen or they could foresee the killing of civilians in the crossfire, given their previous experience fighting with the Ugandan army and the proximity of the location between the army and civilians.

The theory of condition has many logical imperfections, most prominent of which are the problems that arise under additional and alternative causation and intervening cause. In cases of additional causation, where A and B simultaneously shoot C in the fatal part of the body, one of them or even both could be held not guilty under the theory if *elimination* is taken as the test of whether an act is a condition.[248] We can eliminate A or B's shooting and the other's shooting can still cause the same fatal effect, in other words, the other person's additional shooting does not have any additional effect on the result. But this is certainty absurd. Also, if one takes the theory of conditions literally, there are no reason why voluntary interventions, or *novus actus*

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[237] *Id*.
[238] According to Professor Ryu, the Courts in these cases apply the theory of condition, even though they seek to limit responsibility within the context of guilt. *See* Ryu, *supra* note 227, at 794.
[239] *S. v. W.* (III. Strafsenat), Oct 1, 1953, 4 B.G.H.S 360.
[240] *Id*.
[241] *Id*.
[242] *Id*.
[243] *Id*.
[244] *Id*.
[245] *S. v. D.* (II Ferienstrafsenat), Aug. 29, 1952, 3 B.G.H.S. 62, cited in Ryu, *supra* note 227, at 795.
[246] *Id*.
[247] *Id*.
[248] HART, HONORE, *supra* note 184, at 455.

interveniens, can break the chain of causation,[249] since the original act is still a condition in the process.[250] Furthermore, the theory of condition is only adopted in some civil law countries,[251] which should not be taken *ipso facto* as a general principle of law. But from the theory, we can adduce the principle that the cause of a consequence does not have to be the sole cause in the process.

b. The Theory of Adequate Cause

Academics have analysed that the theory of adequate cause is a generalising theory, contrary to individualising theories such as the theory of condition.[252] Generalising theories differ from individualising theories in that they select a particular condition as the cause of an event because it is of a kind which is connected with such events by a *generalisation* (in general) or of regular sequence.[253] In contrast, according to Hart and Honore, most individualising theories were satisfied that a condition is the cause of an event where it "contributed" more of the "energy" needed to "produce" the event if it contributed more of the energy than any other condition.[254] The individualising theories find causation on a case-by-case basis.

The theory of adequate cause suggests that a condition is a cause of an event where conditions of that type generally, in light of experience, produce effects of that nature.

> In order that a condition may qualify as a "cause" it is not sufficient that it produced that result in the concrete case, but it is further required that in all cases abstractly possible such result would probably follow in accordance with a judgment, passed on the basis of general laws of nature.[255]

To determine if a condition constitutes a cause, two types of knowledge are required: knowledge of the particular facts and knowledge of the pertinent general laws of nature.[256]

A German civil court decision can help us comprehend how the theory is applied in practice. The owner of two lighters sued a contractor for breach of contract, wherein the lighters were to be towed from Cuxhaven to Nordenham on the 28th October 1909, on which day the weather was fine.[257] The contractor began to tow on the 28th, but returned to port despite the owner's objection.[258] They began to tow on the 29th but a storm broke out and they suffered great damage, even though on the day the weather forecast was favourable.[259] The Court ruled, on appeal, that the delay by the contractor was the adequate cause of the damage. The Court stated that the damage need not be foreseeable. It is sufficient that the "objective probability of a consequence of the sort that occurred was generally increased or favoured" by the breach.[260] On the facts of the case, the delay had increased the risk of loss as at the end of October, it was more likely that the weather will hold for a journey of six hours begun in good weather than it

[249] *Id.*, at 459.
[250] *Id.*
[251] *Id.*
[252] *Id.*, at 465.
[253] *Id.*
[254] *Id.*
[255] Ryu, *supra* note 227, at 791.
[256] *Id.*, at 791, 792.
[257] RGZ 81 (1913), 359, cited in HART, HONORE, *supra* note 184, at 478.
[258] *Id.*
[259] *Id.*
[260] *Id.*

will hold on the following day, even if the weather forecast was 'favourable'.[261] It was found that storm was not unusual for the time of year.[262]

The test suffers from many potential logical flaws, explored in depth by Hart and Honore's *Causation in the Law*.[263] Despite this, under the theory of adequate cause, logically the cause does not have to be the sole cause of an effect.

c. The Theory of Objective Imputation (objektive Zurechnung)

The theory of *objektive Zurechnung*, translated as objective or normative imputation,[264] prescribes that causation has to be interpreted or determined in light of the underlying normative standards and the purpose of the law in question.[265] "Causation is one aspect of the fundamental question of whether the result of a crime was realised by a legally disapproved conduct."[266] The German criminal law professor Murmann takes the example of the offence of murder to explain this. In a murder case, the victim's clothing would not be a relevant factor considering the fact that human life is the protected legal interest of the crime.[267] However, the exact time of death can be considered relevant as it relates directly to that interest.[268] "Therefore, the relevant question is whether a human action is a necessary element for the particular time of death."[269] The theory leaves room for determining the exact underlying purpose of an offence, which depends on a case-by-case basis, but does not suffer from the same logical flaws or inconsistencies as some other theories of causation.

In the *Leather Spray Case*, the German Federal Court of Justice found that causality in German criminal law involves a 2-stage test: Stage one involves a hypothetical test that closely resembles the common law "but-for" test for factual causation: if one were to eliminate the act in question from the course of the event, would the result have still occurred? If the answer is in the affirmative, then the act was not the cause of the result; if the answer is no, causality is established.[270] For stage two, German criminal law next inquires whether the result should be attributed to the offender.[271]

2. Spain

According to *Criminal Law in Spain*,[272] co-authored by Professor Bachmaier and Dr Garcia, the former an academic teaching criminal law in Spain and the latter a former judge at the Criminal Chamber at the Spanish Supreme Court, the Spanish criminal courts currently apply a hybrid of theory of adequate causation, the theory of conditions, the theory of relevance of conditions and the theory of objective imputation. Courts take the theory of condition or *conditio sine qua non* as a starting point to investigate culpability.[273] The authors admit that the theory is useful

[261] *Id*.
[262] *Id.*, at 479.
[263] *Id.*, at 478- 497.
[264] BOHLANDER, *supra* note 229, at 47.
[265] Uwe Murmann, *Problems of Causation with Regard to (Potential) Actions of Multiple Protagonists*, 12 (2) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 283 (2014), at 284.
[266] *Id.*, at 286.
[267] *Id.*, at 287.
[268] *Id*.
[269] *Id*.
[270] DUBBER, *supra* note 230, at 300
[271] *Id.*
[272] LORENA BACHMAIER WINTER, ANTONIO DEL MORAL GARCIA, CRIMINAL LAW IN SPAIN (2012), at 78.
[273] *Id*.

to exclude causation, i.e. where someone has not caused something, but is insufficient to confirm it.[274] As to the theory of relevance of condition ("*Relevanztheorie*"), it prescribes that the pertinent penal laws, in defining various crimes, give a hint to what conditions should be deemed *relevant* as causes.[275] The authors, however, did not supply concrete cases where the tests and theories are applied.

The authors note that in the current Spanish jurisprudence, the theory of objective imputation has been applied without reservation and as a complementing formula of other theories mentioned above,[276] and the Courts held that the theory of objective imputation is the most appropriate to solve causation problems.[277] "The theory of objective imputation relies on the possibility of attributing causation of a result to the conduct of a subject when where exists a relationship of risk between the conduct and the result."[278] There are two criteria to attribute causation under the theory: First, the creation of a prohibited risk under the relevant law and second, the generation of a result within the purpose or scope of protection of the violated provision.[279] When either of these criteria fail, causation will not stand. What are prohibited and unprohibited risks must be judged on a case-by-case basis. In addition, where the result is outside the scope of protection of the provision, i.e. "when the provision was not aimed at avoiding that class of result", objective imputation is excluded.[280] The authors gave two examples where they argue that an application of the objective imputation test would not find causation between the events: 1) Negligent causation of a suicide, where a gun was left where a person with depression could access it; 2) Consequences so indirect that they cannot be considered to be in the mind of the legislator, for instance, death due to a shock suffered when hearing of the criminal death of a close person.[281]

It has already been submitted that these theories, i.e. the theory of condition, the theory of adequate causation and objective imputation do not logically require the perpetrator of a crime to be the *sole* cause of the crime. The same applies to the theory of relevance of condition: the condition in question has to be relevant to the prohibited offence of the provision in question, but it does not have to be the sole cause of the crime.

3. Japan

In *The Handbook of Comparative Criminal Law*, the author has pointed out that the Japanese law on causation is a hybrid test adopting several theories, largely influenced by German scholarship.[282] All of these theories are premised on finding that "but for" the act the harm would not have occurred, i.e. the act is a *conditio sine qua non* of the harm.[283] Nevertheless, the Courts find that the application of the test must be pursued with a second determination or value judgment about the criminality of the act in terms of both the constituent elements of the crime at issue and its societal context.[284] Two tests are applied by the Japanese Courts for this purpose.

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[274] *Id.*, at 124.
[275] Ryu, *supra* note 227, at 793.
[276] BACHMAIER WINTER, DEL MORAL GARCIA, *supra* note 273, at 78, para. 125.
[277] STS 19 Oct. 2000 and STS 7 June. 2002, cited in WINTER & GARCIA, *supra* note 274, at 125.
[278] *Id.*
[279] *Id.*, at 78, 79.
[280] *Id.*, at 79, para. 126.
[281] *Id.*
[282] THE HANDBOOK OF COMPARATIVE CRIMINAL LAW (Kevin J. Heller, Markus D. Dubber eds., 2011), at 393-413.
[283] *Id.*
[284] *Id.*

First, it is the "prerequisite" (*jōken*) principle, which focuses on the constituent elements of the crime in terms of both the illegality of the act and the culpability of the actor.[285] The author John O Hailey remarked that in cases where lack of foreseeability would have exonerated the accused, the courts more frequently impose criminal liability through what scholars view as the application of the prerequisite theory.[286] This appears to be making value judgments with respect to culpability in terms of their view of the "common sense of society" (*shakai tsūnen*).[287]

The second test is the theory of adequate causation based on German scholarship, as explained above. The author found that theoretical differences do not seem to matter in most cases as "[t]he requisite causation may be found to exist under both theories despite intervening actions by other persons or natural occurrences".[288] Where the Japanese Courts found causation and liability by applying the aforementioned tests, in spite of intervening actions involving other persons, undoubtedly its jurisprudence dictates that the perpetrator of a crime does not have to be the *sole* cause of an offence or harm.

In a 1967 decision by the Supreme Court in Japan, the Court expressly referred to the adequacy theory and found that, contrary to the lower courts, no causation was established on the ground that the accused could not possibly have foreseen that his negligence would lead to the victim's death.[289]

4. The Netherlands

In the Netherlands, the decisive test for determining issues of causation in criminal law is the "reasonable attribution" test.[290] By applying the test, judges determine whether the result can be reasonably attributed to the offender's conduct.[291] According to Johannes Keiler, "[b]y adopting the theory of reasonable attribution the Dutch penal system has abandoned the view that causality is a metaphysical concept and has adopted the view that the establishment of a causal link in criminal law entails a normative judgment."[292] The test allows Courts to assume that the offender's conduct need not be the *sole* cause of the occurred result.[293] In a recent Dutch Supreme Court decision, it was held that where the defendant together with others assaulted the victim by punching and stomping on the victim's face in a pub, the question of causation between the accused's (and his partners') violent conduct and the injuries suffered by the victim has to be determined by "utilising the criterion of whether the injuries can *reasonably*, as a result of the violent conduct, be attributed to the defendant and his partners".[294]

We can deduce from these findings, it is submitted, that the accused's action need not be the sole cause in the chain of causation to find him guilty of crimes such as murder.

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[285] *Id*.
[286] *Id*.
[287] *Id*.
[288] *Id*.
[289] *Id*.
[290] KEILER, ROEF, *supra* note 39, at 110.
[291] *Id*.
[292] *Id*.
[293] *Id*.
[294] Dutch Supreme Court, NJ 2007, 49, Judgement (Nov. 28, 2006), paras. 3.4, 3.5., cited in KEILER, ROEF, *supra* note 39, at 111.

C. The Principle of Novus Actus Interveniens or Intervening Cause

Establishing the principle that a criminal conduct does not have to be the sole cause of the result it produces for an accused to be guilty of the offence, we move onto the next consideration of the Courts: they must consider if there are any intervening acts by third parties which break the chain of causation between the act or omission and the consequence. It is, as this Article suggests, a reasonable consideration to have for the international criminal courts in deciding as the final stage of the test in criminal causation.

The common law doctrine of *novus actus interveniens* has been widely adopted by the Courts not only in England and Wales, but also Australia, New Zealand, Canada in deciding criminal cases.[295] In Australian case *R v. Hallet*, for instance, the defendant struck the victim in the head on the beach and left the unconscious victim behind, who was subsequently drowned in the incoming tide.[296] The Court found that the victim's death was the result of an ordinary operation of natural forces and convicted the defendant of murder.[297] In other words, there is no intervening cause in the case. Furthermore, the doctrine *novus actus interveniens* also finds its counterpart in some civil law countries such as Germany, the Netherlands and Spain.

1. Germany

In Germany, Courts have held in different cases how free, deliberate and informed third-party interventions could break the chain of causation. "The rule is that as long as the conduct of D is still operating as a cause of the intervener's acts, even if these are made intentionally and on a free, deliberate and informed basis, there will be no *novus actus* breaking the chain."[298] Only if the act of the accused has no more influence on the result will there be a lack of causality.[299] This differs from the English approach to *novus actus interveniens*, which holds that free, deliberate and informed third-party intervention would break the chain of causation.

In the following cases, German Courts found that there is no intervening cause breaking the chain of causation: 1) death of a rescuer as a consequence of arson;[300] 2) refusal by the victim to have an operation after an accident;[301] 3) improper use of products by the victim;[302] 4) provocation of the victim leading to lethal outcome, even if D was then acting in a state of self-defence[303]. In contrast, in the case where the defendant tried to import drugs, which were then stolen and imported by another, the Federal Court of Justice (BGHSt) held that there was no causality between the two acts.[304]

In one judgment of the German Supreme Court, the idea of an intervening cause was extensively discussed. The case concerns a man who had a verbal dispute with his wife, in the course of which the man, weighing 128 kg, sat forcefully on the ribcage of his wife who was

[295] Eric Colvin, *Causation in Criminal Law*, 1 (2) BOND LAW REVIEW 253 (1989).
[296] Supreme Court of South Australia, R v. Hallet, [1969] SASR 141, Judgement cited in K. Arenson, *Thabo Meli revisited: the pernicious effects of results-driven decisions*, 77 THE JOURNAL OF CRIMINAL LAW 41 (2013). See also KEILER, ROEF, *supra* note 39, at 115.
[297] Supreme Court of South Australia, *supra* note 298, at 41-55.
[298] BOHLANDER, *supra* note 228, at 48.
[299] *Id*.
[300] Sch/Sch-Lenckner/Eisele, Vorbem. §§ 13 ff, Mn. 76, cited in KEILER, ROEF, *supra* note 39, at 48.
[301] BGHSt 39, 324, cited in KEILER, ROEF, *supra* note 39, at 48.
[302] OLG Celle NJW 2001, 2816, cited in KEILER, ROEF, *supra* note 39, at 48.
[303] "The Leather Spray Case", BGHSt 37, 112, cited in KEILER, ROEF, *supra* note 39, at 48.
[304] BGHSt 38, 32, cited in KEILER, ROEF, *supra* note 39, at 48.

lying on her back.[305] The wife suffered 18 rib fractures, almost suffocated as the defendant sat for almost two minutes on her.[306] She later died due to a wrong treatment by the doctor.[307] The Court of Lower Instance found the defendant guilty of infliction of bodily harm causing death.[308] On appeal, the Supreme Court held that the causal link between the assault and the death must be carefully considered. It needs to consider which treatment would have been required after a diligent diagnosis carried out *de lege artis*, and the fact that the victim did not consult the doctor over her fractures after the 2nd May.[309] In other words, wrongful treatment by the doctor and the victim's inaction regarding her deteriorating conditions could, in certain cases, act as an intervening cause breaking the chain of causation.

2. The Netherlands

The Dutch Supreme Court had also considered whether there was an intervening cause which broke the chain of causation in a homicide case. In the case, the defendant intentionally fired a shot at the victim, which hit him in the neck and caused paraplegia and pneumonia that led to his death.[310] The Defence pled that the victim's death was due to pneumonia, and it would have been possible for her to survive had she received treatment.[311] However, the Court of Appeal found that the victim had lost the feeling and control of her arms and legs.[312] Furthermore, she would have suffered from permanent incontinence and be reliant on artificial respiration in order to live.[313] The Court of Appeal found her remaining life expectancy to be ten years at best.[314] On appeal, the Supreme Court upheld the finding of the Court of Appeal, that the victim's death was a result of the defendant's conduct.[315] Even though the victim forewent treatment, it does not cut the chain of causation of attributing the death to the action of the defendant. In the words of the Court:

> [w]ith this finding the Court of Appeal has expressed the view that the defendant brought into existence the circumstances which prompted the victim to forego medical treatment and that this decision, in the causal chain of events, was not of such a quality that the death of the victim could any longer be reasonably attributed to the defendant's conduct.[316]

3. Spain

The Spanish criminal courts currently apply the theory of objective imputation in deciding issues of causation. The theory itself will be explained in Chapter VIII. In *Criminal Law in Spain*, the co-authors, an academic and a former Supreme Court judge have stated that "there will be no objective imputation if other non-foreseeable co-causes that are outside the risk attributable to the action *intervene*", for instance, where a victim injured with violence dies

[305] German Supreme Court, NStZ 2009, 92, Judgement (July 8, 2008), cited in KEILER, ROEF, *supra* note 39, at 121.
[306] *Id*.
[307] *Id*.
[308] *Id*.
[309] *Id*.
[310] Dutch Supreme Court, NJ 1997, 563, Judgement (June 25, 1996) cited in KEILER, ROEF, *supra* note 39, at 118.
[311] *Id*.
[312] *Id*.
[313] *Id*.
[314] *Id*.
[315] *Id*.
[316] *Id*. at 119.

when an ambulance which takes him to hospital is involved in an accident.[317] It is suggested that this is the same test as *novus actus interveniens*, even the Spanish courts do not directly cite the Latin legal doctrine.

4. Self-Defence Makes No Intervening Cause

It can be discerned that *novus actus interveniens* is a general principle of law practised by the principal legal systems of the world, from both civil and common law countries. The Ugandan army's shooting back to the LRA fighters could not be considered as a *novus actus interveniens.* It is not a free, deliberate or informed third party intervention. Their action of shooting back, like that in the English case *R v Pagett*, was involuntary. It was conducted for the reasonable purpose of self-defence and the defence of civilians. It was not "ultroneous, something unwarrantable, a new cause which disturbs the sequence of events, something which can be described as either unreasonable or extraneous or extrinsic", the test for *novus actus interveniens* adopted in the English case *The Oropesa*.

International criminal courts accept various defences. Article 31(1)(c) of the Rome Statute provides self-defence as a ground of excluding responsibility, stating that a person shall not bear criminal responsibility if, at the time of the person's conduct,

> [t]he person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected.

The use of force in self-defence under Rome Statute is subject to the objective requirements of necessity, reasonableness and proportionality. Where the Ugandan army if acted reasonably in its self-defence, alongside other principles of international criminal law, its shooting back should constitute no novus actus interveniens. It is a foreseeable and reasonable action on the part of members of the Ugandan army.

D. Islamic Criminal Law

Authors suggest that the ICC should pay heed to Islamic law, besides common law and civil law systems, in deducing general principles of domestic law of the world. The present chapter analyses certain general principles of Islamic Criminal Law, and found that the principle of non-exclusivity of causes and principle of novus actus interveniens are both present in Islamic Criminal Law.

Islamic law, also known as Sharia Law, is practised in some Middle East countries, some of which have Islam as their state religion. Islamic law is generally defined as "God's eternal and immutable will for humanity".[318] This ideal Islamic law finds is narrated in the Quran and Mohammed's example (*Sunna*) and developed by jurisprudence (*Fiqh*). However, numerous interpretations of sharia can be found in laws, scholarly literature, the media and in popular perceptions.[319] In this respect, there are many interpretations of Sharia Law. This chapter examines Islamic Criminal Law separately from other common law and civil law jurisprudence, due to its unique system. This gives rise to the need to study its different major doctrines which

[317] BACHMAIER WINTER, DEL MORAL GARCIA, *supra* note 274, at 126.
[318] JAN M. OTTO, SHARIA AND NATIONAL LAW IN MUSLIM COUNTRIES: TENSIONS AND OPPORTUNITIES FOR DUTCH AND EU FOREIGN POLICY (2008), at 7.
[319] See, for instance, *id.*, at 7-10, providing a background to the different interpretations of Sharia law.

may not appear immediately relevant, but the examination of which gives better context and understanding of it.

In terms of Islamic criminal law, its sources consist of the following: (i) The Holy Book: Quaran; (ii) Sunnah: Prophet's Rulings; (iii) Ijma: Consensus of opinion of Muslim scholars; (iv) Qiyas: Analogy; (v) Istihsan: Equity; (vi) Masalih al-Mursalah: Public interest.[320] Bearing a third place in the constitution of the source of Islamic criminal law, Muslim jurists play an important role in the interpretation and development thereof, whose opinion are *Fiqh*.[321] Notably, there is no doctrine of *stare decisis* in Islamic criminal law, contrary to the Common law.[322]

Since Quaran and the Prophet's Rulings bear the fundamental consistence of Islamic criminal law, it remains an important source of law in many Muslim countries. These countries can be roughly classified into ones which still practise classic Islamic criminal law, such as Saudi Arabia and Iran; whereas other countries adopt a hybrid system, allowing Islamic law to play a dominant role and influence certain areas of national law, while enacted national constitution and codified certain areas of civil and criminal law, modelled after European or Indian codes.[323] Countries such as Pakistan, Afghanistan, Egypt, Morocco, Malaysia, Nigeria, Sudan and Indonesia can all be classified into this category.[324] By way of a further example, Egypt, adopted Article 2 in its constitution in 1971 which states that "the Islamic Shariah principles are the important principles of legislation".[325] A new constitution was passed in 2011 and a recent Article 219 was added, which provides that available evidence and its primary and doctrinal rules and sources are included in Islamic Shariah principles by People of tradition and consensus schools.[326]

For Islamic countries with hybrid systems, it can be seen that their national laws comprise of a complex web of laws and rules, extracted from Islamic law and other sources and influences. For the purpose of this Article, it suffices to say that some Islamic countries, at the very least, still practise Islamic criminal law in its classic formulation. Interpreting the Islamic criminal law would allow us to derive general principles of some, if not all, domestic criminal systems.

This section summarises and analyses Islamic criminal law based on literature of it written or translated in English, in the forms of both textbooks and articles accessible to English readers. Research into Islamic law is noted in academic literature to be difficult, due to the fact that Islamic law and cases are not widely translated into English.[327] This is also the reason why the International Criminal Court and other international criminal tribunals may have difficulty embracing Islamic criminal law into its jurisprudence, amongst other reasons.[328]

Under Islamic criminal law, the majority of jurists divide 'murder' into three categories, namely intentional murder (*Qatl-al-amd*), quasi-intentional murder (*Qatl-Shibh-al-amd*) and

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[320] Mohammad Ibn Ibrahim Ibn Jubeir, *Criminal Law in Islam: Basic Sources and General Principles* in CRIMINAL LAW IN ISLAM AND THE MUSLIM WORLD (Tahir Mahmood *et al* eds., 1996) at 42.
[321] OTTO, *supra* note 320, at 9. See also *id.*, at 46.
[322] Hajed A. Alotaibi, *The challenges of execution of Islamic criminal law in developing Muslim Countries: An analysis based on Islamic principles and existing legal system*, 7 (1) COGENT SOCIAL SCIENCES 133 (2021).
[323] OTTO, *supra* note 320, at 8.
[324] *Id*.
[325] Alotaibi, *supra* note 324, at 6.
[326] *Id.*, at 6-7.
[327] Alotaibi, *supra* note 324, at 2.
[328] See, for example, Mohamed E. Badar, *Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court*, 24 (2) LEIDEN JOURNAL OF INTERNATIONAL LAW 411 (2011).

murder by mistake (*Qatl-al-Khata*).[329] Intentional murder is most relevant, which is akin to the requirement of both *actus reus* and *mens rea* under the Rome Statute.

1. Intentional Murder under Islamic Criminal Law

Intentional murder is defined as a murder where an adult who is a sane person wilfully and with the intention of causing death makes another person the direct object of his action which is in general fatal and that person dies as a result of that action.[330] Jurists, according to Professor Anwarullah, breaks down the three essential components of intentional murder as follows: (i) The victim must be a living human being; (ii) the victim died as a result of the action of the accused and; (iii) the accused has wilful intention of causing death of the victim.[331] There is also a fourth element as the present author observes which is unique to Islamic criminal law, which is that the weapon must be one of a kind which is likely to cause death, such as a heavy stone, club or hammer, strangulation or administering poison.[332]

What about quasi-intentional murder and murder by mistake? Quasi-intentional murder, by definition under Islamic criminal law, is committed where someone intentionally makes another person the direct object of some actions, not usually fatal but intended for bodily harm, and he dies as a consequence of that action.[333] However, different from intentional murder, the weapons employed in the case of quasi-intentional murder usually would not cause death.[334]

Murder by mistake takes place where an accused, without intention to cause death or cause harm to a person, causes the death of a person either by mistake of intention or by mistake of fact.[335] Example would be where a person mistakes another person for a wild beast and kills him accidently, or where someone hits the victim unluckily while shooting at a target so that the victim dies.[336]

Similar to most, if not all, criminal law of murder, under Islamic criminal law, the accused must bear both *mens rea* and *actus reus* for committing murder in order to be found guilty. It is noteworthy that there are no general legal principles of causation developed by jurists or otherwise in Islamic criminal law, as compared to criminal laws of countries such as English law and German law as discussed. That said, we can extrapolate general principles under Islamic criminal law on our own endeavour, which are pertinent to the issue of crossfire causing death.

a. A Person with Murderous Intent Causing Death to Another is Guilty of Murder

Jurist Imam Malik finds that "if a person causes the death of another person with the intention of causing death, it will be considered intentional murder whether he has used a deadly weapon, heavy stone, wood or any other thing".[337] This is similar to the doctrine of transferred malice under English common law, analysed in section VI (A1) of this Article.

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[329] CHOWDHURY ANWARULLAH, THE CRIMINAL LAW OF ISLAM (2006), at 55.
[330] *Id.*
[331] *Id.*
[332] *Id.*, at 57.
[333] *Id.*, at 81.
[334] *Id.*
[335] *Id.*, at 82
[336] *Id.*
[337] MALIK BIN ANAS, AL-MUDAWWANA, Vol. 3, at 108, cited in ANWARULLAH, *supra* note 331, at 58.

b. Death Must Result from the Act of the Accused

Another legal principle is that to establish intentional murder, the murder must be the result of a fatal act of the offender.[338] If the act concerned of the accused is not of the nature which in the ordinary course is likely to cause death, he will not be found guilty of murder.[339] Instances could be further examined to provide a better context for discussion. In one case, it is claimed that a Jewish woman offered a poisonous piece of mutton to the Prophet and he ate some of it but threw the rest after a while.[340] The Prophet had a companion named Bashir who also ate from it at the time, and later died as a result.[341] On the death of Bashir, the Prophet ordered that the woman be put to death.[342] Other examples are that setting on fire or throwing someone into deep water amount to intentional murder, where under ordinary circumstances it is not possible for the victim to survive.[343]

There are some room for debate on what "ordinary course of event" is. But with the above instances in mind, it is likely that someone who has murderous intent and causes crossfire whereby another person died consequently, that he is guilty of intentional murder under Islamic criminal law. The test, summarising from the doctrines and examples, is one of *foreseeability*: if it is foreseeable that someone will die as a consequence of the accused's action, then death could be said to follow from his act in the ordinary course of events.

c. Death Does not have to be Caused by One Single Cause

"If two or more persons jointly cause the death of any other person by taking practical part in it, all of them shall be liable to intentional murder. This is based on the decision of Hadrat Umar."[344]

In one case, in the period of Hadrat Umar, a husband of a woman went missing, and he had one son from his previous wide.[345] The woman developed illicit relationship with another man. She told her new friend to kill the young son of her missing husband. One day, they along with a servant and another person jointly killed that young son. Eventually news spread out and the governor of Yemen arrested all four of them, who confessed to the offence of intentional murder. Hadrat Umar ordered Caliph Umar to execute all of them, stated that "If all the inhabitants of San'a had joined in it, I would have executed all of them."[346]

Under this legal formulation, an accused does not have to be a sole offender, and his act does not have to be the sole cause for him to be found guilty of intentional murder.

Jurists, further, opine that "if two or more persons cause the death of another person jointly and the act of each of them is individually sufficient to cause death, all of them shall be liable to intentional murder".

In cases where the individual act which contributed to the death of the victim is not the sufficient cause or it is uncertain whether it is sufficient fatal, but the cumulative effect brings about the death, jurists have different opinion on the subject matter. For death with multiple causes which is uncertain of whose act is sufficient to cause death, in the opinion of jurist Imam

[338] *Id*., at 57.
[339] *Id*.
[340] *Id*.
[341] *Id*.
[342] *Id*.
[343] SYED SABIQ, FIQH AL-SUNNAH, Vol. 2, at 437, cited in ANWARULLAH, *supra* note 331, at 57.
[344] ANWARULLAH, supra note 331, at 59.
[345] *Id.*
[346] *Id.*

Malik, all of the joint offenders are liable to intentional murder.[347] In the view of other jurists such as Imam Abu Hanifah, all of them are not liable to intentional murder but are liable for the hurts caused.[348]

The accused' guilt of intentional murder also hinges upon whether there is a common plan between the joint offenders. Where there is a common plan between the offenders to commit murder, even if none of the act *per se* is sufficient individually to cause death, all of those who are directly involved in the commission of the act shall be liable to intentional murder.[349] Where two or more offenders cause hurt to a victim one after another without a common plan, they shall all be liable to quasi-intentional murder.[350]

d. There Must Not be an Intervening Cause

According to Professor Anwarullah, "[t]he victim must have died of the act of the offender without any gap sufficient for recovery or for a fatal attack by another person." This resembles the doctrine of *Novus Actus Interveniens* as discussed.

Let us consider the following scenario with reference to Islamic criminal law: What would happen in a case where A shot at B, and B shot back as a measure of self defence, in the process of which B's bullet killing an innocent passerby C ("Scenario 1")? Or where A instigated a public gun fight and B followed, both knowing full well that there will be people walking pass and would be shot dead; Eventually the bullet of B killed the passerby C, akin to the scenario of *R v. Gnango* ("Scenario 2")? Suppose that A has the *mens rea* and *actus reus* for murder, how would Islamic criminal law deal with A's responsibilities in these hard cases?

There is no common plan. The actions in the abovementioned scenarios are not contributions to causing the death, in the sense that there are individual acts which accumulated to cause the victim's death, such as beating him one after the other. In Scenario 1, B's act was fatal, but not to his fault acting in self-defence. Further, A's action is not sufficient by itself to cause the death. In Scenario 2, B's bullet caused the death of C, and A's action is not sufficient to cause death *ipso facto*.

It is submitted that under Islamic criminal law, A is guilty of intentional murder. His acts fulfil the three requisite components of intentional murder, namely that the victim must be a living human being, the victim died as a result of the action of the accused, and thirdly the accused has wilful intention of causing death of the victim. The death of C did not happen in insolation, which is caused by B's bullet under the instigation and participation of A in Scenario 1 and 2 respectively. As discussed, the cause of the death do not have to be the sole cause in Islamic criminal law. Further, A made C the direct object of his shooting by shooting at close proximity to him or in his vicinity. Even though his shooting, in both scenarios, did not hit C, but C's death did ensue from his actions. B's shots did not take place in isolation, but in the process of instigation and encouragement by A. A's act in the ordinary course of events would also cause death, as it is clear in the circumstances that B was shooting back due to A's shooting, and people usually walk by the area.

An alternative to the above interpretation would lead to a huge gap in Islamic law. A if not held guilty of intentional murder, would be also free of quasi-intentional murder. As explained, quasi-intentional murder is committed where someone intentionally makes another person the direct object of some actions not usually fatal. But subjecting C to a gun fight is fatal

[347] *Id.*, at 60.
[348] *Id.*
[349] *Id.*
[350] *Id.*

in nature. Consequently, A will also be held free of quasi-intentional murder. Someone is guilty of murder by where an accused has no intention to cause death or cause harm to a person. However, A has the intent to cause death to B. This goes to show the grave gap and mischief, if A is not guilty for intentional murder under Islamic criminal law.

It has been established that there are two general principles of law from different principal legal systems of the world, applicable to solve the puzzle and issue of causation in the present case: 1) the non-exclusivity of criminal causes principle (i.e. a cause does not have to be the sole cause in an offence to find an accused guilty) and 2) the principle of *novus actus interveniens*. Applying these principles to *Prosecutor v. Dominic Ongwen*, it is submitted, first, that the Ugandan soldiers' shooting back does not constitute an intervening cause in the case, as it is not a voluntary, free or deliberate course of action. It also serves as a legitimate self-defence and the purpose of defending civilians. Second, even though the shooting of the civilians was done through a second actor, the Ugandan soldiers, the first actor, i.e. the LRA fighters, are still liable for the causation under the second principle: the non-exclusivity of causes.

However, it can be discerned that different civil law and common law countries apply different tests and theories on the law of causation, from individualising theories to generalising theories. They can hardly be used to adduce further general principles. By extracting these general principles which constitute the common denominators of various civil law, common law and Islamic law jurisprudence, the ICC can develop and clarify the ICL on the law of causation.

VII. Conclusion

The English Court stated in *R. v. Maybin*

> Any assessment of legal causation should maintain focus on whether the accused should be held legally responsible for the consequences of his actions, or whether holding the accused responsible for the death would amount to punishing a moral innocent." [351]

In the English Common law, a person is guilty of an offence if all the following conditions are met: (a) there is a guilty conduct by the accused (*actus reus*); (b) there is guilty state of mind of the accused (*mens rea*); and (c) there is an absence of any valid defence. The accused's conduct, further, must have caused the consequence under the definition of the crime.[352] This is, in essence, the law of causation. As a first test for the law of causation, the Court must consider if the accused's conduct is a "but for" cause of the proscribed consequence.[353] It will ask whether "but for" the accused's act the result would have occurred.[354] Next, where the accused's conduct is potentially a relevant legal cause of the proscribed consequence, the Court can consult certain principles: which includes that the accused's conduct does not have to be the sole cause.[355] Where the accused's conduct is potentially a relevant legal cause, consideration should be had on whether there is any intervening act between the accused's conduct and the prohibited result which breaks the chain of causation.[356]

[351] Supreme Court of Canada, R. v. Maybin, [2012] S.C.C. 24, Judgement (May 18, 2012).
[352] ORMEROD, *supra* note 37, at 38.
[353] *Id.*, at 39.
[354] *Id*.
[355] *Id*.
[356] *Id*.

The jurisprudence in the law of causation in English law has developed considerably over the years. The English Courts have ruled on many difficult cases which involves issues in causation, The international criminal courts and tribunals, in contrast, have not developed the law of causation much.[357] But it is about time. In decisions such as *Prosecutor v. Dominic Ongwen*, the International Criminal Court has cleverly avoided confronting the issue and law of causation, given that there are no witnesses seeing crossfire happening. The evidence also points towards the fact that Dominic Ongwen and members of the LRA did kill and had made plans to kill civilians at the IDP camps in Uganda. It leaves, however, the issue of whether crossfire between armed groups or army whereby civilians are killed in the process would deny an otherwise murderous act its chain of causation.

This Article contends that it would not cut the chain of causation. Where the material elements and mental elements of murder are satisfied under the Rome Statute, an armed group or army inducing or leading to a crossfire with another armed group foreseeing that it will cause death to civilians will constitute murder. This especially holds true in the case of *Prosecutor v. Dominic Ongwen*, where Ongwen made thorough plans to wilfully kill civilians at the IDP civilian camps.

The Rome Statute, Elements of Crimes and its Rules of Procedure and Evidence do not provide an answer to the issue of crossfire or causation. Jurisprudence of the international criminal courts and tribunals does not address the issue of crossfire either. However, international criminal tribunals such as the ICTY held that for causation of murder to stand, the conduct of the perpetrator must be a *substantial* cause of the death of the victim. Further, applying the purposive approach of interpretation under the VCLT, it is argued that the object and purpose of the crime of murder (both as a war crime and crime against humanity) under the Rome Statute are for the prevention of indiscriminate attack against civilians in wars and an internal armed conflict of a country. Not treating this as a conclusive finding on the issue of crossfire or causation, the article further examines customary international law and finally, general principles of law derived from domestic legal systems of the world. Generalising principles of laws from both common law countries and civil law countries, as well as Islamic Criminal Law, it deduced two essential general principles applicable in the case of *Dominic Ongwen*: that the cause of the crime does not have to be the sole cause; assessing whether there are any intervening act breaking the chain of causation, it deduced the *novus actus interveniens* principle. The shooting back of the Ugandan army is not an intervening act, despite being part of the "cause" in the death of civilians, if those are acts of reasonable self-defence. No evidence in *Dominic Ongwen* shows otherwise.

The arguments and general principles advocated in this Article should apply in other situations where international criminal law applies, such as air strikes, artillery barrages and shelling,[358] in a situation of murder or intentional killing of civilians where the material and mental elements of crimes are both present. The author also aims to inspire further discussions and debates on the subject of law of causation under International Criminal Law.

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[357] *See* KLAMBERG, *supra* note 155, at 288, 576. There is a vast amount of academic literature in international criminal law that uses the word "causation" to mean "command responsibility". In Klamberg's Commentary, only the *Lubanga case* was cited on informing the readers about "causation", but the text and the case in fact discuss the question of causation between the harm done and victim reparation, and not the law of causation between the conduct and whether it leads to the consequence prescribed under the crime.

[358] These are common military tactics leading to immense civilian deaths. *See* Amnesty International, *Civilians Caught in the Crossfire as Militias Battle for Tripoli* (Oct. 22, 2019), www.amnesty.org/en/latest/press-release/2019/10/libya-civilians-caught-in-the-crossfire-as-militias-battle-for-tripoli.

Journal of International Criminal Law [Vol. 6 – Issue 1]

Mexico's Failure to Prevent and Avoid Repetition of Femicide: Breaking the Patterns of Non-Compliance

by Willie Mack[*]

ABSTRACT**:** Although the Mexican government often espouses the highest aims and principles when it comes to gender-specific issues that affect its female population, it also tolerates the most serious form of femicide *rather than* providing women and girls with effective protection. Its failure to prevent and avoid repetition of femicide is inexcusable, though. Mexico should fulfill its international obligations, which have been delineated by declarations and conventions on human rights (international and regional), case law, constitutional provisions, ethical principles. The author argues that the Mexican government both should and can fulfill its obligations, including the ones that result from femicide rulings of the Inter-American Court of Human Rights. There is no basis, empirically or otherwise, for the reasons Mexico has presented to try to circumvent or even deny its responsibility. With a newly elected female President of the country, the author of this essay hopes to see a change of course in favor of compliance and justice for vulnerable stakeholders.

KEYWORDS: Compliance; Complicity; Femicide; Impunity; Mexico.

I. Introduction

Regarding its female population, it is hardly controversial to claim that Mexico is already in the negative spotlight. Among others, "the Inter-American Commission on Human Rights (IACHR) expressed its concern over the upsurge in violence against women, girls, and adolescents in Mexico and urged the State to step up its efforts to investigate, prosecute, punish, and provide reparation for gender-based violence".[1] It continued that [Mexico] must also take effective measures to prevent and avoid the repetition of patterns of violence".[2] However, no one should assume automatically that Mexico's State responsibility can be either activated or sustained. To do that, Mexico must address the legitimate concerns, underlying causes, and preventive measures for *all* of its people. To the contrary, there is ample evidence to support the belief that State officials condone and even facilitate the widespread risk situations for the female social group.

DOUBLE BLIND PEER REVIEWED ARTICLE

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[1] Organization of American States, *Mexico Must Take Urgent Measures to Eradicate Violence Against Women*, (May 10, 2022), https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media_center/PReleases/2022/097.asp.
[2] *Id.*

"There comes a point where we need to stop *just* pulling people out of the river. We need to go upstream and find out why they're falling in".[3] By analogy, the authorities need to cease merely discovering the mutilated bodies of young females in Mexico, but to 1) identify actual risks, 2) estimate their probability of turning into reality, and 3) evaluate their potential harm. In addition to assessing the risks, the authorities need to assess their risk-reduction strategies and adjust to objectively unavoidable failures. In essence, to prevent killings, the most effective measure begins with preventing or reducing potential risks.

Despite that, Mexico's continuous lack of protection against gender-based discrimination, violence, and femicide violates legal and moral principles. Whether due to disregard of decency or ignorance of impartiality, these failures suggest impunity[4] of legal and moral imperatives. Mexico ignores the principles of the Commission on Human Rights of the United Nations (UN) Economic and Social Council, which were submitted for the protection and promotion of human rights through action to combat impunity.[5]

Principle 1 indicates:

> to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations", Principle 2: Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through […] systematic violations, to the perpetration of those crimes […] the right to the truth provides a vital safeguard against the recurrence of violations.

Principle 4:

> Victims and their families have the imprescriptible right to know the truth about the circumstances in violations took place […] in the event of death or disappearance, the victims' fate.

Paradoxically, these legal and moral violations provide the foundations to explain why Mexico should overcome its obstacles and protect and promote human rights for all of its people. In accord with these principles, this article aims to provide accurate information about Mexican femicide and how it separately and collectively, violates legal and morals maxims. To address comprehensively Mexico's numerous diversionary tactics, effective countertactics must be recommended. For the survivors of heinous crimes and their families, post-disappearance or -discovery measures of investigation, prosecution, punishment, and reparation are key. However, for the benefit of the *intended* female victim, prevention and the avoidance of repetition of femicide is most important.

Reversing Mexico's impunity[6] can provide the foundations for integrity and explanations why Mexico should overcome its obstacles and protect and promote human rights for all of its people. Specifically, it has breached several principles of human rights theory (Section C), principles of Hans Kelsen's legal theory (Section D), relevant clauses of the Mexican Constitution and protective provisions of regional and international treaties (Section E), relevant rulings of the Inter-American Court of Human Rights (Section F), and moral law (Section G). Therefore, this paper will argue that Mexico should obey its Constitution, international treaties to which it is a party, the rulings of the

[3] The quotation is often and widely attributed to Archbishop Desmond Tutu.
[4] United Nations Special Rapporteur on Extrajudicial Executions, Report on Extrajudicial Executions, note 168 in IACtHR, González *et al*. (Cotton Field) v. Mexico, Judgment, para. 163 (Nov. 16, 2009).
[5] UN Economic and Social Council, *Promotion and Protection of Human Rights, Impunity*, (Feb. 8, 2005), Documents.un.org/doc/undoc/gen/g05/109/00/pdf/g0510900.pdf.
[6] González v. México, *supra* note 4, para. 111.

Inter-American Court of Human Rights, and moral principles that underpin the meta-ethical framework for human rights.

II. Mexican Femicide

Obviously, Mexico must identify femicide as a phenomenon before it can prevent it. To define–and demarcate it, Mexico must recognize three comprising elements, which include gender-based discrimination, violence, and mutilation. Art. 1 of the Convention Against the Discrimination Against Women (CEDAW) defines gender-based discrimination as:

> Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms.

Furthermore, Mexico's Constitution[7] bans discrimination. Art. 1 States that

> [a]ny form of discrimination, based on ethnic or national origin, gender, age, disabilities, social status, medical conditions, religion, opinions, sexual orientation, marital status, or any other form, which violates the human dignity or seeks to annul or diminish the rights and freedoms of the people, is prohibited.

As for CEDAW, General Recommendation No. 19 establishes a correlation between discrimination and gender-based violence:

> the definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately.[8]

Even though elements of discrimination and femicide overlap, only the most severe aspects of physical and mental harm are typically associated with femicide.[9]

Violence against women and girls (VAWG) has traditionally been viewed as a domestic and family matter and off limits to the State.[10] The UN also includes non-domestic forms of violence stemming from exploitation, forced prostitution and human trafficking. These crimes are often committed across borders by organized criminal organizations.

Currently, the UN describes:

> Violence against women to mean any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.[11]

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[7] Constitution of Mexico, https://www.constituteproject.org/constitution/Mexico_2015.

[8] The CEDAW Committee introduced VAWG in CEDAW through its General Recommendation No. 19 (1992), supplemented by General Recommendation No. 35 (2017), para. 53, cited in ANGELA HEFTI, CONCEPTUALIZING FEMICIDE AS A HUMAN RIGHTS VIOLATION, STATE RESPONSIBILITY UNDER INTERNATIONAL LAW (2022), at 114.

[9] Mexico objected to using the term femicide because it claimed that femicide did not exist in domestic law or in binding instruments of the Inter-American human rights system. Later femicide was added to the penal code in 2012. See González v. México, *supra* note 4, para. 139.

[10] HEFTI, *supra* note 8, at 62.

[11] UNGA, Res. 48/104, Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979, art. 2.

Using different arrangements, the UN Special Rapporteur classifies and divides gender-related killings into two categories: 1) active or direct and 2) passive or indirect. The active or direct category of femicides includes the following:

- Killings of women and girls as a result of domestic violence, inflicted by an intimate or domestic partner;
- Misogynist killings of women;
- Killings of women and girls in the name of "honor";
- Armed conflict-related killings of women and girls;
- Dowry-related killings of women and girls;
- Female infanticide and gender-biased sex selection; and
- Ethnic and indigenous identity-related killings.

Like VAWG, the first category focuses on traditional forms of violence at the domestic level. In contrast, the passive or indirect category of femicides includes death(s):

- Linked to organized crime;
- Linked to small-arms proliferation;
- Linked to human trafficking;
- Due to drug dealing;
- Linked to gang-related activities;
- From neglect, starvation, or (other) ill-treatment;
- Linked to deliberate acts or omissions by public servants or agents of the State.

Although there is no generally agreed upon definition of the concept of femicide,[12] Diana Russell has distilled the essence as "the killing of females by males because they are female". Femicide applies to all forms of *sexist killing* that is "motivated by a sense of entitlement to or superiority over women, by pleasure or sadistic desires toward them, or by an assumption of ownership of women".[13] It is the most extreme expression of gender violence committed against women. Since some women might be killed by other women, the definition has evolved to "the killing of a female because she is a female".

In 2010, Mexican lawmakers added femicide to the federal criminal code.[14]

A. Rates of Femicides vs. Homicides

Out of approximately 190 nations, Mexico ranks the 23rd in cases of femicide in the world. With respect to cases of femicide perpetrated with firearms, Mexico ranks 10th. The UN

[12] By analogy, note Bert Röling, the Dutch Member of the Tokyo Tribunal, once said that "it would be a remarkable and astonishing thing; to find a generally acceptable definition of aggression". Röling was by no means a lone voice. In view of this, one should perhaps not be too dismissive of the fact that the "thing" has finally happened in the words of the 1998 Rome Statute art. 8-*bis*. To avoid reaching misleading results, researchers debate whether it is necessary to differentiate between female homicide and feminicide. Some say that public policies must differentiate between feminicides and female homicides. While female homicide policies might require the development of public security-oriented programs, feminicides require interventions that tackle structural and ideological gender inequalities. Sonia M. Frias, Femicide and feminicide in Mexico: Patterns and trends in Indigenous and Non-Indigenous Regions, 18(1) FEMINIST CRIMINOLOGY 1 (2023).

[13] In 1976, at the first International Tribunal on Crimes against Women was held in Brussels (Belgium). The tribunal was created to bring attention to violent and discriminatory acts committed against women (HEFTI, *supra* note 8, at 21).

[14] Fabiola Sanchez, Fernanda Pesce, *Why Mexico Has Made Little Progress on Femicide,* PBS (Dec 27, 2022) https://www.pbs.org/newshour/world/femicides-in-mexico-little-progress-on-longstanding-issue

reported the femicide rate in Mexico from 2015 to 2021.[15] In recent years, the highest rates of femicide have been registered in the States of Chihuahua, Guerrero, Baja California, and State of Mexico. In the country-specific case in question, gun violence is not only associated with resolving disputes, maintaining discipline, and intimidating rivals, but has also been directed toward the government, political candidates, the media, and especially females. Consequently, "[s]ecuring weapons and reducing their circulation removes a frequent choice of weapons for domestic and gender-based violence and femicide".[16]

Characteristics of female victims, Femicide vs. Homicide				
	Indigenous		*Non-indigenous*	
	Femicide	Female homicide	Femicide	Female homicide
Marital status				
Married	28.9%	20.6%	27.9%	20.2%
Cohabiting	21.8%	16.0%	15.5%	14.1%
Divorced/Separated	2.8%	2.1%	4.0%	4.0%
Single	25.7%	38.2%	28.3%	39.0%
Widow	8.7%	7.6%	8.5%	4.4%
Under 12 years old	7.8%	5.6%	8.0%	4.4%
Unknown	4.3%	9.9%	4.8%	13.9%
Average age	38.7 years old	33.9 years old	37.7 years old	31.9 years old

Table 1 also indicates that the percentages of killings differ very little between indigenous and non-indigenous females in Mexico. Femicides outrank homicides for both groups.[17]

The number of homicides (includes male and female) and the homicide rate grew substantially beginning in 2007 during the administration of President Felipe Calderón, just as it stayed at elevated levels through ensuing Mexican administrations. Estimates of Mexico's disappeared or missing victims – numbering more than 73,000 since 2007 as reported by the Mexican government in mid-2020 – have generated domestic and international concern,[18] if not corrective actions.

According to the UN Special Rapporteur on Violence against Women, the highest rate of femicides is associated with the

> persistent penetration of a sexist culture in which institutionalized gender inequality serves as the basis for gender discrimination and helps legitimize the subordination of women and the differential treatment in terms of access to justice.[19]

[15] UN reported the number of femicides by years: 412 (2015); 607 (2016); 742 (2017); 896 (2018); 947 (2019); 949 (2020); 966 (2021). See *Femicide rate in Mexico 2021/Statistics*, STATISTA (Jan. 2022), https://www.statista.com/statistics/979065/mexico-number-femicides/.

[16] UN Office for Disarmament Affairs, *Gender and Small Arms Control*, https://disarmament.unoda.org/gender-and-small-arms-control/.

[17] FRÍAS, *supra* note 12, at 13.

[18] Mary Beth Sheridan, *Mexico's Plague of Disappearances Continues to Worsen*, WASHINGTON POST (July 14, 2020); "*Mexican Gov't Unveils Plan to Search for Missing People*", AGENCIA EFE (English Edition) (Feb. 4, 2019).

[19] CAMILO BERNAL SARMIENTO *ET AL.*, LATIN AMERICAN MODEL PROTOCOL FOR THE INVESTIGATION OF GENDER-RELATED KILLINGS OF WOMEN (2014), at 14.

In the Inter-American context, art. 8(h) of the Belém do Pará Convention directs States to gather statistics and perform research "relating to the causes,[20] consequences, and frequency of violence against women".[21] Shadow reports of NGOs provide an alternative account of Mexico's human rights compliance, which makes everyone aware of the widespread women's rights violations. These reports include a number of factors to be considered.

1. Types of Victims[22]

Subjectively, the Mexican police and prosecutors often accused female victims of alleged low moral standards and provocative modes of dress.[23] Objectively, reports indicate that the ages of victims were between 15 and 25, that they worked in low qualified and income jobs. Many were young, underprivileged, migrant or indigenous women, who usually were employed in the *maquila* (sewing) industry. Occasionally, affluent students and government employees also fell victim.[24]

Many sources maintain that Mexico experienced roughly 150,000 murders related to organized crime out of more than 288,000 intentional homicides.[25] These 150,000 likely organized-crime-related killings do not include the 73,000 considered to be missing or disappeared over the last 14 years as reported by the (then) current government under President López Obrador.[26] As regards the link to organized crime, it is noteworthy that V.M. Varun States "[t]ransnational crime violates core human rights with a *jus*

[20] The following list by Toledo Vázquez's (2009) reviews the diverse reasons feminicide. provides thirteen types of feminicides: a) intimate feminicide; b) nonintimate feminicide, which is the death of a woman by either an unknown person or someone known by the victim that does not a have an intimate relationship with her (*e.g.*, a neighbor); c) child feminicide, the death of a girl under 14 years of age committed by a male in the context of a relationship of power, responsibility, or trust; d) family feminicide, which the death of a woman in the context of an adoption, consanguinity, or affinity; e) feminicide by connection, which is when the death of a woman occurs in the same place where a male kills or attempts to kill another female friend, mother, daughter, etc.; f) sexual systemic feminicide, associated with the death of women previously kidnapped, tortured, and/or raped—it is disorganized if the woman is killed in a certain period of time and organized if the perpetrators act in a network of sexual feminicides; g) feminicide associated with sexual exploitation and prostitution; (h) Feminicide associated with female trafficking and sexual exploitation; i) transphobic feminicide, associated with deaths linked to the victim's transgender or transsexual identity; j) lesbophobic feminicide, which is the death of a woman due to her sexual orientation, rejection, or hatred; k) racist feminicide, associated with the death of a women due to her phenotype or hatred of her racial/ethnic origin; and l) feminicide linked to genital mutilation, which is the death of a girl or woman due to genital mutilation (see FRÍAS, *supra* note 11, at 6).

[21] Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Belém do Pará Convention), adopted Jun. 9, 1994, entered into force May 3, 1995, art. 8(h). Cited in HEFTI, *supra* note 8, at 287.

[22] FRÍAS, *supra* note 13.

[23] González v. México, *supra* note 4, paras. 153-154.

[24] Lagarde y de los Rios supra note 39, at xviii cited in HEFTI, *supra note* 8, at 16.

[25] ORGANIZED CRIME AND VIOLENCE IN MEXICO: 2021 SPECIAL REPORT ORGANIZED CRIME (LAURA Y. CALDERÓN *et al*. eds., 2021), https://justiceinmexico.org/wp-content/uploads/2021/10/OCVM-21.pdf.

[26] "In Mexico, the disappearances are blamed on a wider variety of culprits: organized crime gangs, police, the military or some combination of the three", quoted in Mary Beth Sheridan, *Mexico's Plague of Disappearances Continues to Worsen*, WASHINGTON POST (July 14, 2020); ID., *Mexican Gov't Unveils Plan to Search for Missing People*, AGENCIA EFE (Feb. 4, 2019), both cited in JUNE S. BEITTEL. CONG. RESEARCH SERV., R41576, MEXICO ORGANIZED CRIME AND DRUG TRAFFICKING ORGANIZATIONS (2020), at 18.

cogens status, and hence the offence of *transnational crime* is a *jus cogens* crime".[27] On his interpretation, it is the coupling of the human rights-based approach and the application of State responsibility that can secure the eradication of crimes that reach the highest level of internationally applicable norms (peremptory norms of general international law, *i.e.* the *jus cogens*).

2. Contributing Factors

Mexican authorities indicated that the murders were due to a change in the family roles, as a result of women working, which led to family conflicts. For them, the roles changed, but the patriarchal attitudes and mentalities remained the same.[28]

3. Types of Victimizers

Not much is known with certainty, but it is assumed that the victimizers include intimate partners, family members, and strangers. Transnational organized criminals (TOC) utilize violence and corruption as parallel and intertwining means to achieve unlawful goals. Despite U.S. policies to combat TOC's violent methods of maximizing profits, drug cartels continue to utilize small arms, which kill Mexicans by the hundreds of thousands yearly:

Nine Major Drug Trafficking Organizations		
Drug Traffickers	Origin	Original Specialty
Sinaloa	Early 2000s	Drug smuggling, corrupt public officials
Los Zetas		Organized violence
Tijuana Arellano Felix Organization	1989	Drug smuggling
Juárez Vicente Carillo Fuentes Organization	1980s	Marijuana, cocaine smuggling, violence
Beltrán Leyva	2008	Cocaine smuggling, extortion, executions
Gulf	1920s	Heroine, methamphetamine, extortion
La Familia Michoacana	1980s	Synthetics, kidnapping, extortion
The Knights Templar	2011	Methamphetamine, cocaine, marijuana, vigilante
Cartel Jalisco Nuevo Generación	2011	Cocaine, methamphetamine, killers of los Zetas

See a recent research finding for Table 2 data on Transnational Organized Crime.[29]

[27] V.M. Varun, *Human Rights-Based Approach to Combat Transnational Crime*, 2 EUCRIM 154 (2020), at 154-156. Note that Varun supports an argument in favor of State responsibility with a reference to art. 1 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). Note that Varun refers to the jurisprudence of the International Court of Justice (ICJ) whereby a *jus cogens* crime can be prosecuted and punished by any State because "offenders are the common enemies of mankind and all nations have equal interest in their apprehension and prosecution". See *Id*., at 156.
[28] González v. México, *supra* note 4, para. 129.
[29] CONG. RESEARCH SERV., *supra* note 26.

4. Accessible Weapons

A study by the National Institute of Women about femicide in Mexico points out that one of the main concerns is the increase of the use of firearms to commit homicide against women in the country, which doubled between the years 2004 and 2010. Furthermore, the study underlines that killings of women with firearms have been perpetrated both in the home as in public spaces. The study concludes that women are at higher risk if their families and communities are armed.[30]

The data provided in Table 3 suggests that femicides are perpetrated by different means and are more likely to entail extreme cruelty and suffering for the victim.

Means to Commit Feminicide and Female Homicide				
	Indigenous		*Non-indigenous*	
Weapons	Femicide	Female homicide	Femicide	Female homicide
Firearm	26.9%	36.8%	31.2%	48.0%
Knife, machete	21.6%	16.7%	22.3%	11.7%
Physical force	5.0%	2.1%	4.8%	1.5%
Suffocated/ drown	14.5%	14.9%	20.2%	15.9%
Other	32.1%	29.5%	21.5%	23.0%

Table 3: Means to Commit Feminicide and Female Homicide in Indigenous and Non-Indigenous Municipalities (2001-2017).[31] The table also indicates that for both groups, the use of firearms outnumbers other means of killings. Furthermore, the female homicides by a firearm far outnumber other groups.

5. External Complicity

In this instance, external complicity refers to a foreign nation working with or contributing to a wrongful act, such as femicide.

> We now know that foreign countries-especially affluent and powerful ones-can and usually do exert real causal impact on domestic societies nearby, and at times even across the globe […] If our actions over here on this side of the world can violate the human rights of people on the other side, the integrative understanding tells us that we should bear duties correlative to such rights.[32]

The accessibility and availability of arms can facilitate or exacerbate violence against women, not only in situations of armed conflict but also in non-conflict situations, such as in countries that experience high rates of firearm-related deaths, including femicides, as well as high levels of impunity and insecurity. The Human Rights Council has adopted resolutions that recognize the link between the arms trade and gender-based violence.[33]

As a context to Mexico's femicide, Izumi Nakamitsu, High Representative for Disarmament Affairs, said that small arms – such as rifles, pistols, and light machine guns

[30] WILPF, *The Impact of Germany's Arms Transfers on Women Germany's Extraterritorial Obligations under CEDAW* (2017), at 9, https://wilpf.org/wp-content/uploads/2017/02/CEDAW-Shadow-Report-on-Germany_20170130.pdf.
[31] FRÍAS, *supra* note 12, at 14.
[32] BRIAN OREND, HUMAN RIGHTS: CONCEPT AND CONTEXT (2002), at 137.
[33] WILPF, *supra* note 30, at 2.

– contributed to some 200,000 deaths every year from 2010 to 2015. He added that small arms continue to facilitate a vast spectrum of actions constituting human rights violations, including the killing and maiming of children, rape, and other forms of sexual and gender-based violence, and that the gender dimension has not been sufficiently integrated into policies regulating small arms and light weapons.[34]

To secure consistency in practice, public leaders should remedy weaknesses in the control or regulation that could help to combat the proliferation of the misuse of small arms. Mexico is not doing what it has agreed to do. Mexico approved the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials.[35] In addition, the UN Protocol Against the Illicit Manufacture of and Trafficking in Firearms, Their Parts, and Components and Ammunition (2001)[36] is a potentially useful tool against violence. The U.S. has expressed concerns about the effectiveness, cost, and interference with the constitutional rights of U.S. citizens to bear arms – in both instances. Researchers should investigate these concerns, together with suppliers or importers of small arms, and related patterns of ratification of small arms treaties.

Well-meaning observers may recommend that dissident groups should disarm themselves or destroy their small arms. However, they overlook the fear that groups may have in disarming themselves in the presence of their enemies. In addition, many suspect that small arms policies conceal their true aim, which is to displace people from land to make it available for the extraction of resources for the benefit of foreign corporations. Given such fears and suspicions, they are not likely to comply with such recommendations.

In sum, casualties and causes of violence are reported differently by the Mexican government and Mexican media outlets that track the violence.[37] Yet, the alarm has grown about continuous reports of extreme violence and the discovery of mass graves around the country.[38] Such empirical evidence provides a chilling context for the seriousness of the nature and scope of femicide.

III. Human Rights Theory

In general, although diagnosing cases and contexts differently, experts seek to prevent the violent death of women in an effective manner. Using a variety of approaches, they analyze the origins of femicide in:

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[34] United Nations, *Security Council Meeting Coverage SC/14098 Spread of 1 Billion Small Arms, Light Weapons Remains Major Threat Worldwide, High Representative for Disarmament Affairs Tells Security Council* (Feb. 5, 2020).

[35] Organization of American States, *Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials*, Mexico signed on 19 May 1998 and ratified on 1 June 1998; the United States neither signed nor ratified it.

[36] Organization of American States, *Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials*, Mexico signed on 31 December 2001 and ratified on 10 April 2003; the United States neither signed nor ratified it.

[37] The Mexican news organizations *Reforma* and *Milenio* both keep a tally of "narco-executions". For instance, in 2014, *Reforma* reported 6,400 such killings, the lowest it has reported since 2008, whereas *Milenio* reported 7,993 organized-crime-related murders. Kimberly Heinle, Octavio Rodríguez Ferreira, and David A. Shirk, Drug Violence in Mexico: Data and Analysis Through 2015, University of San Diego, (April 2016).

[38] Andrea Navarro, *Drug Cartels Muscle into Town Packed with Americans*, BLOOMBERG (Dec. 4, 2019); Id., *Mexico: 50 Bodies Among Remains at Farm Outside Guadalajara*", AP (Dec. 15, 2019).

1. A feminist approach, which confronts patriarchal domination at the same time as it investigates the killing of women;
2. A sociological approach, which focuses on the examination of the features special to the killing of women that make it a phenomenon, *per se*;
3. A criminological approach, which distinguishes femicide as a unique sector in "homicide" studies;
4. A human rights approach, which extends femicide beyond the lethal and into extreme forms of violence against women; and
5. A decolonial approach, which examines instances of femicide in the context of colonial domination, including so-called "honour crimes".[39]

It is a regrettable axiom that "[a]n unknown right is not exercised".[40] Therefore, this section addresses the human rights of female individuals and corresponding responsibilities of governmental authorities to publish and protect those same rights.

Rights of individuals or groups refer to both positive and negative rights. Positive rights provide the right holder with a claim against Mexico. Examples include the right to life, liberty, personal integrity, etc. In contrast, by limiting the actions of other people or governments toward or against the right holder, a negative right restrains them. Such treaties refer to the right to non-discrimination, freedom from arbitrary arrest, violence, or torture. Recognition of positive and negative rights and claims by Mexico would be a meaningful step toward satisfying its State responsibility of ensuring that its people can enjoy their human rights.

State responsibility, according to the Office of the UN High Commissioner for Human Rights, includes:

- The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights.
- The obligation to protect requires States to protect individuals and groups against human rights abuses.
- The obligation to fulfill means that States must take positive action to facilitate the enjoyment of basic human rights.

Policy analysis based on this tripartite understanding of a duty bearer's responsibilities is commonly known as a "human rights-based approach" (HRBA).[41] While Mexico emphasizes the fact that the issues of femicide are complex, these same issues are nevertheless comprehensible. Even if Mexico were to rely only on its domestic law, compelling reasons in favor of compliance can be identified.

IV. Kelsen's Pure Theory of Law

Kelsen advocated in his *Reine Rechtslehre* that "[t]he legal order is not of legal norms of equal rank but a pyramid structure of different layers of legal norms". The Mexican legal system illustrates the structure of the Kelsen Pyramid[42] in art. 133 of its Constitution:

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[39] Consuelo Corradi *et al.*, *Theories of Femicide and Their Significance for Social Research,* 64(7) CURRENT SOCIOLOGY 975 (2016), at 979.

[40] Juliana G. Quintanilla, José Martínez Cruz, *Opinión| 16 años de la Ley General de Acceso de las Mujeres a una Vida Libre de Violencia*, SEMMÉXICO (Feb. 10, 2023).

[41] *Human Rights Advocacy and the History of International Human Rights Standards*, https://humanrightshistory.umich.edu/accountability/obligationr-of-governments/.

[42] The Pyramid of Kelsen is a graphic representation of the legal system by means of a pyramid segmented into various strata or levels. It represents a vertical relationship between the different legal norms, as

> The laws of the Congress of the Union that emanate from it and all the Treaties that are in accordance with it, entered into and that are entered into by the President of the Republic, with the approval of the Senate, shall be the Supreme Law of all the Union. The judges of each State shall abide by said Constitution, laws, and treaties, despite the provisions to the contrary that may exist in the constitutions or laws of the States (*estados*).

Typically, once Mexico expresses consent to a treaty, it is bound to that treaty according to international law.[43] Originally, art. 133 had established the supremacy of the Constitution. In 2011, human rights that derive from treaties started to share the same hierarchical position as the human rights that derive from the Constitution.[44] A modified art. I, now contrasted to art. 133, created an apparent ambiguity between their interpretations by the Mexican Supreme Court.[45] Art. I becomes a "coordination article",[46] while art. 133 remains a "subordination article". To many, the interpretation[47] appeared to maintain constitutional supremacy regardless of what art. I States about the human rights that derive from international treaties. Based on an alleged constitutional ambiguity, would Mexico's rulers, perhaps, conspire to avoid compliance thereby avoid fulfilling its State responsibility?

As sources of international law, all treaties are considered equivalent in the sense that they are all "binding".[48] But should Mexico's compliance vary by sources of international law? Without a theory of compliance, it is impossible to consider the circumstances under which violations take place or to develop strategies to improve the compliance pull of a treaty. The absence of an explanation for why States obey international law in some instances and not in others threatens to undermine the very foundations of international law.[49] The absence of a coherent theory may explain why most conventional international law scholarship does not ask why there is compliance but rather simply assumes as much.[50]

> The decision to honor or breach a promise made to another State imposes costs and benefits upon the promising country and its decision-makers. The model assumes that decision-makers behave in such a way as to maximize the payoffs that result from their actions.[51]

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understood by the Austrian jurist and philosopher Hans Kelsen (1881-1973), from the positivist doctrine. This normative pyramid arises from the idea that every legal norm obtains its value from a superior norm in the hierarchy, according to three different hierarchical levels in which Kelsen divided its pyramid; at the top of the pyramid, sits the National Constitution, or the basic legal text from which emanates all other laws and provisions.

[43] UN Vienna Convention on the Law of Treaties, signed on May 23, 1969 and entered into force on January 27, 1980, art. 26, establishes the principle of *pacta sunt servanda*, which is a fundamental principle of international law that requires States to honor their agreements and obligations. The Latin phrase translates to "agreements must be kept".

[44] Antonio Olguín-Torres, *The Challenge of Creating a Concept of Sustainable Development as Human Right in the Mexican Constitution According to International Law*, 28(2) SOUTHWESTERN JOURNAL OF INTERNATIONAL LAW 747 (2023), at 750.

[45] *Id.*

[46] *Id.*, at 756.

[47] H.L.A. HART, THE CONCEPT OF LAW (2nd ed., 1994), at 141: "Nay whoever hath an absolute authority to interpret any written or spoken laws it is he who is the lawgiver to all intents and purposes and not the person who first wrote or spake them".

[48] Vienna Convention on the Law of Treaties, art. 18.

[49] ANDREW T. GUZMAN, A COMPLIANCE BASED THEORY OF INTERNATIONAL LAW (2002). See ABRAM CHAYES, ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995), at 3.

[50] *Id.*

[51] *Id.*

If the payoffs serve the interest of the decision-makers without serving the common good, experts like M. Cherif Bassiouni conclude that *realpolitik* or power politics are driving forces behind the outcomes.

Concerning a nation's treatment of its own citizens, David Moore argues that respecting human rights impose immediate cost-restraints on governments, thereby narrowing the scope of their opportunities. Immoral governments tend to enjoy unrestrained action; ethical governments accept restrained action. Mexico acts as if the concept of international law (*ius inter gentes*) only governs relations between nations and not between governments and their citizens. It ignores provisions of the Constitution, which indicates that it is obliged to "promote, respect, protect, and guarantee human rights" and that it should prohibit any form of discrimination.

According to an assumed compliance theory, there are two theoretically equal possibilities: monism[52] with the supremacy of international law and monism with the supremacy of the constitution. Compliance is defined as "the degree to which States adjust their behavior to the provisions contained in the international agreements they have entered into".[53]

Louis Henkin States that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time". The Managerial Model contends that compliance with international law within treaty regimes, such as the one placing countries under the jurisdiction of the IACHR.

[T]he fundamental instrument for maintaining compliance with treaties at an acceptable level is an iterative process of discourse among the parties, the treaty organization, and the wider public.[54]

Other possible causes cited for treaty compliance include the need to maintain one's status within a highly interrelated and interdependent community of States, fairness of the international rules themselves,[55] threat of sanctions, self-interest, and prudence.[56]

In summary, compliance exists because States are concerned with both the reputational implications and the direct sanctions of violating the law. The model explains not only why nations comply, but also why and when they violate international law.[57] In contrast, Moore posits that none of the mentioned approaches offers a comprehensive description of compliance with international law in general or human rights in particular.[58] International law is largely determined by the actions of approximately 192 States.

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[52] In monism, a single legal system, international law is supreme over domestic law. Mexican authorities are bound by both international and domestic law, and private parties can rely on international law in domestic courts. Monism is opposed to dualism, which is the theory that international and domestic law are separate systems.

[53] Carmela Lutmar and Cristiane L. Carneiro, *Compliance in International Relations*, OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS, (25 June 2018). Başak Etkin, The Cynic's Guide to Compliance: A Constructivist Theory of the Contestation Threshold in Human Rights, https://www.erudit.org/en/journals/rqdi/2021-rqdi06201/1079428ar/.

[54] CHAYES & CHAYES, *supra* note 49.

[55] THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995).

[56] This view holds that the State's obligation to keep promises is a prudential decision, not a moral decision. The decision to keep a promise turns on its effect on the good of the State. JACK L GOLDSMITH, ERIC A POSNER, THE LIMITS OF INTERNATIONAL LAW (2005), at 191, https://www.afri-ct.org/wp-content/uploads/2020/09/09-International-Law-and-Moral-Obligation.pdf.

[57] *See* e.g., CHAYES & CHAYES, *supra* note 49.

[58] In his view, the Chayes's managerial model assumes "a tendency to comply rather than explaining compliance". *Id.*, at 80-81.

Primary Sources of International Law	
Treaties between States*	International conventions are treaties signed between two or more nations that act as an international agreement.
Customary practice of States*	Oldest and the original source of International Law
General principles of law recognized by civilized nations*	
Judicial decisions*	Decisions of International Courts and Tribunals
Writings of "the most highly qualified publicists"*	Views of renowned jurists
Decisions or determinations of the Organs of International Institutions	
Other secondary sources	

Table 4: *Listed in the Statute of the International Court of Justice [ICJ], art. 38 Decisionsor Determinations of the organs of International Institutions or International Organizations.

V. Mexico's Constitution and International Treaties

Mexico demonstrates a monist perspective of law. According to art. 1 of the country's Constitution, it holds:

> In the United Mexican States, all individuals shall be entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as to the guarantees for the protection of these rights. Such human rights shall not be restricted or suspended, except for the cases and under the conditions established by this Constitution itself.

Hence, human rights are not only guaranteed by the Constitution but are also by international instruments signed by the President.[59] Human rights (national and international) are on the same hierarchical level in the legal system. They complement each other. This is in accord with Kelsen's theory, that "analysis of international law has shown that most of its norms are incomplete norms which receive their completion from the norms of national law".

No universal treaty exists which exclusively deals with VAWG, let alone femicide.[60] However, treaties are very important in the Mexican legal system because they represent a form by which Mexico participates in the international community. It negotiates and signs treaties with other countries, and of course, is obligated by those international instruments which establish additional human rights as a way to expand those rights that already are in the Constitution.

When a State enters a treaty, it also binds a large number of people to policies to which they do not consent: for example, people who are not yet born, people who have not yet immigrated, and people who do not yet participate in the existing political system.

Under pertinent international and regional treaties, Mexico recognizes positive rights to life, liberty, and security, and negative rights, freedom from bias/discrimination, violence, and femicide. It is redundant to mention that although its responsibility to satisfy international obligations has been delineated by numerous declarations and conventions of human rights, these rights have not been fully enforceable. As a correction, it is argued

[59] Constitution of Mexico, *supra* note 7.
[60] HEFTI, *supra* note 8, at 109.

that Mexico 1) recognizes the universal nature of the application of the provisions; 2) ensures both positive and negative human rights; 3) adheres to the treaty provisions; and 4) complies with those obligations listed therein. Pertinent aspects of 1) to 4) are further detailed below.

A. Universal nature of provisions

As a primary duty-bearer, Mexico is obligated to protect all of its people against discrimination, violence, and femicide and to protect human rights to life, liberty, and security.

While female victims are being subjected unfairly to discrimination, violence, or femicide, they are treated, *as if* they were inferiors to the rest of humankind.[61] Mexico's recognition of the universal nature of the internationally applicable provisions and the potential claims cited therein is a first step in satisfying its responsibility to ensure that all Mexicans can enjoy their human rights.

A similar error or defect resulting from human rights instruments envision men as the (main) bearers of human rights.[62] They usually fail to specify rights that would ensure women against specific types of violence that are characteristic of human rights violations against women and girls – *e.g.*, dowry-deaths, slow deaths, domestic violence, forced marriage, sexual slavery, and rape. These acts of violence can also constitute acts of femicide.[63]

Potential claims cited within human rights treaties refer to both positive and negative rights.

Concerning the subjects or holders of such rights, treaties refer to "every human being", "all children", "everyone", "migrant workers and members of their families", "women and girls with disabilities", and/or "every woman". Addressing the universal nature of the provisions, in part, the American Convention on Human Rights (ACHR)[64] clarifies that "person" means every human being and that "[e]very person has the right to have *his* life respected".[65] Concerning the subjects or holders of negative rights, they are circumscribed in terms of "[n]o one" as in "[n]o one shall be arbitrarily deprived of his life".

B. Positive and negative rights

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[61] Dr. Martin Luther King's Letter from Birmingham "It gives the segregator a false sense of superiority and the segregated a false sense of inferiority". https://www.csuchico.edu/iege/_assets/documents/susi-letter-from-birmingham-jail.pdf.

[62] DANIELA NADJI, INTERNATIONAL CRIMINAL LAW AND SEXUAL VIOLENCE AGAINST WOMEN: THE INTERPRETATION OF GENDER IN THE CONTEMPORARY INTERNATIONAL CRIMINAL TRIAL (2018), at 35, cited in HEFTI, *supra* note 8, at 107.

[63] *Id*., at 108.

[64] Organization of American States, American Convention on Human Rights, signed on November 22, 1969 and entered into force on July 18, 1978.

[65] Author emphasis to highlight the exclusive aspect of treaty language (*cf*. his life): "This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life. 1. States Parties recognize that every child has the inherent right to *life*"; UN Convention on the Rights of the Child (1989), art. 4: "The right to *life* of migrant workers and members of their families shall be protected by law"; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), art. 6.

Recognition of positive and negative rights and claims by Mexico is a second step toward satisfying its responsibility to ensure that its people can enjoy their human rights. Mexico is expected to ratify treaties that enable its people to enjoy a life in which their rights are respected and protected. For example, The American Convention on Human Rights specified a negative right, which restrains others from engaging in biased behavior.[66] According to art. 24: "Right to Equal Protection, all persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law".

Linking violence to discrimination, The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[67] identified "hatred that constitutes incitement to discrimination". Also, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women[68] specified in art. 6 that "[t]he right of every woman to be free from violence includes, among others […] The right of women to be free from all forms of discrimination". Art. 2 of the Convention on the Rights of the Child expresses no tolerance for discrimination against children.[69]

It was not until 1992 that violence directly against women and girls was recognized by CEDAW as a violation of human rights.[70] In 1993, the UN Declaration on the Elimination of Violence Against Women became significant because it made violence against women an international issue and no longer subordinate to claims about relativism. It prohibits not only State violence against women, but also private violence, including

> battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence or violence related to exploitation.

These private acts had previously been regarded, in some quarters, as acceptable or beyond the realm of the law as it concerns enforcement. Their prohibition placed individual rights to physical integrity above claims of cultural rights.

C. Adherence to Treaty Provisions

States have duties that correspond to the positive and negative rights of people. Specifically, Mexico's fulfillment of preventive duties is a third step to satisfying its protective responsibility. By ensuring benefits, services, or treatments, States recognize and fulfill their duties to provide the right holder with a legitimate claim against them. In general, treaty provisions usually cite "any State", "States", or "State parties". Conversely, a State's negative duty restrains the actions of people or governments toward or against any right holder.

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[66] In 1979, the Convention on the Elimination of Discrimination Against Women marked the first international step toward recognizing women's right to equal protection before the law. Article 2 of CEDAW requires States to take a clear stand on discrimination against women and communicate their opposition to discrimination to the international community.

[67] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *supra* note 65.

[68] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, *supra* note 21.

[69] The Convention on the Rights of the Child, *supra* note 65.

[70] BETH SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS, (2009), at 207, cited in HEFTI, *supra* note 8, at 109.

Regarding violence against women, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women specifies preventive duties on behalf of the State.[71]

Originally seen as a restrictive private issue, CEDAW's achieved recognition of State responsibility for acts committed by non-State actors, such as rape, forced marriage, femicide, listed in the treaty text itself.[72] CEDAW illustrates a paradigm shift, which recognizes that preventive duties are as essential as States' traditional negative obligations.[73]

A State's duty to protect rights consists of three components: 1) to respect, 2) to prevent, and 3) to guarantee. Concerning the duty to respect human rights, the American Convention on Human Rights specifies in art. 1:

> Obligation to Respect Rights 1. The *States Parties* to this Convention *undertake to respect* the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition[74].

Regarding the duty to prevent violations of human rights, the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities indicates that:

> The *State parties* […] 1. *Cooperate* with one another in helping to prevent and eliminate discrimination against persons with disabilities; […] shall create effective communication […] to eliminate discrimination against persons with disabilities.[75]

Addressing the common failure to specify rights that would ensure women against specific types of violence, art. 6(1) of the Convention on the Rights of Persons with Disabilities[76] indicates that:

> *States Parties recognize* that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.

Also, concerning violence, the International Convention on the Elimination of All Forms of Racial Discrimination contains arts. 4 and 5(b) whereby:

> *State parties shall declare an offence punishable* by law […] all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin. […] The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution[77].

Regarding violent inducements and State obligations, the American Convention on Human Rights[78] cites:

> Any […] national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any

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[71] Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *supra* note 68.
[72] HEFTI, *supra* note 8, at 111.
[73] *Id.*, at 117.
[74] American Convention on Human Rights, *supra* note 63.
[75] Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, signed on June 8, 1999 and entered into force on September 14, 2001.
[76] *Id.*
[77] International Convention on the Elimination of All Forms of Racial Discrimination, signed on December 21, 1965 and entered into force on January 4, 1969.
[78] American Convention on Human Rights, *supra* note 63.

> grounds including those of race, color, religion, language, or national origin shall be *considered as offenses* punishable by law.

Art. 19(1) of the Convention of the Rights of the Child[79] indicates that:

> States Parties shall take all appropriate legislative, administrative, social, and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Further, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families expressly prohibits under art. 13:

> For the purpose of preventing any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Art. 16 of the Convention on the Rights of Persons with Disabilities, which addresses freedom from exploitation, violence and abuse enumerates:

> 1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities 2. to prevent all forms of exploitation, violence and abuse […] shall ensure that protection services are age-, gender- and disability-sensitive 3. shall ensure that all facilities and programmes […] are effectively monitored by independent authorities.

Finally, the Inter-American Convention on the Forced Disappearance of Persons provides:

> The States Parties to this Convention undertake: Article I, a. Not to practice, permit, or tolerate the forced disappearance of persons, even in States of emergency or suspension of individual guarantees; Article II […] forced disappearance is considered to be the act of depriving a person or persons of his or their freedom[80].

For the first time, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women calls for the establishment of mechanisms for protecting and defending women's rights as essential to combating the phenomenon of violence against women's physical, sexual, and psychological integrity, whether in the public or the private sphere, and for asserting those rights within society.[81]

Without ambiguity, the human rights approach stresses that the prime responsibility and duty of Mexico is to respect, promote, and protect human rights and fundamental freedoms, which include life, liberty, and personal security.[82] The provisions of the Mexican Constitution and the signed international treaties, being the Supreme Law indivisibly, compel Mexico to comply with the provisions of human rights and fundamental freedoms fully and thereby, fulfill its State obligations.

The Constitution and international treaties demonstrate that Mexico's obligations consist of preventive and negative duties, which affect everyone (State and non-State actors, children and adults, *etc*.), with aim of eradicating discrimination, violence, femicide and their inducements. Their provisions, being the Supreme Law indivisibly,

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[79] The Convention on the Rights of the Child, *supra* note 65, art. 19.
[80] Inter-American Convention on the Forced Disappearance of Persons, signed on June 9, 1994 and entered into force on Mach 28, 1996.
[81] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, *supra* note 67.
[82] OHCHR, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UNGA Res. (July 9, 1998), https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-right-and-responsibility-individuals-groups-and.

compel Mexico to comply with and protect human rights and fundamental freedoms fully and thereby, fulfill its State obligations.

VI. Criteria of State Responsibility of Prevention by the Inter-American Court of Human Rights

The Court, in almost every case, orders the State to investigate, prosecute and punish the individuals responsible for human rights violations. These orders seldom find fulfillment. In most cases, impunity reigns[83], and the State power structure lacks the means or the will (*cf*. realpolitik) to bring the perpetrators of human rights violations to justice.

In reaction, a State may perceive unwarranted Court jurisdiction and interpretations, current withdrawal of support from previously ratified treaties, or it may not believe in monism, that is, that violations of human rights belong properly to the international sphere as well as to its domestic province. In *González et al*., Mexico contested the Court's jurisdiction and interpretations,[84] witness testimony, and assessment of evidence.[85]

Mexico alleged that the Court did not have jurisdiction to "determine violations" of the Belém do Para Convention. It claimed that the general rule regarding jurisdiction of the IACHR for treaties other than the American Convention on Human Rights is that each Inter-American treaty requires a specific declaration granting jurisdiction to the Court.[86] In disagreement, the Court expressly decided that it has contentious jurisdiction to examine violations of the Belém do Pará Convention.

In general, even if a State recognizes the Inter-American Court of Human Rights as a legitimate source of international law, it may disagree with the Court's interpretation of a given treaty. Specifically, Mexico may not agree with the relevant international Court's interpretations of key concepts: 1) duty to prevent human rights violations; 2) elements of crimes; 3) characteristics of at-risk victims to be protected; 4) State actions and inactions before and immediately after reported disappearances; 5) types of victimizers that the State is accountable for; and 6) an appropriate relationship to be held between any State and the Court. However, The IACtHR indicated that Mexico has an obligation to comply with human rights treaties.[87]

In the *Cottonfield* case,[88] the slain three women were between 17 and 20 years old. Shortly after they vanished, their mothers reported their disappearances to the police.

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[83] *An "almost total" impunity reigns in Mexico when it comes to violent crimes,* THE YUCATAN TIMES (Oct. 13, 2021), https://www.theyucatantimes.com/2021/10/an-almost-total-impunity-reigns-in-mexico-when-it-comes-to-violent-crimes/.

[84] González *et al*, *supra* note 4, at paras. 31-39; 44, 66, 87-107.

[85] *Id.*, at paras. 87-107.

[86] The Court argued that the (overall) purpose of the provision confirmed its jurisdiction. See Juana I. Acosta López, *The Cottonfield Case: Gender Perspective and Feminist theories in the Inter-American Court of Human rights Jurisprudence*, 21 INTERNATIONAL LAW, REVISTA COLOMBIANA DE DERECHO INTERNACIONAL 17 (2012).

[87] Mexico indicated that, although "the object and purpose of the Convention of Belém do Pará is the total elimination of violence against women", "this ultimate purpose should not be mistaken for […] the judicialization of the system of rights and obligations that regulates the instrument". González *et al*., *supra* note 4, at para. 60.

[88] The IACtHR found that the three women had been subjected to gender-based violence under Article 1, Belém do Pará Convention and the CEDAW Committee's General Recommendation No. 19. Mexico had admitted that a culture of discrimination existed, which led to the perception that crimes against women were insignificant and therefore did not require specific immediate action. In this climate of widespread violence, by their own admission, the Mexican authorities stereotyped the victims, which ultimately

Mexico denied that it had committed any violation of the rights of life, humane treatment, or personal liberty.[89] To the contrary, the Court held that Mexico had failed to protect the three women from violence, thereby violating the victims' right to life (art. 4(1) ACHR), their right to personal integrity and personal liberty (arts. 5(1)(2), and 7 ACHR), their right to judicial protection and due process (arts. 8 and 25 ACHR), the rights of the child (art. 19 ACHR), and its duty to investigate VAWG (art. 7(b)(c) Belém do Pará Convention).

The *Cottonfield* case introduced, and for the first time ever, the notion of *femicide* to the language of the Court. The Commission and the representatives had held that the issue of gender was the common denominator of the violence in Ciudad Juarez. They alleged that the violence suffered by the victims constituted femicide, that is, an extreme form of VAW *merely because* of their gender in a society that subordinates them.

To determine State responsibility for non-State actor violence, the Court applied the *Osman* test. Under the *Osman* test, States' responsibility is only engaged if:

> The authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The *Osman* test has been upheld and endorsed by international human rights bodies, including the African Commission, the CEDAW Committee, and the IACtHR – also in cases concerning femicide.[90]

Its trailblazing effect is indisputable. In its current interpretation, the Osman test does not weigh the specific ways violence targets women and girls. The reported awareness of domestic authorities does not fit the reality of the harm caused by femicide. Women and girls often do not know that they are in imminent danger of being abducted and cannot alert the authorities for the same reason. The Court fails to consider that vulnerable stakeholders who belong to the targeted group composed of women and girls in Mexico are inherently at risk of violence, simply by virtue of being who they are.

The Court supplemented the obligation of appropriate knowledge with an enhanced due diligence obligation. This means that States must investigate violence against women and girls without delay, an obligation arising from art. 7(b) Belém do Pará Convention (the obligation to eradicate violence against women).[91] The Court has developed specific investigative standards in femicide cases.[92]

Perhaps in a failed attempt to avoid State responsibility, Mexico denied that a gender-based pattern of violence existed.[93] Conversely, the Court found that the violations were especially addressed against women. This conclusion was drawn from the following elements: the existence of a gender-related pattern of violence, the characteristics of the victims, and the modus operandi of the crimes.[94]

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prevented the police from doing their job and help search for the missing women. HEFTI, *supra* note 8, at 196; González *et al*., *supra* note 5.

[89] *Id.*, at para. 111.

[90] HEFTI, *supra* note 8, at 277.

[91] Organization of American States. Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, *supra* note 68.

[92] In particular: 1) the obligation to investigate these cases with a gender perspective; 2) to refrain from stereotyping women and girls. An investigation with a gender perspective (essentially the woman question) asks how violence targets women and girls specifically (HEFTI, *supra* note 8, at 175).

[93] González *et al*., *supra* note 4 at para. 132.

[94] *Id.*

The Court observed that several pieces of evidence pointed toward discriminatory attitudes by the authorities.[95] Observing this context of gender discrimination[96] and inequality allowed the Court to shape the international responsibility of Mexico, relying not on State action (considering that the Court did not find evidence of agents participating in the crimes) but rather on the lack of prevention of the disappearances and murders in the context of a gender-related pattern of violence.

The Court confirmed in the *Cottonfield* case that the status as a child "requires special protection that must be understood as an additional right that complements all the other rights that the Convention provides", and that "the State must pay special attention to the needs and rights of the alleged victims owing to *their condition as girls who, as women*, belong to a vulnerable group".

Nevertheless, focusing on the interconnection between their young age and gender in this case, the Court has noted that children might face multiple discrimination, It did so by recalling the independent expert for the UN study on violence against children who held that "[v]iolence against children takes a variety of forms and is influenced by a wide range of factors, from the personal characteristics of the victim and perpetrator to their cultural and physical environments". It further argued, "economic development, social status, age, sex and gender are among the many factors associated with the risk of lethal violence". Victimization of "second class citizens" (if not lower) is as brutal as the victims are vulnerable.

It is also noteworthy that the *López Soto* case provides the basis for analyzing State responsibility for private acts in the Inter-American system.[97] In 2001, the female victim had been sexually enslaved by a private actor for three months. Immediately after her disappearance, her sister reported Linda's absence. Claiming that the victim and her aggressor were partners, the authorities did not file the complaint. Suffering psychological and physical injuries during her captivity, the victim was sexually abused and seriously assaulted. Fourteen surgeries and fifteen years later, her case was presented to the Inter-American Court of Human Rights.

Venezuela argued that it did not incur responsibility for sexual violence and rape during her captivity. To the contrary, the IACtHR held that Ms. López Soto had been sexually enslaved, under art. 6(1) ACHR, which stipulates that "[n]o one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms".[98] The Court also applied the Osman test to determine State responsibility for non-State actor violence.[99]

Applying the Osman test, the Court Stated that, even though she was raped and sexually enslaved by a private individual, Venezuela incurred responsibility for its inaction because it "knew or ought to have known" about the serious risk. The Court argued that, under art. 1 of the American Convention on Human Rights, States have a

[95] The Court indicated that the comments made by officials that the victims had gone off with a boyfriend or that they led a disreputable life and selected questions regarding the sexual preferences of the victims constitute stereotyping (para. 208). Gender stereotyping refers to a preconception of personal attributes, characteristics or roles that correspond or should correspond to either men or women. The creation and use of stereotypes becomes one of the causes and consequences of gender-based violence against women.

[96] Mexico admitted that a culture of discrimination contributed to the murders. González *et al*., *supra* note 4, at para. 152.

[97] Ms. López Soto's right to integrity, liberty, dignity, autonomy, and private life were at "real or immediate risk", and Venezuela failed to take reasonable measures to mitigate that risk. Art. 2 of the Belém do Pará Convention lists abductions as a form of violence (HEFTI, *supra* note 8, at 213-214).

[98] HEFTI, *supra* note 8, at 210.

[99] HEFTI, *supra* note 8, at 169.

duty to ensure that every person can freely exercise their rights under their jurisdiction, *i.e*., to create the conditions for individuals to be protected from human rights abuses. The *Velásquez Rodríguez* case abandons the idea that the State should not intervene in individuals' freedom, shifting to the premise that States also have a guarantor function, that they have a duty to protect people from human rights violations. This requires that States address human rights abuses committed by non-State actors such as:

> An illegal act which violates human rights, and which is initially not directly imputable to a State […] can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [ACHR].[100]

The Court Stated that "the State has a legal duty to take reasonable steps to prevent human rights violations and to identify the culprits and punish them. The Court established that the preventive duty must include "legal, political, administrative and cultural" measures.

In summary, The Inter-American Court of Human Rights (IACtHR) classifies femicide cases as involving the right to life (art. 4 ACHR), the right to personal integrity and liberty (arts. 5 and 7 ACHR), the right to judicial protection and due process (arts. 8(1) and 25(1) ACHR), and the duty to prevent violence under art. 7 Belém do Pará Convention. The IACtHR has also begun to classify the violence in non-State actor femicide as torture.[101]

The Court embraced and valued the partial acknowledgment of responsibility of the State of Mexico but rejected the State's arguments regarding its lack of responsibility on the other claims, even though there was no evidence of the State's direct participation in any of the three murders.

The decision of the IACtHR reveals several gender-sensitive approaches; the Court:

- Declared the international responsibility of the State for failing to prevent the disappearances and murders in a gender-based pattern of violence;
- Discussed the concept of *femicide* in the case;
- Ordered reparations explicitly designed according to a gender perspective.

Thus, when an international Court declares that a State is responsible not only for the acts of its agents but also for the lack of prevention of crimes. In the relevant case of gender-based crimes, it created an entirely new range of obligations for the States that are not obvious from the text of international treaties.

This outcome implies that States will need to re-structure their public policies to avoid international responsibility. This theory is also relevant for the prevention of domestic violence, which is traditionally viewed as a private and not a public concern, considering that States might be internationally responsible for the lack of prevention of this type of violence.

It is useful to explore possible reasons why Mexico currently fails to comply. Its failure to comply may be due to a passive-aggressive backlash for perceived unwarranted Court interpretations. For example, Mexico may believe that, unsupported by previously ratified texts, the Court has expanded interpretations of key concepts: 1) duty to prevent human rights violations; 2) elements of crimes; 3) characteristics of at-risk victims to be protected; 4) State actions and inactions before and immediately after reported disappearances; 5) types of victimizers that the State is accountable for; 6) an appropriate relationship to be held between any State and the Court; and 7) a point of view that

[100] Velásquez Rodríguez v. Honduras (n1), para. 172, cited in HEFTI, *supra* note 8, at 275.
[101] *Id*., at 241-242.

violations of human rights belong properly to the international sphere as well as to the domestic province.

In this instance, Mexico could learn from France. *E.g*., it is noteworthy that:

> In September 2019, France's Prime Minister, Edouard Philippe, formally recognized that France has a femicide problem, thereby signaling the State's awareness that women and girls are at great risk of being harmed or killed.[102] Does that mean that France bears international responsibility for the hundreds of women who are killed under its jurisdiction? The Osman test's response to this question is that States which take adequate preventive measures to address the risk, can no longer be blamed and relinquish their international responsibility for femicide.[103]

The existence of a pattern of widespread violence against the female social group, evidenced by reports and statistics, should suffice to prove States' knowledge about systematic or widespread violence against the female group. As experts are aware, isolated or sporadic violations of internationally recognized human rights do not amount to crimes against humanity, whereas the commission of the latter requires a systematic or widespread attack against a civilian population. Furthermore, the risk of femicide ought to be considered real and immediate, since acts of femicide are continuous (and can materialize at any time).[104] This is especially so where States have contributed to the risk by failing to punish perpetrators, thereby creating a widespread context of violence against women and girls. Once the risk exists, States must take urgent legislative, policy, and budgetary measures to stop the violent practices endangering women and girls.[105]

Despite Mexico's ratification of treaties protecting human rights, it ignores these provisions. One may well ask then, why did it ratify the human rights treaties in the first place? One possible reason is argued by Kathryn Sikkink who wrote that human rights policies originally have often been embraced by the less powerful to try to restrain the more powerful. They assume that they are more likely to succeed when they also have allies within powerful States. "Protection of national sovereignty and the personal rights of individuals impelled the founding Latino delegates".[106] On one hand, supporting doctrines of sovereign equality and non-intervention, they sought a means to avoid interventions by more powerful countries.[107] They saw international law as one of the "weapons of the weak" to counterbalance U.S. power.[108] and to "eliminate the misuse of diplomatic protection of citizens abroad".[109] On the other hand, these Latin American diplomats were motivated by enlightenment ideas of human rights.

Nevertheless, according to the Court's jurisprudence, it is evident that a State cannot be held responsible for every human rights violation committed between private individuals within its jurisdiction. Indeed, a State's obligation of guarantee under the Convention does not imply its unlimited responsibility for any act or deed of private individuals, because its obligation to adopt measures of prevention and protection for

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[102] *France Announces Anti-feminicide Measures as 100th killing Recorded*, BBC (Sept. 3, 2019), https://www.bbc.com/news/world-europe-49571327.
[103] ECtHR, Osman v. UK (n1), Application No. 23452/94, Judgment (Oct. 28, 1998), para. 116, cited in HEFTI, *supra* note 8, at 118.
[104] ECtHR, Kurt v. Austria, Application No. 62903/15, Grand Chamber, Judgment (June 15, 2021), para. 175, cited in HEFTI, *supra* note 8, at 270.
[105] HEFTI, *supra* note 8, at 270.
[106] KATHRYN SIKKINK, LATIN AMERICA'S PROTAGONIST ROLE IN HUMAN RIGHTS (2015), at 211 https://sur.conectas.org/en/latin-americas-protagonist-role-human-rights/.
[107] *Id*.
[108] *Id.*
[109] *Id*.

private individuals in their relations with each other is conditional on its awareness of a situation of real and imminent danger for a specific individual or group of individuals and the reasonable possibility of preventing or avoiding that danger. In other words, even though the juridical consequence of an act or omission of a private individual is the violation of certain human rights of another private individual, this cannot be attributed automatically to the State, because the specific circumstances of the case and the discharge of such an obligation to guarantee must be taken into account. In effect, there are two crucial moments in which the obligation of prevention must be examined. The first is prior to the disappearance of the victims and the second is before the discovery of their bodies.

The criteria of State responsibility as determined by the IACtHR determine the degree of dissent, disinterest, and deference to sources of international law. States do not transition smoothly from contesting to complying with the jurisdiction or interpretations of the IACtHR. The Court acts as an external force to prod Mexico from complacency to compliance with international norms. Through its decisions, the Court has signaled that women and girls are in need of special protection from discrimination, violence, and femicide. It has determined what must happen during the small window of time before and after any disappearances. It has clarified what it means by Mexico's knowledge, assurance, and prevention.

Yet, the law does not suffice. As an instrument, it assumes an abstract entity, "the State". A correlation between legal and moral obligations is necessary.

VII. Moral Obligations

Moral obligations are intended, not for bricks and mortar or an inanimate, impersonal concept (State), but for living, breathing State officials. The expectation is that once an official addressed is reminded of the moral principles at stake, he may be led by guilt or shame to respect it and make amends.[110] Others, who are entrenched in a tolerance for harm need to be identified, disemployed, and replaced by new leaders with moral leadership.

Scholars debate whether a State or only individuals can have moral obligations to comply with international law. The international law system is based on the conviction that there must be a moral obligation to obey its rules, though this may be overridden in exceptional cases.[111] In this instance, the rules refer to the Mexican Constitution, international treaties, and the relevant judgments of the IACtHR. The rules, deemed essential for the survival of Mexico, include those forbidding or at least restricting the free use of violence against women and girls.[112]

For many experts, international law purports to bind States, not individuals. Although individuals sometimes have obligations under international law, these obligations are derived from the actions of States. But if we grant international law the power to bind States – and we henceforth make this assumption – we still must ask why individuals and governments should feel obligated to cause the State to comply with its legal obligations.[113]

Several observers and commentators perceive international law to be in a dilemma.

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[110] HART, *THE CONCEPT OF LAW*, *supra* note 47, at 227.
[111] *Id.*
[112] *Id.*, at 172.
[113] GOLDSMITH & POSNER, *supra* note 56, at 189.

> On the one hand, if international law takes the State as the primary obligation-bearing agent, then it can have no direct moral force for the individuals or groups who control the State. On the other hand, if international law takes the individual or non-State group as the primary moral agent, then it can claim the agent's loyalty, but it must give up its claim to regulate the relationships between States.[114]

Yet others believe that States should:

> Comply with the treaty only if compliance is the right thing to do. International law has no moral authority. International law scholars tend to confuse two separate ideas: (1) a moral obligation on the part of States to promote the good of all individuals in the world, and (2) a moral obligation to comply with international law. The two are not the same; they are in tension as long as governments focus their efforts on helping their own citizens.[115]

H.L.A. Hart indicated that in all communities, there is a partial overlap in content between legal and moral obligations. The requirements of legal rules are more specific and hedge round with more detailed exceptions than their moral counterparts.[116] Morality is seen as the ultimate standard by which human actions (legislative and otherwise) are evaluated.[117] In accord, Dr. Martin Luther King wrote: "One has not only a legal but a moral responsibility to obey just laws".[118] Justice, which constitutes one segment of morality, is primarily concerned with treatment of classes of individuals.[119] The rules jointly address the unjustifiable death of girls and women from neglect, starvation and or other ill-treatment.

These rules collectively intrude upon the patriarchal prerogatives, misogynistic aversions, and strong passions of victimizers. Old customs and traditions, which once widely held the status of moral rules, enjoy that scope no longer.[120]

Does it matter whether States have a moral obligation to obey international law? Hart denied that it matters whether States have a moral obligation to obey international law or feel bound by such a conviction; all that matters is that States have a reason to comply with international law. States do what they do; they might violate a moral obligation even if they have it, or they might comply with international law even if they do not have a moral obligation to comply with it.[121]

The most common explanation for why States have a moral obligation to comply with international law is that they have consented to it.[122] Other hypotheses include "the capacity to do good", prudence, and self-interest. The following five principles[123] can also guide the compliance of Mexico, according to an ethics study whereby:

- The first is the Principle of Recognition of Value, which applies to all human beings or individuals simply because they belong to the human species or simply because they are members of "the human family". Accordingly, Mexico would be expected to secure women from all forms of violence and harassment, including verbal, physical, sexual, or psychological.

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[114] *Id*., at 188.
[115] *Id*., at 197.
[116] HART, *supra* note 47, at 171.
[117] *Id*., at 227.
[118] KING, *supra* note, at 61.
[119] HART, *supra* note 48, at 167.
[120] *Id*., at 175.
[121] GOLDSMITH & POSNER, *supra* note 56, at 201.
[122] *Id*., at 190.
[123] The five ethical principles were synthesized by Dr. Anja Matwijkiw in Anja Matwijkiw, Willie Mack, *Making Sense of the Right to Truth in Educational Ethics: Toward a Theory and Practice that Protect the Fundamental Interests of Adolescent Students*, 2 INTERCULTURAL HUMAN RIGHTS LAW REVIEW 329 (2007), at 355-360.

- The second is the Principle of Consideration which focuses on the consideration of the motivations, needs, and status of vulnerable people, including women and girls. As needed, Mexico would be expected to provide women and girl friendly health facilities.
- The third is the Principle of Decent Treatment, which means that women and girls will be treated with dignity and respect. Consequently, rather than blaming females for male-initiated violence or deeming them to be inferior, Mexico would implement a standardized system of decent treatment, which includes safe and affordable housing, safe schools and workplaces, physical and mental health services, and safe access and egress from each of them.
- The fourth is the Principle of Respect and Dignity. As a consequence, Mexico would be expected to treat all females, regardless of citizenship or any other contingency, in a respectful way in words and in action.
- The fifth is the Principle of Avoidance of Harm, which will shield women's and girls' exposure to words or deeds that tend to abuse, misuse, or harm them. Hence, Mexico would be expected to issue timely and regular "pervert alerts", and other related notices to families and schools.

In sum, women and girls possess human rights unconditionally that are not based on any alleged special qualifications, such as citizenship or legal entitlement.[124] Neither should their rights be denied because of their age or apparel. Conforming to moral principles, Mexico is expected to enforce all female rights. This expectation contradicts the current harm caused by the tolerance of discriminatory and systemic violence, the intentional taking of female life, and Mexico's ineffective preventive practices.

Mexican State officials have a moral responsibility to comply with the Constitution, international treaties, and judgments of the IACtHR that protect the rights of women and girls. Their provisions constitute just laws. Therefore, based on the moral principles of justice, value, consideration, decent treatment, respect, dignity, and the avoidance of harm, Mexico has a moral obligation to obey these just laws.

Even as individual rights and State responsibilities (duties) have positive and negative aspects, so has compliance. Concerning a negative relationship between law and morality, one often reads about Dr. Martin Luther King's rationale for advocating the noncompliance of *unjust* laws, which would include Jim Crow or Nazi era discrimination and persecution laws. Yet, concerning a positive relationship between law and morality, experts seldom explore rationales for advocating compliance with *just* laws that otherwise compel compliance. In this instance, by utilizing morally substantive principles, compliance at the national and international levels is not currently advocated. A predictable criticism of introducing principles from cynics and skeptics will be that it is an innovation which States have not agreed to, let alone signed or ratified. By specifying moral principles that complement any common law or statutory law that protects women and girls, it is not unreasonable to seek to increase compliance with those higher norms that extend beyond the law.

VIII. Concluding Remarks

The Mexican government can and should stop its evasive strategies and its tacit tolerance of femicide, which has been facilitated by small gun proliferation. The human rights

[124] AMARTYA SEN, ELEMENTS OF A THEORY OF HUMAN RIGHTS (2004), at 316.

approach stresses Mexico's duty to respect, promote, and protect human rights and fundamental freedoms, which include life, liberty, and personal security.[125] The Mexican Constitution and the signed international treaties, being the Supreme Law indivisibly, compel Mexico to comply with their provisions and thereby, fulfill its State obligations. Declarations and conventions of human rights (international and regional), regional judicial case law, and moral principles require Mexico to prevent femicide. Mexico's continuous lack of protection of women against gender-based discrimination, violence, and femicide violates legal and moral principles alike, has no reasonable justification, and must cease immediately. With a newly elected female President of the nation, the author of this essay hopes to see improvement in terms of compliance and justice for vulnerable stakeholders.

[125] OHCHR, *supra* note 82. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Dec. 9, 1998).