

COLOMBIA

Manual

Contextual Analysis of Criminal Investigations by the National Analysis and Context Division of the Attorney General's Office

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David Martínez Osorio

Acknowledgments

This manual was created as part of the Framework Cooperation Agreement between the International Center for Transitional Justice and the Attorney General's Office, with the aim of providing technical assistance to the National Unit for Analysis and Context (UNAC) and supporting the development of protocols, procedures, and methodologies related to the investigation and analysis of system crimes. We would like to thank David Martinez Osorio, our consultant and author of the manual. Meritxell Regue, an associate expert of the Criminal Justice Program of ICTJ, also contributed to the draft and revision of the manual. The report was financed by the Swedish Embassy.

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About ICTJ

The International Center for Transitional Justice works to redress and prevent the most severe violations of human rights by confronting legacies of mass abuse. ICTJ seeks holistic solutions to promote accountability and create just and peaceful societies. To fulfill that mission, ICTJ links experience from its many field programs with its research in transitional justice. This allows ICTJ to develop, test and refine field practices and remain a research leader. ICTJ uses this knowledge to inform and advise governments, civil society and other stakeholders working on behalf of victims. It seeks to persuade those stakeholders, the media and the general public of the need for justice and accountability.

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ACRONYMS

AGO	Attorney General's Office
CSFA	Supreme Command of the Argentinian Armed Forces
CONADEP	National Commission on the Disappearance of Persons
DINAC	National Analysis and Context Division of the Attorney General's Office
IACHR	Inter-American Court of Human Rights
ICC	International Criminal Court
GMM	Montes de Maria Group of the National Analysis and Context Division of the Attorney General's Office
GU	Uraba Group of the National Analysis and Context Division of the Attorney General's Office
OHCHR	United Nations Office of the High Commissioner for Human Rights
UNAC	National Analysis and Context Unit (former name of the National Analysis and Context Division of the Attorney General's Office)

Introduction

According to the Inter-American Court of Human Rights (IACHR), the analysis of the historical, political and legal context surrounding human rights violations is a key factor to properly understanding them and the state's responsibility regarding specific crimes¹. In particular, this type of analysis identifies complex criminal structures, their plans and modus operandi, and insight into the nature of complex crimes, by observing patterns that explain their commission.² IACHR jurisprudence holds that to fulfill state obligations to investigate human rights violations with due diligence according to the “logical lines of investigation,” a state must conduct an analysis of the context.³

In 2012, the Attorney General's Office (AGO) decided to adopt a new model of contextual criminal investigation to address the challenges that system crimes and organized crime pose to the criminal justice system. Given the potential impact that this decision could have on ending impunity for serious human rights violations, the International Center for Transitional Justice (ICTJ) has supported initiatives aimed at implementing this initiative, including the National Analysis and Context Division (DINAC).

This manual aims to catalog the jointly developed reflections of prosecutors, analysts, and DINAC investigators through the framework of technical assistance provided by ICTJ. It is divided into three parts. The first part describes the institutional proposals drawn up by the AGO regarding contextual criminal investigation, which may be found in the AGO's Directive 0001 of 2012. The second part elaborates on the concept of system crimes and proposes some general guidelines on contextual investigation derived from accumulated experience and knowledge in the arena of international criminal investigations. The third part contains reflections on the different methods of contextual analysis elaborated by DINAC and finds there are three general guidelines for the exercise of each type of contextual analysis. This discussion provides an example of some of the analytical results obtained by

¹ *Case of La Rochela v. Colombia 2007*: paragraphs 72, 76–77.

² *Ibid.* at paragraphs 158 & 194.

³ *Ibid.* at paragraph 158.

DINAC to date and presents pieces of international jurisprudence developed by the International Criminal Court (ICC), with the aim of illustrating the objectives and criteria that should be included in a complete analysis.

This publication comes with a CD that contains the electronic version of the Manual and a number of reference documents that complement the text.

Maria Camila Moreno Munera
Director, ICTJ Office in Colombia

1. The Attorney General’s Office and Criminal Investigation

On October 4, 2012, the Attorney General’s Office issued Directive 0001. Among its aims was “to create a new criminal investigation and management system [for situations and cases].”⁴ The directive also set up the National Analysis and Context Unit (UNAC) “as a tool of criminal justice policy focused principally on dealing with the phenomena of organized crime.”⁵ In December 2013, the UNAC—currently, the National Analysis and Context Division⁶ (DINAC) — referred to the new system as the model for criminal investigation or **system for criminal investigation in context** (i.e., contextual analysis).⁷

The Attorney General decided to set up the system for criminal investigation in context as a response to the limitations encountered by the AGO and to address the diverse manifestations of organized crime. His considerations, contained in the directive, are summarized below.

1.1. Challenges of Confronting System Crimes and Organized Crime

According to the current AGO administration, until 2012, it did not have “strategies that led to efficiently combating diverse phenomena of organized crime linked to the evolution of the internal armed conflict, drug trafficking, corruption in public administration, and the destruction of the environment.”⁸ This lack of strategy impacts the prosecution of serious crimes, as “the current isolated investigations of criminal activities [do not] allow the efficient dismantling of numerous criminal organizations that commit all sorts of common crimes (e.g. extortion, theft of vehicles, financial embezzlement, etc.)”⁹ This is an issue of **limitations on the AGO’s**

4 Fiscal General de la Nación 2012: 1. The original full quote is, “This current directive aims to adopt criteria for the prioritization of situations and cases and create a new criminal investigation and management system in the Attorney General’s Office.”

5 Fiscal General de la Nación 2012 (a): Article 1.

6 On January 9, 2014, by way of Decree 016, the UNAC became the National Analysis and Context Division (DINAC) and was given 16 functions. See the Departamento Administrativo de la Función Pública 2014: Article 16

7 UNAC 2013: 1.

8 Fiscal General de la Nación 2012: 25. At the ellipsis, the original quotation mentions, in parenthesis, various phenomena: “(e.g. sexual crimes, recruitment of minors, aggravated homicide, theft of land, forced displacement, forced disappearance, kidnapping, etc.)”

9 Ibid. at 26.

mission, which the Attorney General succinctly expressed in regards to the AGO’s current management model:

It prevents the revelation of the real socio-political dimensions of organized crime that have affected the country. In fact, the dispersal of investigations and available information has prevented, in many cases, not only the uncovering of organizational configuration of the illegal group and its criminal and military dimensions, but also aspects of its social and political set up.¹⁰

Why is the AGO unable to address the diverse manifestations of organized crime? The answer is linked to the reason why the Attorney General chose to reform its prosecutorial strategy:

The persistence of an institutional operational model anchored exclusively in “the [traditional] paradigm of managing investigations on the basis of dealing with individual cases.”¹¹

There are three supporting arguments put forward by the Attorney General:

- **Traditional paradigm of investigation.** The guiding prosecutorial strategy has been the “traditional paradigm of investigation, centered only on solving the specific case at hand.”¹² This means “criminal activities are [investigated] as isolated, unrelated acts.”¹³ This unnecessarily limits the AGO to complying with just one aspect of its constitutional mission; however, “solving a specific case is just one of the functions that a criminal investigation should carry out.”¹⁴
- **Operational limits of the traditional paradigm of investigation.** The main operational consequence of the continued use of the traditional paradigm of investigation is the “scattering of investigations and . . . available information.”¹⁵ Consequently, it is very difficult for the AGO “to meet the global targets of the institution [and] carry out more general strategic planning for the fight against crime.”¹⁶ At the same time, this non-cohesive approach contributes to creating an operationally non-functional entity, and ultimately, to the persistence of “high levels of impunity.”¹⁷

¹⁰ Ibid.

¹¹ Ibid. at 25.

¹² Ibid. at 27.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid. at 26.

¹⁶ Ibid. at 26.

¹⁷ Ibid. at 26.

Such a state of affairs . . . has given rise to dysfunction in the system, including: (i) the same criminal organization is under investigation by various National Units and Regional Sections (e.g. self-defense group blocs or guerrilla fronts); (ii) the same situations are examined by multiple sections of the AGO (e.g. cases of mass displacement); (iii) the same criminal conduct is treated in a variety of manners in various Attorney General’s offices (e.g., sexual crimes); and (iv) the same alleged act is investigated by at least two prosecutors with different results.¹⁸

- **Strategic limitations of the traditional paradigm of investigation.** The continued use of the “current Attorney General’s Office management model . . . has prevented investigations from focusing on those most responsible for the phenomena of macro-criminality,” and as a result the daily activity of the AGO does not correspond with the “execution of a global investigative strategy,”¹⁹ nor does it guide “the investigative work [of the prosecutors] towards achieving the general objectives of criminal justice.”²⁰

1.2. AGO’s Proposal for a New System of Criminal Investigation in Context Guided by Prioritization

1.2.1. Overall Aims and Specific Objectives

According to the AGO, the adoption of the new system of criminal investigation in context has the following overall aims:

- In strategic terms: “(i) address the large scale of crimes committed in the setting of the internal armed conflict; and (ii) show the existing links between the various manifestations of organized crime and certain strata within Colombian society.”²¹
- In operational terms: “investigate criminal conduct not as isolated or unrelated acts but as the result of the activity of criminal organizations in a given context.”²² The objective is that the progressive adoption of the new criminal investigation system enables the criminal justice system to overcome the limitations of a “traditional paradigm of investigation focused only on solving a specific case.”²³

18 Ibid.

19 Ibid. at 25.

20 Ibid. at 26.

21 Fiscal General de la Nación 2012: 25–26.

22 Ibid. at 27.

23 Ibid.

Furthermore, according to the statements of the Attorney General, the new system of criminal investigation in context will be adopted progressively.²⁴ Through its operation it will hopefully achieve **three specific objectives**:

- (i) The effective prosecution of those most responsible for the commission of system crimes perpetrated by organized, powerful apparatuses with the purpose of revealing the truth about what happened, avoiding recurrence, and making proposals for reparations;
- (ii) The investigation and dismantling of criminal organizations responsible for the commission of multiple ordinary crimes;
- (iii) Combatting discriminatory cultural patterns and serious violations of fundamental rights, in cases of crimes not perpetrated by criminal organizations.²⁵

1.2.2. Focusing on Situations and Priority Cases

According to the Attorney General, the adoption of the new system of criminal investigation in context requires, as part of a general approach to crime, that there be a guiding policy for prioritizing cases.^{26 27} This prioritization policy aims to “focus the investigative work of the Attorney General’s Office on certain situations and cases with the aim of ensuring a greater impact and use of administrative and logistical resources.”²⁸

Regarding the focus, each of the prioritized situations and cases corresponds to “an illustrative case of a criminal plan”²⁹ or, in other words, “a factual situation representative of the patterns of criminal conduct characteristic of a particular criminal organization.”³⁰ According to Directive 0001 of 2012, once prioritized cases and situations have been identified, the AGO has **three obligations** to make the model effective:

24 Ibid. at 32.

25 Ibid.

26 Directive 0001 of 2012 reads as follows: “**Prioritization Policy**: Instructions and guidelines geared towards introducing a change in the way the Attorney General’s Office complies with its legal and constitutional obligations regarding certain situations and cases with the aim of ensuring a greater impact and better use of administrative and logistical resources.” Ibid. at 2. Furthermore, the directive sets out four aims of prioritization and warns that: “Under no circumstances will the criteria for prioritization be interpreted and applied as mere tools to clear up a judicial backlog.” Ibid. at 3. See also

27 Numeral IV. 5 of the Directive suggests the Attorney General participate in the design of the state’s policy on crime. Ibid, 22–24.

28 Ibid. at 2.

29 Ibid. at 1. Ibid.

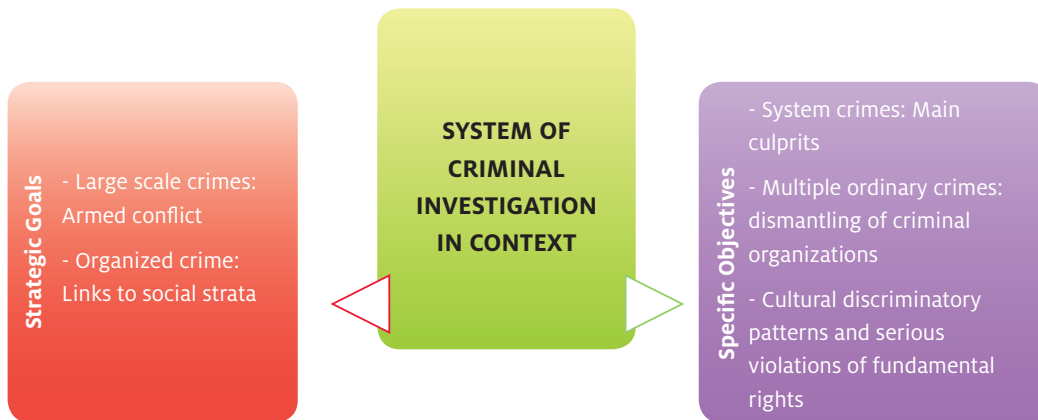
30 Ibid.

- (i) Construct the respective context;
- (ii) Gather AGO proceedings that prove the existence of a criminal organization and unlawful conduct that can be attributed to its alleged members, regardless of whether the proceedings concern the same class of crime or not;
- (iii) Employ the forms of indictment that are most legally suited to investigating and charging those who allegedly bear most responsibility, including collaborators and financial backers.³¹

The strategic goals and specific objectives of the AGO's system of criminal investigation in context are diagrammed as follows:

Diagram 1

Diagram of Strategic Goals and Specific Objectives of the System of Criminal Investigation in Context



³¹ Ibid.

Concepts from Directive 0001 of 2012 Associated with the Adoption of the New System of Criminal Investigation in Context

Prioritized cases that cannot be attributed to a criminal organization: Punishable conduct that does not correspond to activities of a criminal organization, but that has a high social impact (determined by considering the conduct's gravity), impact on the fundamental rights of the victim, effect on assets protected by law, or potential for revealing the existence of discriminatory cultural patterns.³²

Illustrative cases of a criminal plan: A factual representation of a particular criminal organization's patterns of criminal conduct. Based on the prioritization of the illustrative case, one should (i) construct the respective context; (ii) gather AGO proceedings that prove the existence of the criminal organization and unlawful conduct that can be attributed to its alleged members, regardless of whether the proceedings concern the same class of crime or not; and (iii) employ forms of indictment that are most legally suited to investigating and charging those who allegedly bear most responsibility, including collaborators and financial backers. Resolving the case should have a broad reparative effect.³³

Criteria for prioritization: Logical parameters used to focus the investigative work of the AGO on certain situations and cases, with the aim of ensuring a greater impact and the use of administrative and logistical resources.³⁴

Most responsible: The concept of those most responsible is applied to two different categories: (i) a person who within the command structure of the criminal organization knew about or could reasonably foresee the perpetration of crimes resulting from the implementation of the operational plans; and (ii) under exceptional circumstances, those who had committed particularly notorious crimes, regardless of their position within the criminal organization.³⁵

Criminal patterns: Set of activities, logistical means of communication, or a criminal modus operandi developed in an area over a particular period of time from which conclusions can be drawn regarding the different levels of command and by certain individuals'/entities' control over the criminal organization. This will help to establish the degree of criminal responsibility of a criminal organization's members and is a fundamental part of understanding the context of criminal activity.

Prioritization policy: Instructions and guidelines geared towards introducing a change in the way the AGO complies with its legal and constitutional obligations and optimizes the use of its resources.³⁶

³² Ibid.

³³ Ibid.

³⁴ Ibid. at 2.

³⁵ Ibid. at 3.

³⁶ Ibid. Other concepts associated with prioritization are: i) aims of the prioritization; ii) to prioritize; iii) rules of prioritization; iv) prioritizable situation; v) test of prioritization. Ibid. at 2-4.

2. Investigation in Context of System Crimes

Throughout the twentieth and twenty-first centuries, mass and systematic human rights violations have shocked humanity. These violations came out of conflicts that have produced millions of victims, from the heinous crimes committed in World War I to the repeated massacres that have characterized the ethnic/political conflict in Darfur and South Sudan during the last decade.³⁷ In the majority of cases, state actors were the principal agents driving the collective violence that resulted in such human rights violations. Furthermore, due to practical and normative concerns, those responsible for these violations have largely enjoyed impunity, even though the acts they committed violated previously existing customary international law and currently applicable international criminal law.

As stated in the preamble to the Rome Statute of the International Criminal Court, which created the court, these violations were “unimaginable atrocities that deeply shock the conscience of humanity.”³⁸ In comparison to ordinary crimes, the impact of these atrocities transcend borders and, therefore, attack the common heritage of all peoples and undermine the fundamental interests of the international community. These crimes are an affront to human nature. This characterization underscores the gravity of crimes encompassed by the terms,³⁹ which includes genocide, crimes against humanity, and war crimes, as well as other crimes.⁴⁰

37 For example between April 4 and 16, 2014, members of the opposition group called the Sudanese People’s Liberation Army massacred 200 people and wounded an additional 400 in a mosque in Bentiu that housed refugees. “The UN condemns the murder of hundreds of civilians in the south of Sudan,” *El País* newspaper, April 21, 2014. Bentiu is the capital of Unity, one of ten states in South Sudan; the Nuer (majority) and Dinka (minority) ethnic groups comprise the majority of the population. In July, 2013, President Salva Kiir (Dinka) fired his Vice President Riek Machar (Nuer). Since then, Machar has accused Kiir of being a dictator. Last December 15, military officers, some supporting Kiir and others loyal to Machar, opened fire on each other in the barracks of the Presidential Guard in the capital city, Juba. Since then, such incidents have become prevalent throughout the country, and what began as a political dispute evolved into interethnic violence of enormous proportions. See Amnesty International (AI) 2014.

38 Second subparagraph of the Preamble to the Rome Statute of the International Criminal Court. .

39 The term *system crimes* was first used by the Dutch jurist Bernard Röling (1906–1985). He was one of eleven judges who served on the International Military Tribunal for the Far East (Tokyo Tribunal), after the World War II. The concept of system crimes was later developed by Paul Seils and Marieke Wierda. See Seils & Wierda 2006. See *infra* Part 2.1.

40 From the perspective of the doctrine of political macro-criminality these crimes are referred to as *macro-criminal conduct*. In essence, they are understood to be the systematic commission of particularly grave criminal acts resulting from “conduct as part of a system and adjusted to the situation within an organizational structure, power apparatus or other context of collective action.” (Jäger 1998: 122ff cited in Ambos 2005:44). The main proponent of this doctrine is the German scholar Herbert Jäger. See Jäger in Lüderssen (editor) 1988; *Kriminalpolitik III* 1998; *Makrokriminalität* 1989; *y MschrKrim* 1980. Kai Ambos revisits the concept of political macro-criminality in various works, particularly Ambos 2005 (in Spanish).

The AGO has proposed that the new system of criminal investigation in context will achieve the objective of the investigation of system crimes. This requires considering certain international guidelines for the investigation of such crimes.

2.1. General Context of Collective Activity in which System Crimes Occur

The commission of *system crimes* or *macro-criminal conduct* does not occur in isolation or under any particular circumstance. Instead, it usually manifests as structural forms of state violence and/or violence exercised by nonstate groups during situations of acute social crisis, favorable conditions for anarchy, or the general collapse of the rule of law.⁴¹

Over the course of human history the prevailing assumption regarding system crimes was that they were primarily carried out by states and organizations under their auspices. Nonstate actors, however, have also developed the capacity to carry them out.⁴²

In general terms, macro-criminality occurs in the context of collective political action. On the one hand, collective crimes are politically conditioned,⁴³ as the organized and systematic commission of these crimes depends on the means and resources at the disposal of those who exercise power.⁴⁴ On the other hand, it is important to point out that political macro-criminality does not cover all “collective-action phenomena” that may be considered part of organized crime.⁴⁵ Furthermore, political macro-criminality differs from common criminality, special forms of criminality (e.g., terrorism and drug trafficking), and the so-called “criminality of the powerful.”⁴⁶

In the case of state violence, the state becomes an agent of political macro-criminality when it transforms from a guardian of individual and collective security⁴⁷ into a repressive and destructive machine,⁴⁸ capable of harming “the values that are the basis of the coexistence and survival of humanity.”⁴⁹ This generally happens when the political situation of a society is characterized by a severe dearth of rule of law. There are at least three situations in which this is likely:

41 See Alpaca 2013:18 based on Jäger 1998:12

42 See *infra*, Parts 2.3. and 3.4.3

43 Jäger 1998: 123, cited in Ambos 2005: 45.

44 Alpaca 2013: 21.

45 Ambos rejects the indiscriminate use of the concept of political macro-criminality in the form of macro-criminal conduct, “in agreement with Jäger, the modern tendency to extend the concept to include all large scale criminal threats.” Ambos 2005:45.

46 *Ibid.* at 44–45.

47 In order to exercise and control the monopoly over the use of force and guarantee compliance with the law, the state designs and establishes a complex web of military, police, and other security forces equipped with huge financial resources and the means to commit violence and coerce. It is contrary to the rule of law for the security apparatus, charged with protecting its citizens and society, to be the source of human rights violations. When such cases arise in a rule of law society, whether they are representative of the system or aberrations, the relevant justice authorities should be in a position to comply with the obligation to proceed and investigate, prosecute, and punish those responsible, regardless of whether they are individuals or state agents.

48 On this Jäger alludes to an *exceptional criminogenic situation*. Jäger 1998:327 cited in Alpaca 2013:18 and Landa 2004:78

49 Lirola y Martin 2001: 2.

1) Societies ruled by politically authoritarian regimes; 2) societies in which there is an internal or international armed conflict; and 3) societies in which there are intense social, ethnic, religious, or political conflicts that demonstrate “the existence of a collapsed or divided social order.”⁵⁰

In such circumstances, state coercion may no longer be limited to ensuring compliance with the law, because the state is susceptible to structural violence or a *structural criminal dynamic*,⁵¹ governed by the rule of force (which becomes law). Consequently, states—as organized actors with an institutional administration that is more or less centralized (structured hierarchy) and with various apparatuses and agencies that carry out wide-ranging, complex functions (division of labor)—foment, promote, strengthen, and conceal criminal conduct. This constitutes “institutionalized programs of systematic violence.”⁵² In some cases, the armed forces, police agencies, and security apparatus adopt illegal global operations systems to carry out macro-criminal actions themselves.⁵³ In other cases, state institutions rely on external agents to implement them through complex mechanisms that ensure that they ultimately have state support.⁵⁴

2.2. Characterization of System Crimes in the Rome Statute

As Kai Ambos maintains, the Rome Statute of the International Criminal Court represents the consolidation of “international criminal law as the system of criminal law for the international community.”⁵⁵ On the one hand, the Rome Statute reflects the broad legal traditions of the predominant legal systems of the international community. On the other hand, it also embodies the specific precedents (principles and norms) from earlier tribunals that prosecuted perpetrators of international crimes.⁵⁶ According to Ambos:

50 Alpaca 2013: 19.

51 According to Jäger, the capacities concentrated in the hands of the state are precisely those that produce the mass expansion of criminal conduct. See Jäger 1989:12 and also Burkardt 2005: 10 & Landa 2004: 83

52 Alpaca 2013: 13.

53 In Latin America’s recent history, this was the model of macro-criminality that was in force in Argentina and Chile. See the case of the Juntas, *infra*, Part 2.4.

54 This model of political macro-criminality was dominant in the low-intensity wars in Central America and has been a characteristic of the prolonged internal armed conflict in Colombia. In this sense, political macro-criminality means “criminality backed by the state” (Naucke 1996:19) cited in Ambos 2005:45.

55 Ambos 2005: 35. Ambos states that in keeping with the Rome Statute the international criminal system broadens “its regulatory remit beyond its legal-material bases to other ancillary areas of criminal law (tort law, sentencing, international cooperation and judicial assistance), criminal procedural law and questions of the judicial system.” *Ibid.*

56 This tradition goes back to the International Military Tribunal of Nuremberg (1945–1946) and the International Military Tribunal for the Far East (1946–1948), although as early as 1919 there was an attempt to try Kaiser Wilhelm II for war crimes under the Treaty of Versailles. At the end of the 1990s, the UN Security Council decided to set up two *ad hoc* tribunals: the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994. Mixed tribunals offer another form of special tribunal: East Timor (1999), Sierra Leone (2000), Cambodia (2003) and Lebanon (2007).

Traditionally, international criminal law is understood as the set of all the norms of international law that establish legal criminal consequences. It is a combination of the principles of criminal law and international law. The central idea of individual responsibility and the irreproachability of particular (macro-criminal) conduct comes from criminal law, whilst the classical criminal models (of Nuremberg), in their role as international norms, should be formally classified as international law, thus subjecting the conduct in question to a punishment independent of international law (principle of direct criminal responsibility of the individual according to international law).⁵⁷

The Rome Statute establishes a legal framework for international criminal law through its identification of the most serious international crimes (*core crimes*):⁵⁸ genocide, crimes against humanity, war crimes, and the crime of aggression.⁵⁹ Pursuant to Article 9 of the statute, an accompanying instrument called *Elements of Crimes* complements the definitions of the core crimes as described in the Rome Statute,⁶⁰ with the purpose of assisting the interpretation of the material elements of each crime as related to:

- The conduct, consequences, and circumstances that constitute each crime;
- When required, the specific subjective basis of responsibility or a particular mental element, beyond the general rule on intentionality and knowledge as set out in Article 30.1;⁶¹
- Contextual circumstances.⁶²

2.2.1. Characterization of Genocide

Genocide is defined in Article 6 of the Rome Statute as follows:

For the purpose of this Statute, ‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

57 Ambos 2005: 34–35. For greater detail, see section § 1.1 of Ambos 2005: 34–48.

58 Article 5 of the Rome Statute refers to “the most serious crimes of concern to the international community as a whole.”

59 Article 5.2. of the Rome Statute states: “The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.” Such a definition was adopted by the Assembly of States Parties of the Rome Statute during the Review Conference of the Rome Statute in Kampala, Uganda. in 2010, and will enter into force in 2017.

60 United Nations, *Elements of Crimes* 2002.

61 Article 30.1 of the Rome Statute states: “Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.” Article 30.2 and 30.3 define each of these terms. Thus, for instance, regarding the crime of genocide, Article 6 identifies the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such” as the specific subjective basis for criminal responsibility.

62 United Nations, *Elements of Crimes* 2002: Paragraph 7 (General Introduction).

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group.

The specific intent, or *dolus specialis*, of genocide is that the perpetrator intended to “destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”⁶³ The following contextual element must also be proven: “[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.”⁶⁴

2.2.2. Characterization of War Crimes in the Framework of an Armed Conflict Not of an International Character⁶⁵

The Rome Statute characterizes war crimes in the context of a conflict of a non-international nature (Art. 8.2(c) & Art. 8.2(e)) as follows:

- c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds detention or any other cause:
 - i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - iii) Taking of hostages;
 - iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable. . . .

⁶³ Art. 6 Rome Statute.

⁶⁴ United Nations, Elements of Crime 2002: Art. 6 (fourth element).

⁶⁵ The elements that characterize war crimes in international armed conflicts provided for in Articles 8.2a & 8.2b of the Rome Statute are excluded here given the interest of the AGO in investigating those responsible for committing crimes in the context of the internal armed conflict in Colombia.

e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

- i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- v) Pillaging a town or place, even when taken by assault;
- vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
- vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
- viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- ix) Killing or wounding treacherously a combatant adversary;
- x) Declaring that no quarter will be given;
- xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- ...

The Rome Statute (Art. 8.1) indicates that the ICC will have jurisdiction over war crimes when they are “committed as part of a plan or policy or as part of a large-scale commission of such crimes.”

Furthermore, the Rome Statute gives insight into characteristics of conflicts not of an international character. “Situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature” (Art. 8.2.d) are not considered to be armed conflicts of a non-international character. In contrast, “armed conflicts that take place in the territory of a state when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups” (Art. 8.2.f) are considered armed conflicts not of an international character to which the Rome Statute applies.

Regarding crimes committed in the context of an armed conflict that is not of an international character, the contextual element that must be satisfied is as follows: “The conduct took place in the context of and was associated with an armed conflict not of an international character.”⁶⁶

2.2.3. Characterization of Crimes against Humanity

The commission of inhumane acts that violate the rights of a civilian population constitutes the essence of crimes against humanity. The general characterization of crimes against humanity in Article 7 of the Rome Statute is as follows:

For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- a) Murder;
- b) Extermination;
- c) Enslavement;
- d) Deportation or forcible transfer of population;
- e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- f) Torture;
- g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph

⁶⁶ United Nations, Elements of Crimes: Art. 8 (fourth element) 8.(2) c.

3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

i) Enforced disappearance of persons;

j) The crime of apartheid;

k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

There are two aspects to the contextual element of crimes against humanity: i) that the attack be part of a **widespread or systematic attack directed against a civilian population**,⁶⁷ and that ii) the attack occurs **pursuant to or in furtherance of a state or organizational policy**.⁶⁸

“Attack directed against a civilian population” in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that “policy to commit such attack” requires that the State or organization actively promote or encourage such an attack against a civilian population.”⁶⁹

2.2.3.1. Attack Involving the Multiple Commission of Acts against any Civilian Population, Pursuant to or in Furtherance of a State or Organizational Policy

As noted above, according to the terms of Article 7.2, an “attack directed against any civilian population” means a course of conduct involving the multiple commission of criminal acts (under Article 7.1) against any civilian population, pursuant to or in furtherance of a state or organizational policy. In various decisions, the ICC has maintained that the attack is an act of aggression against the civilian population, arising from a violent campaign, operation, or actions that are not necessarily of a military nature. The attack’s key feature is that it is part of a course of conduct that includes a series or global course of events, as opposed to a spontaneous or isolated act of violence.⁷⁰ If it can be shown that the attack was planned, directed, or organized, this satisfies the policy criterion, regardless of whether the policy has been formally adopted.⁷¹

67 Ibid. at Art. 7.1.

68 Ibid. at Art. 7.2(a). The most recent jurisprudence on the widespread or systematic nature of attack is *Prosecutor v. Gbagbo*, Case ICC-02/11-01/11, 2014: paragraphs 222–225.

69 United Nations, *Elements of Crimes* 2002: Art. 7 (Introduction, paragraph 3)

70 *Prosecutor v. Gbagbo*, Case ICC-02/11-01/11-656-Red, 2014: paragraphs 209–210; *Prosecutor v. Katanga*, Case ICC-01/04-01/07-3436, 2014: paragraph 1101 (noting that in exceptional cases a single criminal event may constitute an attack within the meaning of article 7(2)(a), as long as the other elements of the article are met); and *Prosecutor v. Bemba Gombo*, Case ICC-01/05-01/08-424, 2009: paragraphs 80–83.

71 *Prosecutor v. Gbagbo*, Case ICC-02/11-01/11, 2014: paragraph 215; *Prosecutor v. Katanga*, Case ICC-01/04-01/07-3436, 2014: paragraphs 1106–1116; *Situation in the Republic of Côte d’Ivoire*, Case ICC-02/11-14, 2011: paragraph 43; *Situation in the Republic of Kenya*, Case ICC-01/09-19-Corr, 2010: paragraphs 83–88; *Prosecutor v. Bemba Gombo*, Case ICC-01/05-01/08-424, 2009: paragraph 81; and *Prosecutor v. Katanga and Chui*, Case ICC-01/04-01/07-717, 2008: paragraph 396.

According to the Geneva Conventions, the civilian population is composed of all civilians as opposed to members of the armed forces and other combatants.⁷² Civilians must be the main target of the attack for the attack to constitute a crime against humanity.⁷³ The characterization of victims, the circumstances of the attack, and means employed during the attack are relevant to determining the nature of the crimes against humanity, particularly when they are committed in a situation of armed conflict.⁷⁴

2.2.3.2. Widespread Character of the Attack

From the point of view of international criminal law, the widespread character of an attack is a contextual element of crimes against humanity. Essentially, the widespread nature of an attack indicates that it is one of a large scale and that it targets a multiplicity of victims. The ICC sets out what constitutes the widespread character of an attack:

- “the large-scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims;”⁷⁵
- “may be the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.”⁷⁶

2.2.3.3. Systematic Character of the Attack

In general terms, the idea of systematicity refers to the organized nature of the acts of violence and the improbability that these acts could occur randomly. Patterns of crime are a common expression of such systematic occurrence. Under international criminal law, the systematic character of an attack is a contextual element of crimes against humanity. In general, systematicity is attributable to the attack that

72 *Prosecutor v. Katanga*, Case ICC-01/04-01/07-3436, 2014: paragraph 1102; *Situation in the Republic of Côte d'Ivoire*, Case ICC-02/11-14, 2011: paragraph 33; *Situation in the Republic of Kenya*, Case ICC-01/09-19-Corr, 2010: paragraph 82; and *Prosecutor v. Bemba Gombo*, Case ICC-01/05-01/08-424, 2009: paragraph 78 (discussing international humanitarian law jurisprudence).

73 *Prosecutor v. Katanga*, Case ICC-01/04-01/07-3436, 2014: paragraph 1104; *Situation in the Republic of Kenya*, Case ICC-01/09-19-Corr, 2010: paragraph 82; and *Prosecutor v. Bemba Gombo*, Case ICC-01/05-01/08-424, 2009: paragraph 76. On different issues relating to the civilian population the following jurisprudence of the ICC is highlighted: *Prosecutor v. Gbagbo*, Case ICC-02/11-01/11-656-Red, 2014: paragraphs 209–212; *Prosecutor v. Katanga*, Case ICC-01/04-01/07-3436, 2014: paragraphs 1101–1105; *Prosecutor v. Gbagbo*, Case ICC-02/11-01/11-9-Red, 2011: paragraph 30; *Situation in the Republic of Côte d'Ivoire*, Case ICC-02/11-14, 2011: paragraphs 32–33; *Situation in the Republic of Kenya*, Case ICC-01/09-19-Corr, 2010: paragraphs 80–82; *Prosecutor v. Bemba Gombo*, Case ICC-01/05-01/08-424, 2009: paragraphs 75–78; and *Prosecutor v. Katanga and Chui*, Case ICC-01/04-01/07-717, 2008: paragraph 399. The following jurisprudence from the ICTY also stands out: *Prosecutor v. Stakić*, IT-97-24-T, 2003: paragraphs 624 and 627; *Prosecutor v. Vasiljević*, Case IT-98-32-T, 2002: paragraphs 33–34; *Prosecutor v. Kunarac, Kovac and Vuković*, Case IT-96-23/1 & IT-96-23/1-A, 2002: paragraphs 90–92 and 2001: paragraphs 421–426; *Prosecutor v. Jelisić*, Case IT-95-10-T, 1999: paragraphs 54–55; and *Prosecutor v. Tadić*, Case IT-94-1-T, 1997: paragraphs 635–644.

74 *Prosecutor v. Kunarac, Kovac and Vuković*, Case IT-96-23/1 e IT-96-23/1-A, 2002: 91.

75 *Prosecutor v. Bemba Gombo*, Case ICC-01/05-01/08-424, 2009: paragraph 83. On the characterization of crimes against humanity as widespread attacks, the following jurisprudence of the ICC stands out: *Prosecutor v. Gbagbo*, Case ICC-02/11-01/11-656-Red, 2014: paragraph 222; *Prosecutor v. Gbagbo*, Case ICC-02/11-01/11-9-Red, 2011: paragraph 49; *Situation in the Republic of Côte d'Ivoire*, Case ICC-02/11-14, 2011: paragraph 53; *Situation in the Republic of Kenya*, Case ICC-01/09-19-Corr, 2010: paragraph 95; *Prosecutor v. Katanga and Chui*, Case ICC-01/04-01/07-717, 2008: paragraphs 395–396; and *Prosecutor v. Harun and Abd-Al-Rahman*, Case ICC-02/05-01/07-1-Corr, 2007: paragraph 62. The following jurisprudence of the ICTR is also noteworthy: *Prosecutor v. Musema*, Case ICTR-96-13-A, 2000: paragraph 204; and *Prosecutor v. Akayesu*, Case ICTR-96-4-T, 1998: paragraph 580.

76 *Situation in the Republic of Kenya*, Case ICC-01/09-19-Corr, 2010: paragraph 95 (footnote omitted) (internal quotation marks omitted). On this point the following jurisprudence stands out: *Prosecutor v. Gbagbo*, Case ICC-02/11-01/11-9-Red, 2011: paragraph 49; and *Situation in the Republic of Côte d'Ivoire*, Case ICC-02/11-14, 2011, paragraph 53. The following jurisprudence from the ICTY is also noteworthy: *Prosecutor v. Blagojević and Jokić*, Case IT-02-60-T, 2005: paragraph 545; and *Prosecutor v. Blaškić*, Case IT 95-14-T, 2000: paragraph 206.

generates the crimes, suggesting that a number of these crimes will share certain characteristics. Such similarities are consequences of the following:

- The organized or programmed nature of the acts of violence rules out the possibility that the crimes are haphazard, isolated, or random;
- Similar criminal conduct that tends to repeat on a more or less regular basis or has the same origin, thus revealing a criminal pattern;⁷⁷
- The existence and implementation of a state or organizational policy.⁷⁸

2.3. Guidelines for Criminal Investigation in the Context of System Crimes

The logic behind the application of criminal law to international crimes and system crimes can be summarized as *the imposition of sanctions against individuals who engage in conduct considered reproachable or to be outside of the common interests of the established social order*. This formula rests criminal responsibility for crimes exclusively on individuals,⁷⁹ which presupposes that crimes are committed exclusively by individuals. As a result of this conception, international criminal law does not include situations where the wrongful act originated from a criminal organization, armed group or state,⁸⁰ and is carried out through “acts devised, organized and put into practice by a range of agents . . . under a structure that requires operational and functional coordination at the highest levels of the chain of command.”⁸¹

It is relatively easy to guide the criminal investigation of an isolated crime to establish a relationship between the aggressor and the victim. However, this is not the case for addressing individual criminal responsibility when investigating crimes committed by organized structures, because the direct perpetrators or intellectual authors of the crime are far removed from the crime scene. In these cases, the aim of criminal prosecution is to contribute to dismantling those structures and ensuring that their crimes not be repeated, which makes investigating crimes of organized structures especially difficult. Overcoming this difficulty is dependent on the

⁷⁷ *Prosecutor v. Kunarac, Kovac and Vukovic*, Case IT-96-23/1 & IT-96-23/1-A, 2001: paragraph 429. This jurisprudence has been reaffirmed in the following sentences of the ICC: *Prosecutor v. Gbagbo*, Case ICC-02/11-01/11-9-Red, 2011: paragraph 49; *Situation in the Republic of Côte d’Ivoire*, Case ICC-02/11-14, 2011, paragraph 54; *Situation in the Republic of Kenya*, Case ICC-01/09-19-Corr, 2010: paragraph 96; *Prosecutor v. Katanga and Chui*, Case ICC-01/04-01/07-717, 2008: paragraphs 394 and 397; *Prosecutor v. Harun and Abd-Al-Rahman*, Case ICC-02/05-01/07-1-Corr, 2007: paragraph 62. It has also been reaffirmed in the following sentences of the ICTY: *Prosecutor v. Blagojević & Jokić*, Case IT-02-60-T, 2005: paragraph 545; *Prosecutor v. Kordić and Čerkez*, Case IT-95-14/2-A, 2004: paragraph 94; *Prosecutor v. Blaškić*, IT-95-14-A, 2004: paragraph 101; and *Prosecutor v. Kunarac, Kovac and Vukovic*, Case IT-96-23/1 & IT-96-23/1-A, 2002: paragraph 94.

⁷⁸ On this point see *Prosecutor v. Katanga*, Case ICC-01/04-01/07, 2014: paragraphs 1106–1122.

⁷⁹ It is worth recalling the famous view expressed by four governments during Herman Goering’s trial at the Nuremberg Tribunal: “Crimes against the rights of peoples . . . are perpetrated by persons, not by abstract entities, and only through the punishment of those who commit such crimes . . . can respect for the provisions of the right of peoples be promoted.” Letter to the International Military Tribunal August 8, 1945, signed by representatives of the governments of the United Kingdom, United States of America, France, and the Soviet Union. UN Treaty Series 280, 1949 (New York: UN- GA-ILC), 39 cited in Ambos: 96–97.

⁸⁰ The commission of macro-criminal conduct cannot be explained as the result of the deviant conduct of individuals—on their own or as part of small groups—as they would not have the will to carry them out (*political nature of macro-criminality*), nor would they be in a position to access the resources required to repeatedly carry out crimes on a large scale, which requires political state power. As Jaeger points out, in reality, macro-criminality “is the criminality of large collectives, state apparatuses and an unjust political system.” (Jaeger 1998:129, cited in Alpaca 2013:38).

⁸¹ Montoya 2003:24.

criminal investigation, including some form of contextual analysis that facilitates understanding the logic of collective action inherent in criminal organizations. This can be used in formulating charges, and it is this type of analysis which is required in the criminal investigation in context model adopted by the AGO, referred to in this manual as *contextual analysis*.⁸²

System crimes are committed by complex criminal apparatuses. Their commission is the product of a complex structure governed through division of labor among its members, a hierarchy, and different levels of access to information (compartmentalization). This creates a situation in which the intellectual authors of system crimes do not necessarily meet the material authors of the acts. The complexity of these types of crimes has been evident since the Nuremberg trials. The ad hoc international criminal tribunals created to prosecute crimes in the former Yugoslavia (International Criminal Tribunal for the former Yugoslavia or ICTY) and Rwanda (International Criminal Tribunal for Rwanda or ICTR) faced a similar challenge. They developed a prosecutorial approach and investigative techniques that were different to those used domestically to investigate and try ordinary crimes.

In 2006, the Office of the United Nations High Commissioner for Human Rights (OHCHR) put forward a tool that brought together the lessons of these prosecutorial initiatives under the premise “that long-term and sustainable solutions to impunity should aim mostly at building domestic capacity to try these crimes.”⁸³

Based on international experiences of investigation and prosecution of system crimes, Seils and Wierda identified the following lessons for OHCHR.

2.3.1. Basis for the Investigation of System Crimes.

The primary basis for investigating the mass occurrence of serious crimes defined in international criminal law is that its commission generally requires that those responsible be part of some type of organizational structure. According to OHCHR, although for many decades this was generally held to be a state apparatus, “[s]ystem crimes are most often committed by State security forces (army or police) or by insurgent or paramilitary organizations.”⁸⁴

2.3.2. Focus or Strategy for Investigating System Crimes

The rationale underlying the investigation of ordinary crimes is not adequate for the investigation of system crimes. The aim of traditional criminal investigation is the description of unique crimes in the context of social relations in which the victims and victimizers can be identified with relative ease. As OHCHR points out:

⁸² The term *contextual analysis* is preferred to *context* for two reasons: first, because contextual analysis refers to an activity one carries out; and second, because *context* (a noun) refers to a product and, consequently, it is conceivable that at some stage in a criminal process one stops producing a contextual analysis or contextual elements.

⁸³ Seils and Wierda 2006: 1.

⁸⁴ *Ibid.* at 13.

The prosecutor’s work in investigating and presenting most ordinary crimes can be likened to that of a film director, whose task is to describe clearly how a particular event occurred, and whose main concern is describing the carrying-out of a specific criminal act. The clearer the description, the easier it will be for the court to determine responsibility.⁸⁵

The **investigation of system crimes** requires a different approach than what is used by prosecutors for ordinary crimes. As Seils and Wierda point out, “The investigation of system crimes requires an approach closer to that of an engineer. The task is not simply to describe the carrying-out of the criminal act, but to elucidate the operation of the elements of the machinery.”⁸⁶

- The investigation of system crimes requires looking at crimes as the result of the operation of the criminal organization. In other words, the crimes are the manifestation of the existence of the “criminal system.” Thus, one can understand the crime as obeying some degree of planning carried out at various level of the operation of the criminal organization. Consequently, the investigation of system crimes cannot be limited to the reconstruction of each crime as an isolated incident. In this context, it is worth mentioning:

System crimes (as with most organized crime) are generally characterized by a division of labor between planners and executants, as well as arrangements in structure and execution that tend to make connections between these two levels difficult to establish. . . . System crime investigation, whether in relation to a series of criminal acts or an isolated one, requires a detailed exploration of the system itself, and not merely of the results, which are manifested in the underlying crimes that constitute the so-called crime base (e.g., murder, torture, rape, deportation).⁸⁷

- The design of the investigation of system crimes should ensure that the highest ranking authors are investigated and accused, because to only seek out those low-ranking authors may give rise to the perception (if not reality) of pursuing scapegoats.⁸⁸

2.3.3 Some Investigative Techniques

The investigative techniques applied to cases of ordinary crime are not adequate for investigating system crimes. Crime-based reconstruction is not sufficient to establish the methods of participation and degrees of criminal responsibility of the intellectual authors of system crimes. As the OHCHR points out:

85 Ibid.

86 Ibid.

87 Ibid.

88 Ibid. at 7-8.

One of the main difficulties is that most investigative forces base their expertise on crime-scene reconstruction and forensic analysis. This is increasingly so because of the technological advances in forensic pathology. Regardless of the crime, it is clearly essential to prove the facts of the criminal act; however, this procedure alone generally cannot provide the proof of participation of those behind the scenes. Most investigative bodies are not trained to prove such participation through different forms of analysis. The tendency is to overload investigations with crime-scene information that ultimately proves only that a great number of criminal acts were committed. It does not clarify the nature of participation in these crimes or the identity of the intellectual authors.⁸⁹

Given the importance of the context in which criminal structures operate and the contextual elements that guide the examination of factual matters to determine the background to system crimes, the investigation requires the application of investigative techniques from other disciplines that facilitate the elaboration of an analysis to guide the gathering of evidence. Of the possible methodologies, the OHCHR is of the opinion that the following are essential and fundamental:

- the mapping of the universe of suspects and victims;
- the determination of the socio-historic context of the events;
- the characterization of local contexts and dynamics of violence; and
- the analysis of both public and restricted documentation regarding the crimes.⁹⁰

Moreover, the identification of patterns is also important to constructing probative inferences that establish the responsibility of the intellectual authors of system crimes.

Part of the goal of analysis will be to identify patterns. A “pattern” refers to a set of events that, by their frequency, location and nature, imply some degree of planning and centralized control. The use of patterns can help prove that a particular crime was part of a planned process. The legal inferences that can be drawn from the use of patterns in evidence will depend on the facts themselves. Although not all system crimes relate to patterns of events, the investigation of patterns can be crucial in determining the responsibility of those behind the scenes. This issue is particularly important in situations where responsibility may be based on omission, rather than commission. Reconstructing patterns can help build a framework that implies that those behind the scenes knew or had reason to know that the events were occurring or were likely to occur and failed in their duty to prevent them.⁹¹

In conclusion, the investigation of system crimes requires an in-depth analysis of the context in which crimes take place. This is significant because it requires a shift of focus on

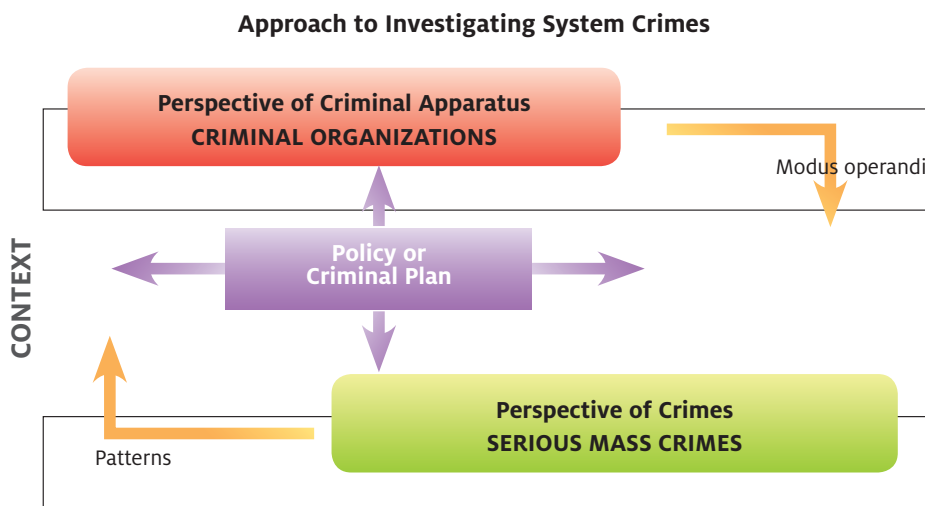
⁸⁹ Ibid. at 13.

⁹⁰ Ibid. at 6 & 14.

⁹¹ Ibid. at 15–16.

the part of the prosecutor—from individual criminal cases, to prosecution in the context of system crimes. Without this level of analysis, understanding and characterizing complex criminal structures would be impossible. In the case of system crimes, crimes at issue are not isolated events, but rather the result of the actions of criminal structures. First, from a programmatic point of view, these crimes can be understood as consequences of existing policies or plans that direct their objectives. Second, from an operational point of view, the manner in which the crimes are committed conforms to the specific modes of operation of such structures. Consequently, the elaboration of patterns from the crimes committed is a crucial task. Finally, an analysis that permits the reconstruction of the *modus operandi* and determines the objectives the criminal organizations (policies or criminal plans) should be carried out. The following diagram shows, in a schematic fashion, the OHCHR guidelines for the investigation of system crimes.

Diagram 2
Flowchart of Guidelines for Criminal Investigation of the Context of System Crimes



2.4. Case Study: Trial of the Military Dictatorship of the Argentinian Juntas

Thousands of people disappeared in Argentina under the military government set up by the National Reorganization Process (1976–1983)⁹². In December 1983, President Raul Alfonsín (in office from 1983–1989) ordered that nine of the members of the three military juntas,⁹³ which took over the government between 1976 and 1982, be tried for “crimes of homicide, unlawful deprivation of liberty and the torture of detainees.”⁹⁴

92 On September 20, 1984, the National Commission on the Disappearance of Persons (CONADEP) — set up in 1983 by President Alfonsín to uncover and clarify the phenomenon of disappearances — published its report *Nunca Más* (Never Again) in which they documented 8,961 cases of disappearances and the existence of at least 340 clandestine detention centers. CONADEP 1984: Chapters 1 & 2, literal D.

93 First military junta (1976–1978): Lieutenant General Jorge R. Videla, Brigadier General Orlando R. Agosti and Admiral Emilio A. Massera. Second military junta (1978–1981): Lieutenant General Roberto E. Viola, Brigadier General Omar D.R. Graffigna and Admiral Armando J. Lambruschini. Third military junta (1981–1982): Lieutenant General Leopoldo F. Galtieri, Brigadier General Basilio Lami Dozo and Admiral Jorge I. Anaya.

94 Decree 158 1983: Art. 2. The text of the decree reads: “without prejudice to any other perpetrator or co-perpetrator, instigators, accomplices of the senior officers mentioned in Art. 1.”

Starting on December 28, 1983, the Supreme Council of the Armed Forces (CSFA) was in charge of the prosecution against these high officials. In October 1984, however, the National Federal Court of Criminal and Correctional Appeals of the Federal Capital decided to assume jurisdiction of case 13/1984, arguing that the CSFA had not made enough progress in the case.⁹⁵ Between April 22 and September 17, 1985, hearings were held on the production of evidence, allegations against the defendants, and defense arguments.⁹⁶ On December 9 of that year, Leon C. Arslanian, in his role as president of the Tribunal, read out the sentence in Case 13/1984.

The case of The Juntas is a significant national experience of bringing to trial the main culprits of system crimes. The main points considered in the extensive findings of the tribunal are discussed below, according to the structure of the contextual elements considered by the Rome Statute in the characterization of crimes against humanity.

2.4.1. An Attack as the Multiple Commission of Criminal Acts Directed Against the Civilian Population

2.4.1.1. Examination of the Criminal Acts

Based on the evidence gathered during the trial, the tribunal concluded that the advent of the military government entailed the enforced disappearance of a significant number of people. The tribunal characterized the multiple criminal acts as follows:

- Of the instances alleged, the tribunal found that the prosecutor proved the unlawful imprisonment of 467 people.⁹⁷ Based on information contained in similar cases,⁹⁸ the tribunal established that between March 24, 1976, and August 18, 1982, 7,936 unlawful detentions were carried out. Of the total, 6,715 (84.61%) were carried out between March 24, 1976, and July 31, 1978.⁹⁹

95 On July 11, 1984, the Tribunal asked the CSFA to investigate the methods used in combatting subversives and terrorists since March 24, 1976, and the possible responsibility of the commanders-in-chief that integrated the three military juntas in their design and execution. On September 25, 1984, the CSFA issued a resolution, in which two statements stand out: "It is an indispensable requirement that the acts committed by the alleged victims be previously established," and "It is hereby noted that, according to the studies carried out to date, the decrees, directives, operational orders etc. that defined the military operations against the terrorist subversives are, as regards content and form, admissible." Extracts cited in Dutrenit, 2004:65.

96 Between April 22 and August 14, 1985, 78 public hearing sessions were held, in which the following evidence was presented: 833 persons testified, 80 testimonies were received through consular missions, and statements of the accused were taken. See Sentence Case 13/84 1985: 2-10; Dutrenit, 2004: 65 and Disappeared Project.

97 Number ascertained from a name count. Sentence Case 13 1985; 60-64

98 With a view to adequately carrying out the evidentiary task of proving the actual occurrence of the events, from the start, the tribunal, in addition to the 700 cases selected by the prosecutor, relied on various sources: 1) documentary and informative pieces on the subject of the investigation, including the *Nunca Mas* report and other information provided by CONADEP; 2) habeas corpus records; and 3) records related to more than 10,000 cases for unlawful imprisonment. Case 13 1985: 86 & 202. The tribunal held that all the information contained in those sources "was useful, pertinent evidence and conducive to the clarification of the truth" (Ibid 202). It also stated that limited probative value was attached to the information provided by CONADEP: "[I]t is worth highlighting that the Tribunal is not required in any circumstances to take as proven an event on the exclusive basis of evidence provided by CONADEP" (Ibid. at 205).

99 Ibid. at 64.

- The tribunal established that on being kidnapped, the “kidnapped individuals were immediately taken to places located within military or police installations or under their control, they were distributed throughout the country and their existence was hidden from public view.”¹⁰⁰ In these centers, detainees were tortured during interrogation.
- The tribunal found that the victimizers decided on three possible fates for victims, after subjecting them to unlawful detention and torture: 1) Some were freed, not before being warned not to tell anyone about their experience; 2) Others were placed at the disposition of the judicial authorities or National Executive Power, without revealing how long their imprisonment had lasted; and 3) Unknown, once their trials were over there was no indication of their whereabouts or fate.¹⁰¹

2.4.1.2. Examination of the Victims as Part of the Civilian Population

As for the victims, the tribunal found that all of the disappeared were people the armed forces considered to be subversives. Accordingly, it declared that the military had wide powers of discretion in deciding who was and was not a subversive.¹⁰² Though this was a source of abuse, the determinative factor that led to the enforced disappearances was the de facto disregard for legal regulations established before the 1976 military coup, the consequence of which was that detainees suspected of having links with subversives were deprived of the protection of the law. This rendered them utterly defenseless in relation to the authorities who had apprehended them.

Legally, the authorization existed to “detain [a] suspect, hold them occasionally and transitorily in a prison or military cell and immediately release them or bring them before military or civilian courts, or before the Executive Power.”¹⁰³ However, the implementation of anti-subversive plans, carried out by troops under military command, represented a “secret derogation [from] the regulations in force.”¹⁰⁴ Paradoxically, they proceeded under the guise of the rule of law, while utilizing practices that undermined respect for it:

100 Ibid. at 90. The tribunal found and classified 39 clandestine detention centers: nineteen operated inside or outside Army installations; two in centers under the control of the Navy; one in an installation under the control of the Air Force; three inside Federal Police installations; four in Provincial Police installations, eight in installations of the Buenos Aires Provincial Police Force; and two in installations of other security forces. Ibid. at 90–120.

101 Ibid. at 145–152

102 In one paragraph of the sentence, the tribunal states: “This discretion in the selection of the target, meant that in many cases the decision to detain fell to those who had no role in the struggle against subversives.” Ibid. at 187.

103 Ibid. at 185.

104 Ibid.

Whilst the operational structure continued to function as before, the subordinates of the accused detained a large number of people, held them clandestinely in military installations or places under their control, interrogated them under torture, held them captive under inhuman living conditions and, finally, they were either given legal status by placing them at the disposition of the courts or the National Executive Power, freed or physically eliminated. They were freed or physically eliminated.

The illegitimacy of this system, and its departure from even exceptional legal norms, arises not only from the violent capture that occurs with disappearance in itself, but also from the concealment of the detention, the fate of those captured and their subjection to unacceptable conditions of captivity, irrespective of the arguments that may be advanced for it.¹⁰⁵

By sanctioning illegitimate acts of violence through a legal process, the system became even more powerful in depriving individuals of their human rights on a massive scale.

2.4.2. Widespread or Systematic Attack

In this case, the tribunal concluded that the phenomenon of mass enforced disappearances constituted a widespread attack. Moreover, its findings indicate it was also a systematic attack. To establish the first, the tribunal looked at the number of proven instances of unlawful detentions, torture, and the concealment of the whereabouts of subversive suspects. Then, using other calculations based on procedural documents, it showed that “the advent of the military government produced a **widespread** significant increase in the number of disappeared persons throughout the national territory.”¹⁰⁶

Additionally, based on a situational analysis of the facts, the tribunal found some **patterns** in the commission of unlawful detentions and torture. Regarding the latter, it concluded that “in the detention centers, the kidnapped were interrogated, in almost all cases, using similar methods of torture . . . Only minor differences in tactics or methods were noted, but the electrocution, the beatings and asphyxiation were repeated in almost all the cases investigated, irrespective of the branch of the armed forces that controlled the center or its geographical location.”¹⁰⁷

¹⁰⁵ Ibid. at 185–186 and 187.

¹⁰⁶ In the paragraph dealing with the length and individualization of the sentences, the widespread character of the execution of the crimes is reiterated. Ibid. at 295.

¹⁰⁷ Ibid. at 120.

2.4.3. Attack as Furtherance of a State or Organizational Policy

2.4.3.1. Characteristics of the Criminal Organization

According to the Tribunal, enforced disappearances were committed by members of the armed forces, the police, and security agencies. In this sense, the combined power concentrated in these institutional organizations became “a clandestine repressive apparatus” disregarding the law.¹⁰⁸ The tribunal highlighted the following characteristics:

Objective. The apparatus was centered on a common objective: the eradication of subversion. Although the objective was legal, the means used to enforce it were illegal in that they consisted of “unprecedented procedures,”¹⁰⁹ which meant the perpetration of serious crimes against the life, physical integrity, and liberty of persons.

Command structure. Just as hierarchy and discipline governed the chain of command in the armed forces,¹¹⁰ the criminal apparatus was also controlled by the commanders of each of the forces. As such, it is likely that the crimes were committed pursuant to these commanders’ orders, especially considering that the commanders also had control over all of the resources required to carry out military operations and the military installations that were used to set up clandestine detention centers. Given the illegal nature of the clandestine repressive regime, orders were not formally transmitted by commanders, but rather were communicated verbally to their subordinates. This created a situation in which “the entire military structure set up to fight subversion continued to function normally under the command of the accused, all that changed was the ‘manner’ in which they fought.”¹¹¹ The commanders were also responsible for guaranteeing impunity for criminal acts that resulted from the implementation of the directives. Regarding this point, the tribunal pointed out:

The guarantee of impunity that the executants received was also part of the approved plan. This ensured that the execution of the actions would be carried out without any interference and in the utmost secrecy. To this end, not only did they take the necessary precautions to impede the intervention of the usual crime prevention mechanisms (e.g. “liberated area”), but they also adopted the strategy of denying the existence of the events in the face of any and all demands from any authority or relatives of the victims, of giving false answers to requests from judges, of avoiding media coverage of news reports related to the disappearances of persons or the finding of corpses, of simulating sham investigations to clarify events, of setting up

108 Ibid. at 193.

109 Term contained in the final document of the military Junta on the war on subversion and terrorism (April 28, 1983), which was cited by the tribunal. Ibid. at 191.

110 The tribunal highlighted that the commanders had denied “the existence of military groups that operated with the commanders’ support.” Ibid. at 189.

111 Ibid. at 268.

important administrative centers to search for the persons, knowing the effort would be useless, of ascribing generic motives to the disappearances, and of placing the entire issue within the framework of an alleged campaign fomented from abroad by the guerrillas themselves.¹¹²

Subordinates. The majority of subordinates followed the orders given by their superiors.¹¹³ Given that the directive “referred to ‘all subversives’ in general terms, it left a wide margin open to the subordinates to define what this meant and proceed accordingly.”¹¹⁴ In regards to the *modus operandi*, the tribunal found five common characteristics to unlawful detentions: 1) kidnappers were members of the armed forces, police, or security agencies, and usually introduced themselves as such, taking care not to identify themselves; 2) a large number of heavily armed people took part in the operations; 3) armed groups warned authorities in the area where they were going to carry out an operation and in some cases received support from them; 4) the majority of kidnappings took place at night and were accompanied by the looting of the dwelling; and 5) vehicles were used to isolate and hide victims from public view.¹¹⁵

Resources to perpetrate crimes. “[T]he events were carried out using the complex range of elements (men, orders, locations, weapons, vehicles, food, etc.) involved in all military operations. Without the essential involvement of all these elements, the events could not have taken place . . . Indeed, as already pointed out, the direct perpetrators could not have carried out the crimes they were ordered to if, in line with their commanders’ orders, they had not been provided with the means to do so. Clothes, vehicles, fuel, weapons and munitions, places of captivity, foodstuffs etc. amounted to indispensable assistance in their execution.”¹¹⁶

2.4.3.2. Examination of the Existence of a State Plan or Policy to Carry Out the Attack

Based on the examination of events surrounding enforced disappearances, the tribunal concluded that the enforced disappearances were not coincidental or random but were the result of a *criminal methodology of fighting terrorism*. The identification of the characteristic patterns of the commission of the crimes and measures the armed forces adopted against the subversive groups allowed the tribunal to establish the existence of an *operational system*. The *operational system* was implemented over a prolonged period of time and with the same characteristics throughout Argentina. Its “customary steps [were] firstly, kidnapping and then the clandestine physical elimination of those who the executants of the orders, at their discretion, designated as subversive delinquents.”¹¹⁷

¹¹² Ibid.

¹¹³ The tribunal highlighted that “all of the bosses and officers that testified in the hearing or in additional proceedings stated that the anti-subversive struggle strictly adhered to the orders of their superior commanders.” Ibid. at 189.

¹¹⁴ Ibid. at 269.

¹¹⁵ The tribunal also found the clandestine detention centers were guarded by persons other than the torturers. Ibid. at 128–145.

¹¹⁶ Ibid. at 268 and 269.

¹¹⁷ Ibid. at 186.

Given the nature of the clandestine, repressive apparatus, the tribunal concluded that the enforced disappearances were the result of orders issued by the commanders-in-chief of the Army, Navy, and Air Force—each one at their own initiative¹¹⁸—to implement the following operational system of fighting against subversion:

In short, it can be said that **the commanders secretly established a criminal methodology of fighting terrorism . . .**

According to what has been substantiated in the case, on or about March 24, 1976, the date on which the Armed Forces overthrew the constitutional authorities and took over the government, some of the accused in their role as Commanders in Chief of their respective forces gave the orders to fight terrorist subversion in a method that consisted basically of the following: a) capturing those who may be suspected of having links with subversives, according to military intelligence reports; b) taking them to military installations or places under military control; c) once there, **interrogating them under torture** with the aim of obtaining the greatest amount of information possible on other people involved [in alleged subversion]; d) **subjecting them to inhuman living conditions** in order to break their moral resistance; e) carrying out the aforementioned items in the utmost **secrecy**, to which end the kidnappers had to hide their identities; preferably carrying out the operations at night, the victims should remain isolated, with their eyes covered, and the perpetrators should deny the existence of the kidnapped and the detention centers to any and all authorities, relatives or associates; and f) a wide margin of freedom [was] given to lower ranking officers to determine the fate of the captive who could be freed, brought before the National Executive Power, subjected to a military or civilian trial or just physically eliminated.¹¹⁹

According to the tribunal, this operational system “was essentially identical throughout the territory of the Nation and prolonged in time.”¹²⁰ Furthermore, the design and establishment of the *operational system* resulted from the overriding priority given to intelligence activities as the guarantor of a triumph over terrorist organizations.¹²¹ Obtaining information that “use of torture, inhumane treatment, forced labor and the belief instilled in the kidnapped that nobody could help them” was considered to be the most ideal and efficient method of achieving this.¹²²

118 According to the tribunal each “commander independently took charge of the planning, execution and control of the actions of their respective force, without any interference or meddling from the other forces.” Ibid. at 185. The tribunal dismissed the idea that the planning, direction, and supervision of anti-subversive actions fell to the military Juntas, as the prosecutor and public ministry maintained. Ibid. at 183–185.

119 Ibid. at 187 & 256 (emphasis added).

120 Ibid. at 190.

121 The tribunal referred to the operation manuals of the three forces. Ibid. at 186.

122 Ibid.

2.4.4. Final Consideration of the Tribunal on the Responsibility of the Accused

Finally, the tribunal decided that the type of criminal responsibility that could be attributed to the accused, regarding the commission of crimes under consideration was “mediate authorship.”¹²³ Beginning with a brief doctrinal exposition on this mode of responsibility as a form of intervention in the perpetration of crimes, the tribunal justified its decision based on the following central argument:

The accused were in command of events as they controlled the organization that brought them about. The incidents tried in this case are not the result of the erratic, lone, individual decisions of those who carried them out, but rather result from the form of combat that the commanders ordered their men to engage in

In this context, the specific executant of the events ceases to have any relevance. Those who controlled the system had complete power over the consummation of the acts they ordered be carried out. Even if there were some subordinate who refused, he would automatically be replaced by another who would do it, from which it can be deduced that the plan could not be frustrated by the will of the executant, whose role is merely that of a cog in a gigantic machine. . . .

So, power is not exercised over a specific will, but rather over an “indeterminate will,” regardless of the executant, the event will take place. . . . [T]he commanders always had in their power the ability to prevent the consummation of the crimes committed. All they had to do was order the termination of the system. Definitive proof of this is that when they judged it necessary, they suddenly stopped the irregular operations, stating that the “war was over,” and thereafter there were no more kidnappings, torture, nor disappearances of persons.¹²⁴

123 The Supreme Court of the Nation confirmed the ruling delivered by the tribunal, although it rejected the qualification of mediate authorship and accepted that of necessary participant collaborators. It also acquitted Roberto E. Viola and Orlando R. Agosti of some of the charges and consequently imposed a lesser sentence. Fallos de la Corte Suprema de Justicia de la Nación 1986:49. The judges Carlos S. Fayt, Enrique S. Petracchi and Jorge A. Bacquè supported the qualification made by the tribunal. *Ibid.* at 49–92.

124 *Ibid.* at 268–269.

3. The Contextual Analysis of the New System of Criminal Investigation in Context Adopted by the AGO

3.1. The Contextual Analysis of the DINAC and Its Duties

According to DINAC, “Criminal investigation in context allows one to understand any criminal phenomenon whose center of gravity is an organization or network.”¹²⁵

In effect, contextual analysis aims to construct systematic explanations of the activity of criminal organizations. It should be understood as a **permanent exercise** that should primarily ensure the consistency of the general design of the investigative strategy of a particular criminal organization and act as a support during its implementation in relation to specific cases or files. To be specific:

- In the **design of the investigative strategy**, contextual analysis is key to identifying those situations that should be investigated and cases that should be selected to uncover the criminal plans of a particular criminal organization.
- In regards to its **execution**, contextual analysis acts as a support to orient the investigation of specific actions, formulate charges against alleged perpetrators, and support their prosecution in court. At the same time, the contextual analyses benefit from findings made by the AGO at each stage of an investigation and/or prosecution. (*See* Diagram 3)

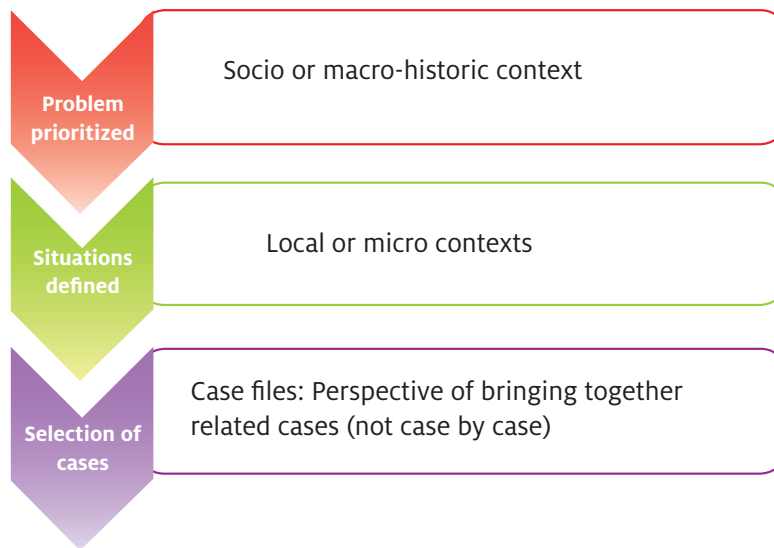
¹²⁵ UNAC, 2013: 4.

Diagram 3
Functionality of Contextual Analysis of Criminal Organizations in the Execution of Investigative Strategies



So far, DINAC has emphasized the use of contextual analysis in the **design of an investigation**. There are three components to the path DINAC has chosen to achieve this: 1) characterize the prioritized problem; 2) identify situations that should initially be investigated, on the presumption that the adoption of contextual criminal investigation is progressive; and 3) formulate a proposal for the selection of cases or processes. (See Diagram 4)

Diagram 4
Route of Contextual Analysis Followed by DINAC to Design an Investigation Pursuant to the New Criminal Investigation System



3.2. Contextual Analysis and Characterization of Problems Prioritized by AGO

As discussed previously, traditional prosecution models that focus on individual perpetrators and victims face challenges when tackling crimes that occur on a mass scale, and crimes that are supported by powerful political, social, and economic forces. These problems arise from the sheer quantity of cases, as well as the many elements

involved in the commission of crime. A socio-historic analysis presents clues to which problems should be investigated and prioritized and reveals the structural elements that facilitated the commission of the crime (e.g., a history of land conflict may point to an investigation of land rights issues).

The production of contextual analyses should aim to formulate a general hypothesis for the investigation, which represents the backbone of the investigation. Such a hypothesis may be arrived at through three fundamental questions:

1. What are the social, cultural, political, economic, ideological, geographic, or military factors that gave rise to or made the emergence and expansion of the criminal organization possible?
2. What are the characteristics of the criminal organization?
3. What criminal plans can be identified?

We will now address some considerations regarding the different methodologies used by DINAC to conduct contextual analyses. Each section will present and discuss the following: general guidelines to orient each specific type of contextual analysis into the socio-historic context that gave rise to the criminal organization, the characteristics of a criminal organization, and the organization's criminal plans; illustrative examples of DINAC's contextual analysis in practice; and international examples of contextual analyses of international crimes.

3.3. Construction of the Socio-Historic Context

3.3.1. General Criteria for the Construction of the Socio-Historical Context

Criminal organizations do not emerge overnight. In one sense their emergence is linked to specific social, cultural, political, economic, ideological, geographic, and/or military factors; and in another, they are intimately linked to the larger historic evolution of social conflict. The socio-historic context is elaborated to identify and describe those factors and conflicts that explain the rise and actions of criminal organizations.

Creating this kind of socio-historic contextual analysis involves a number of challenges. Due to the long length of time during which criminal acts have been committed in Colombia, in conducting a socio-historic contextual analysis it is necessary to distinguish moments or sub-periods. Additionally, the distribution of criminal acts over a large geographic area presents difficulty in the construction of a national socio-historic context. Simply couching criminal investigations in the context of the victimization of certain groups (e.g., journalists, trade unionists, and the UP) does not constitute a socio-historic context. Instead, a socio-historic context should be constructed around specific situations that occurred in specific territories (i.e., regions, states, municipalities, or zones). In the case of the strategy of the FARC-EP, the first socio-historic interpretation would, to a large degree, be confused with a characterization of the structure.

Among all of the issues that could be included in historic context, the following are noteworthy:

- Dynamics of the violence of the armed conflict
- Precedents of official militarization
- Relevant social conflicts
- Actors and political relations
- Economic dynamics
- Geopolitical and geo-economic importance
- Characterization of the population and relevant settlement processes (of particular importance in areas recently colonized)

This method of contextual analysis is of particular importance in the investigation of system crimes perpetrated by guerrillas, paramilitaries, armed forces, and state security agencies in the context of a long-running armed conflict.

Generally, the construction of the socio-historic context is based on secondary sources.

3.3.2. Example: DINAC Analysis of the Socio-Historic Context of the Montes de María Region

The socio-historic context elaborated by the Montes de María Group (GMM), of the National Analysis and Context Division at the Attorney General's Office, dealt with the period 1961 to 2010. This period was subdivided into four sub-periods and concentrated on three issues: the evolution of the land conflict, the dynamics of the armed conflict, and the *parapolítica* phenomenon.¹²⁶

- **First Sub-Period: Agrarian reform, land conflict, and elitist polarization (1960s and 70s).** From the peasant movement to the continuation of the old struggle for land with new actors. In its reconstruction of the socio-historic context of this period, the GMM had the following aim:

We want to look at the effects of agrarian reform on the land conflict and on the preexisting social order, from its implementation up to its decline, with the aim of understanding what happened to the peasant movement and its relationship with the actors that were already present in the region and with those that gradually inserted themselves into the region with their own interests, agendas and history. The utility of this subject lies in that we believe that the judicial investigation should be guided towards the current problem of access to land, which is to be found in old conflicts, but with new actors.

¹²⁶ Grupo de Montes de María, 2013.

Our hypothesis indicates that an investigation about land conflict in Montes de María should include the following points: the polarization and radicalization of social sectors since the 1960s; the construction of enmity as an historical byproduct and as a precondition for the elimination of others (the clash of two conflicting agrarian and social models and the subsequent violent encounters that such enmity catalyzed); the socio-historic conditions in which guerrilla and paramilitary groups established themselves and in which local vigilante and paramilitary groups emerged; and the relationship between the old land conflict, the military strategies employed by the armed actors and the litany of land seizures through the intensification and transformation of the armed conflict.¹²⁷

The GMM put forward a general outline of the land conflict in the region, which revolves around five sequentially linked events:

1. Montes de María was founded as a region in which the *hacienda* (estates) expanded through the theft of land from small-scale peasant farmers and settlers.
 2. Sucre was the epicenter of the emergence of an organized peasant movement that catalyzed the “largest reclamation of land in the history of the country.”¹²⁸
This movement was known as the National Association of Peasant-Farmers, and was particularly known for the sub-group *línea Sincelejo* or *línea radical* (Sincelejo or radical political line).
 3. The organization and mobilization of the peasantry, which had radicalized in comparison to other regions of the country, generated a reaction: “[T]he elite, the landlords, traditional parties and business associations reacted by forming the Chicoral Pact, which halted the process of recognizing the peasants’ claims on land.”¹²⁹
1. “In the midst of this scene of social conflict and polarization, various leftwing movements and guerrillas began to have a presence in the region.”¹³⁰
 2. “The paramilitary groups represented an alliance between sections of the drug trafficking mafia, landlords and politicians, with the cooperation or tolerance of the armed forces, in order to eradicate the guerrillas, control the drug trade and take charge of the land and the local and regional public administrations on the Atlantic coast. They aimed, through corrupt practices and clientelism, to take a slice of public funds transferred by central government for themselves.”¹³¹

127 Ibid. at 12.

128 Ibid. at 19.

129 Ibid. at 20.

130 Ibid. at 21.

131 Quote from Reyes *ibid.* at 23.

- **Second Sub-Period: National isolation to nascent insertion in the dynamics of the armed conflict (1980s–1997).** The analysts had two aims in reconstructing the second historic period:

Firstly, to reconstruct the violence, the established social order, the actors and interests that arose in the subregion during the 1980s and laid the local and regional groundwork for the entry of the AUC. Secondly, to include in the judicial investigation those individuals, families, clans and state agents that played a decisive role in the period and were key to the intensification of the armed conflict after 1997.¹³²

First, the analysis examines the presence of guerrilla groups in the region: FARC-EP; the National Liberation Army (Ejército de Liberación Nacional or ELN); and the People’s Revolutionary Army (Ejército Revolucionario del Pueblo or ERP). Second, it looks at the emergence and expansion of paramilitary groups: it considers the existence of vigilante groups as the precedent for the paramilitaries (“From the beginning of the 1980s small armed groups in the service of local elites, families and drug traffickers emerged with the acquiescence of various sectors of the state”);¹³³ and it analyzes two developments in the four year period (1994–1997), the creation of the CONVIVIR and the emergence of the Peasant Self Defense Groups of Córdoba and Urabá.¹³⁴

- **Third Sub-Period: Intensification of the armed conflict and intensification of the clashes between the armed actors (1997–2002).** This is introduced in the following manner:¹³⁵

Hereinafter we characterize the process of the paramilitary arrival in Montes de María. We outline the genesis of the paramilitary group that established its presence in the sub-region from the end of 1996 until 2005 and we describe the situation of the violent clashes that took place in this period between the different armed actors. We go on to outline the violence of war through the presentation of the data, which was found in the consulted databases.¹³⁶

- **Fourth Sub-Period: Rehabilitation and Consolidation Zones, *parapolítica*, disarmament, demobilization, and the continuity of paramilitarism. The old land conflict in a new setting with new actors (2002–2010).** Two excerpts from the text exemplify the content of this section:¹³⁷

¹³² Ibid. at 12–13.

¹³³ Ibid. at 40.

¹³⁴ Ibid. at 50–63.

¹³⁵ Ibid. at 64–110.

¹³⁶ Ibid. at 13.

¹³⁷ Ibid. at 111–121.

In this period we focus firstly on the effects of the Democratic Security and Defense Policy in the sub-region, which was implemented through the creation of the Rehabilitation and Consolidation Zone (ZRC). Secondly, we address the phenomenon of the capture and reconfiguration of the state by the paramilitaries and certain social sectors, manifested most infamously through the *parapolítica* phenomenon. Thirdly, we revisit some points dealt with in the *first moment* and the *third moment*, with the intention of examining the continuity of the situation, albeit with new actors and settings. And lastly we deal with the demobilization of the BHMM [Heroes of Montes de María Bloc] in July of 2005 as a pretext for analyzing the post demobilization armed structures, more commonly known as criminal gangs [BACRIM].¹³⁸

This section aims to show what happened in Montes de María from Álvaro Uribe's government coming into office in August 2002 to the demobilization of the BHMM on July 14, 2005. Why does the Uribe government represent an inflection point? Because after the implementation of the Democratic Security and Defense Policy, the armed conflict in Montes de María underwent unprecedented and radical change that consisted of an increased sustained military presence that shifted the balance of forces in the region. This strategy was exemplified by the Rehabilitation and Consolidation Zone, which contributed to the collapse and weakening of the guerrilla groups. Furthermore, it opened the path to so-called investor confidence, a little known aspect of development of the region, which consisted of maneuvers used to consolidate various agroindustrial projects in territories that were suspected of having been stolen by the paramilitaries from the peasants. This stolen land was then "laundered," with the complicity of allied functionaries (e.g. land registrars, notaries) who were coopted by these investors and other economic interest groups.¹³⁹

3.3.3. International Perspectives on the Importance of Analyzing the Socio-Historic Context

OHCHR considers analysis of the socio-historic context, the local context, and the characterization of the dynamics of violence to be the type of analysis required to characterize how the state and the guerrilla or paramilitary organizations operated while committing system crimes. OHCHR also considers it necessary to produce "convincing evidence" of the commission of crimes.¹⁴⁰

138 Ibid. at 14–15.

139 Ibid. at 111.

140 Seils and Wierda 2006: 32–33.

The Inter-American Court of Human Rights holds that in all cases submitted to it, it requires that the context of the case be given legal consideration “because the political and historical context is a determinant element in the establishment of the legal consequences of a case. Such consequences include the nature of the violations of the [American Convention on Human Rights] and the corresponding reparations.”¹⁴¹

Moreover, in the first instance of the ICTY, the case against *T. Blaškić*, the court stated that “the general historical circumstances and the overall political background”¹⁴² are one factor—among others—that allow one to infer the existence of a plan to carry out an organized or systematic attack against a civilian population, that constitute crimes against humanity.

In general, the international criminal tribunals have given over part of their sentences to describing the socio-historic and economic context of the territory where the conflict took place. For example, the sentence handed down by the First Chamber of the ICC, which found Thomas Lubanga guilty of the war crimes of recruiting, training, and using minors under the age of 15 to actively take part in hostilities, contains an extensive section explaining the historical, political, and economic context of the Ituri region.¹⁴³ The ICC’s view on the context was formed by evaluating the evidence given by expert witnesses (one presented by the prosecutor and another summoned by the judges themselves) as well as the evidence furnished by witnesses for the prosecution and the defense.¹⁴⁴

3.4. Characterization of the Criminal Organization

3.4.1. General Criteria for the Characterization of the Criminal Organization

The characterization of a criminal organization aims to determine its composition, its internal structure (command structure), how it functions, its criminal plans and its modus operandi. According to the typical division of labor, such a characterization should also aim to establish the relationships that exist between the military structure and representatives of the political, economic, and military powers, if they were a part of the criminal organization.

The criminal organization is usually characterized by the existence of a plurality of individuals that share:

141 IACHR Case *Massacre of La Rochela v. Colombia* 2007: paragraph 76. It is important to point out that the court took this view because representatives of the Colombian state declined to consider the context put forward by the plaintiffs. The court succinctly explained the Colombian state’s position thus: “Regarding the events described in the instant case, the State asserted that it has only acknowledged its responsibility for ‘the facts which specifically relate to the ‘The Rochela’ massacre, whereby it ‘categorically rejects any findings about the ‘context’ [which] might suggest that ‘paramilitarism’ was a product of a generalized policy of the Colombian State.’ As consequence, the State rejected all evidence that support the allusion of this context (supra para. 31). Therefore, the State argued that its recognition of responsibility refers only to ‘isolated acts’ committed by various state agents.” *Ibid.* at paragraph 70.

142 *Prosecutor v. Blaškić*, IT-95-14-T 2000: paragraph. 204. These factors were considered by the Second Pre-trial Chamber of the ICC to infer the existence of a nonstate policy in line with Article 7 (2) of the Rome Statute in the decision authorizing the prosecutor to open an investigation in the case of Ruto & Sang, mentioned above: ICC-01/09-19 paragraph 83.

143 *Prosecutor v. Lubanga*, Case ICC-01/04-01/06-2842, 2012: paragraphs 67–71.

144 *Ibid.* at paragraph 67.

- common unlawful purposes aimed at the ongoing commission of serious crimes that correspond with the targets of their criminal plans;
- division of labor that makes the organization more complex and leads to the specialization of its members;
- existence of a stable structure, be it vertical or horizontal, rigid or flexible, that usually has a code of conduct accepted by the members of the group, which facilitates the coordination of the criminal actions;
- existence of decision making mechanisms, centralized or decentralized;
- existence of measures that ensure compliance with orders; and
- capacity and resources to carry out the organization's unlawful acts.

The concept of a criminal organization consists as part of unlawful organizations (e.g., irregular armed groups; as well as those structures or members of lawful organizations that decide to perpetrate crimes in a coordinated fashion among themselves or with a third party.

Typically secondary sources provide general analyses of particular criminal organizations. Only access to primary procedural documents guarantees a sufficiently complete characterization of criminal organizations.

3.4.2. Example: DINAC Characterization of the Paramilitary Project in Urabá

The Urabá Group of the National Analysis and Context Division at the Attorney General's Office put forward the following characterization of paramilitarism in the region:

Recently the High Court of Bogotá, in its sentence against Hérbert Veloza García, alias H.H., expressed the view that paramilitarism, in addition to having a military component, included different forms of collaboration with the armed forces and had political and economic components. In keeping with its opinion, it issued an order and exhortation for a criminal investigation of the economic component of paramilitarism, which falls under the jurisdiction of the Attorney General's Office:

Thirty Fifth: Order *the investigation of the traders, cattle ranchers and banana growers in Urabá that were allegedly involved in financing, collaborating with, or benefiting primarily from the activities of the Bananero Bloc of the Peasant Self Defense Group of Córdoba and Urabá (ACCU), according to the spontaneous declarations of HERBERT VELOZA GARCÍA and RAÚL EMILIO HASBÚN MENDOZA . . .*

Fortieth: Exhort *the Attorney General's Office, in particular the Delegate Offices for Justice and Peace and the Analysis and Context Unit, to prioritize undertaking investigations to uncover patterns of macro-criminality, make progress in the identification of the political and economic components of paramilitarism, reconstruct the judicial truth of these events and investigate, try, and sentence those responsible.*¹⁴⁵

The exhortation of the High Court of Bogotá regarding “the identification of the political and economic components of paramilitarism” serves as the basis for achieving a systematic investigation of this phenomenon from a criminal law perspective.

Upon starting such an investigation, the first thing that jumps out is the high number of violent acts perpetrated by paramilitary groups particularly, though not exclusively, against the life and personal integrity of thousands of people, as has been acknowledged by the *postulados* (demobilized paramilitary participating in the justice and peace process under Law 975 of 2005). There were many violent events that did not occur in isolation, but rather were the immediate consequence of the presence of the paramilitary armed groups in the territory. Regardless of who directly carried out the violence, it was organized and intentional, whose deployment, for some, was necessary.

In the majority of cases, the confessions of the *postulados*, a *sine qua non* requirement for them to obtain alternative punishments,¹⁴⁶ and the investigations carried out by the AGO,¹⁴⁷ have allowed the partial identification of those who were the direct perpetrators of numerous crimes and the reconstruction of the orders and military plans that oriented the commission of these crimes. Nonetheless, questions remain to be answered. Who planned this violence? Who organized the mechanisms capable of perpetrating thousands upon thousands of crimes? For whom was it necessary to deploy and maintain this violence? Answering these questions is of supreme importance for the judicial functionaries in Colombia, as in general, criminal responsibility for the commission of crimes committed by the paramilitaries does not end with the investigation, trial, and punishment of the direct perpetrators and military commanders.¹⁴⁸

With respect to this problem, the Urabá Group proposed that as a criminal organization, the paramilitary project be held responsible for the commission of system crimes, as follows:

¹⁴⁵ High Court of Bogotá, Chamber of Justice and Peace, *Partial Sentence against Hébert Veloza García*, File No. 11-001-60-00 253-2006 810099, Internal File 1432, 30th of October 2013, M. P. Eduardo Castellanos Roso, 555 y 557 (emphasis added).

¹⁴⁶ On the benefits of alternative punishments see Article 3 of Law 975 of 2005.

¹⁴⁷ In compliance with the third point of Article 17 of Law 975 of 2005.

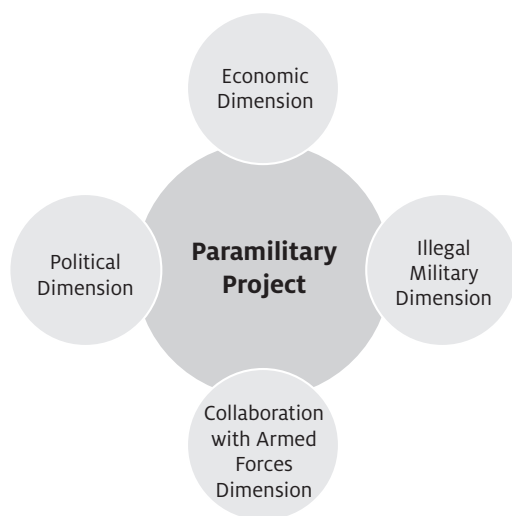
¹⁴⁸ In a few cases, pursuant to instructions from the judicial functionaries of the Peace and Justice Law, the Colombian judiciary has sentenced politicians, businessmen, members of the armed forces, and other classes of people who were connected in different ways to the paramilitary armed groups and behind their regional expansion and benefitted from the violence they unleashed.

The violence carried out by the paramilitary groups did not happen in a vacuum nor was it superfluous; on the contrary, it took place in the midst of the tensions of the existing social conflicts in the regions where the paramilitary groups expanded and reflected the diverse interests of those actors who came together around a common project. From the findings of the Attorney General’s Office in the course of their criminal investigations of various paramilitary structures, and in line with the conclusions of multiple social studies, it can be affirmed that paramilitarism constituted a project: the **paramilitary project**. According to the Royal Spanish Academy, the term project means “Plan and arrangement made to carry out an agreement or for the execution of something important,” another definition is “Design or intent to carry out something.” So, characterizing the paramilitary project requires answers to at least three questions: Who gave the orders? How? And to what end?

In the case of the Urabá Group, the macro-context allowed for the definition of the following general focus of analysis:

Illustrative Case of the Criminal Plan. The AGO considers the paramilitary project in Urabá to be an “**illustrative case of the criminal plan**” or, in other words, a “factual situation representative of the patterns of criminal conduct characteristic of a particular criminal organization.”¹⁴⁹ In that regard, it is understood that the paramilitary project is not just composed of military structures, but rather corresponds to an apparatus that brings together at least four general dimensions: 1) military; 2) economic; 3) political; and 4) relationship with the armed forces. (See Diagram 5)

Diagram 5
Paramilitary Project and Its Dimensions



¹⁴⁹ Fiscal General de la Nación, 2012: 27.

Based on some of the contextual analyses that the National Peace and Justice Unit of the AGO have forwarded to the courts and the examination of some of the decisions handed down by them and the Supreme Court of Justice,¹⁵⁰ paramilitarism can be considered to be a global project with four main dimensions:

- **Illegal military dimension.** This covers the illegal military structures themselves that were known nationally as the Self-Defense Groups of Colombia. Historically, these groups adopted different names and then organized themselves into *blocs* or *fronts* as they grew. Their members are the most direct agents of violence.
- **Economic dimension.** There is abundant evidence that paramilitary groups exercised violence in an instrumental way to further their economic interests. In many regions, violence was a necessary condition for actors from diverse economic sectors to ensure their ability to conduct highly profitable business dealings, both legal (varied) and illegal (particularly drug trafficking and contraband). On many occasions such sectors provided economic resources for the upkeep of armed paramilitary structures; in the majority of cases, extortion was a complementary means used by these structures to finance themselves.
- **Political dimension.** In the majority of regions, the violence of paramilitary groups was also functional to the maintenance of the local and regional established order. As such, the paramilitary project turned real or alleged political and social opposition to the government into priority targets. Once consolidated on a territorial level, the paramilitary project designed and implemented strategies to coopt local administrations, public corporations, and other institutions. Such strategies became national in scope. This phenomenon is commonly referred to as *parapolítica*.
- **Collaboration with armed forces dimension.** Paramilitary violence also had a counterinsurgency element. It was particularly evident at the beginning of the paramilitary project that the creation of illegal armed groups was inspired by ideas of the National Security Doctrine, such as the idea of an “internal enemy,”¹⁵¹ the distinction between an “insurgent civilian population” and “armed group,”¹⁵² and the option of fighting the insurgent threat (not just the

¹⁵⁰ Justice and Peace Chambers of the High Courts of Barranquilla, Bogotá and Medellín. Having presented charges, the prosecutors from the National Peace and Justice Unit proceed against the accused and present their case during the hearings on the judicial review of the charges. The majority of prosecutors and investigators have included analyses of the regional contexts in which specific paramilitary groups operated as well as general characterizations of them, particularly in relation to the composition and functioning of the military structures.

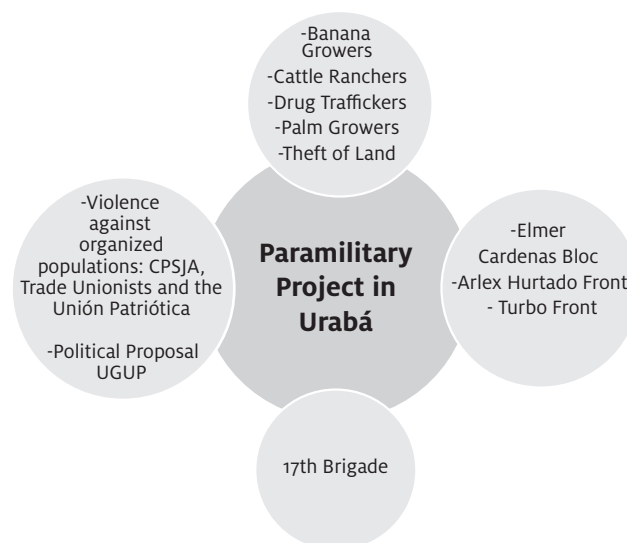
¹⁵¹ One publication of the Colombian army reads: “In modern warfare the enemy is hard to define . . . the dividing line between friends and enemies is within the nation itself, within a city and sometimes within a family . . . Anybody that, in one way or another, favors the aims of the enemy should be considered a traitor and treated as such.” Colombian Army *La guerra moderna*, Bogotá, Biblioteca del Ejército, 1963, 32–33.

¹⁵² On this distinction see Comando del Ejército, *Reglamento de combate de guerrillas-EJC 3-10. Reservado*, Bogotá, Imprenta de las Fuerzas Militares, 1987, 19. The principle behind such a statement was enunciated by Retd. General Álvaro Valencia Tovar: “The insurgency does not concentrate itself in particular areas, but rather seeks to propagate itself with the greatest speed possible to all areas of the nation.” Retd. Colonel Orlando Zafra Galvis also puts forward this idea: “The guerrillas are just an appendix of the subversives and have less importance than what they are generally attributed; the danger lies in a subversive process, which is comprised of what the insurgents term the political or psychological war. This type of war is aimed at taking control of human centers: to turn the people into fanatics of extremist ideologies; to set up bodies in charge of manipulating the masses.” Orlando Zafra “Conceptos sobre inteligencia en la guerra subversiva”, in *Revista de las Fuerzas Armadas*, Bogotá, n.º 122, January to March, 1987, 39.

guerrillas) through strategies of “removing the water from the fish.”¹⁵³ In some cases the omission or collaboration of members of the armed forces with the paramilitary project was so obvious that for the last two decades international organizations for the protection of human rights recommended that the Colombian state remove “from service all those members of the armed forces and police that have formed part of or supported these groups,”¹⁵⁴ and that the armed forces accept “as a priority the taking of effective action to disarm and dismantle armed groups, especially paramilitary groups.”¹⁵⁵

Based on contextual elements identified in the socio-historic context and the review of case files, the GU outlined the specific aspects of the paramilitary project.

Diagram 6
Dimensions of the Paramilitary Project in Urabá



3.4.3. International Perspectives on the Importance of Analyzing the Various Dimensions of Criminal Organizations

The structure of the criminal organization has been the object of special attention in the international criminal tribunals, with respect to determining the contextual elements of crimes against humanity and the type of criminal responsibility assigned

153 The 1987 military regulations read: “The isolation of the civilian population from the guerrillas [must be guaranteed]” as “the success of a guerrilla movement is directly related to the growth of its military capability and the support it gains from a wide sector of the civilian population . . . Without the civilian population the guerrillas would be at the mercy of fortune and dangerously reduced to their vulnerable material means, which do not represent a significant military threat.” Comando del Ejército, *Reglamento de combate de guerrillas-EJC 3-10. Reservado*, Bogotá, Imprenta de las Fuerzas Militares, 1987, 52 & 73.

154 United Nations, Report of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, Visit to the Republic of Colombia 1989. Doc. E/CN.4/1990/22/Add.1.Paragraph 67.

155 United Nations, Report of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, Visit to the Republic of Colombia 1994, January 16th, 1995. Doc. E/CN.4/1995/111. Paragraph 124.

to the accused. At the ICC, crimes against humanity require that the prosecutor not only show the existence of a widespread or generalized attack against a civilian population, but also the existence of a state or organizational policy.¹⁵⁶

The Rome Statute does not lay down criteria for the term “organization,” but the ICC has expressed that “organization” does not only include state-like organizations and that the decisive criterion is whether the group “has the capability to perform acts which infringe on basic human values.”¹⁵⁷ At the same time, though it is not an exhaustive list, the ICC takes into account the following factors to establish the existence of an organization: 1) existence of a group under an established command structure or hierarchy; 2) availability of means to carry out a widespread or systematic attack against the civilian population; 3) control over a part of the territory or state; 4) existence of a main objective to carry out criminal actions against the civilian population; 5) intention to attack the civilian population explicitly or implicitly articulated by the group; and 6) if the group is part of a larger group, it must fulfill some or all of the aforementioned criteria.¹⁵⁸

Furthermore, the interpretation of Article 25(3)(a) of the Rome Statute, which provides for criminal responsibility for mediate authorship and co-perpetrators of crimes, requires the existence of an organizational apparatus of power that serves the object and purpose of enabling a perpetrator to commit crimes through others. Among the requirements that need to be met in order to apply Article 25(3)(a), in the *case against Germain Katanga and Mathieu Ngudjolo*, the Pre-Trial Chamber II of the ICC established that an organization should have a hierarchical structure with superior–subordinate relationships and sufficient members to guarantee the orders of its leader are executed, if not by one subordinate then by another. The chamber concluded that members of the organization were interchangeable, expendable, and replaceable, to the extent that even without a unique individual subordinate, once a leader had set a crime in motion, the functioning of the criminal apparatus would ensure its execution.¹⁵⁹ A leader should, thus, have control over the group. This may be evaluated by examining, among other factors, the capability to hire and sanction its members, train them, and provide them with resources.¹⁶⁰

3.5. Preliminary Identification of Criminal Plans

3.5.1. General Criteria for the Preliminary Identification of Criminal Plans

A criminal plan refers to the set of coordinated and concerted actions by one or more people or criminal organizations that rely on resources available to the organization to achieve a specific aim. The plan generally consists of the commission of crimes varying in type and severity, which is to say it typically includes the infringement of a range of laws. Its execution corresponds to the *modus operandi* of the

¹⁵⁶ Article 7.2 Rome Statute. See *supra* numeral 2.2.3.1.

¹⁵⁷ *Situation in the Republic de Kenya* ICC-01/09-19-Corr: paragraph 90

¹⁵⁸ *Ibid.* at paragraph 93.

¹⁵⁹ See *supra*, numeral 2.4.4, Trial of the Juntas of the Argentinian military dictatorships.

¹⁶⁰ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo*, ICC-01/04-01/07-717: paragraphs 511–518.

criminal organization. From a temporal point of view, criminal plans and the *modus operandi* that materialize are not static, but, instead, tend to change and transform themselves.

In the conception and execution of a criminal plan the participation of the entire organization is not required. Thus, for instance, various plans with dissimilar objectives representing different sectors can converge within the organization.

The identification and reconstruction of criminal plans requires two complementary tasks. From the perspective of the criminal organization, a deductive task: there is a need to identify and characterize the **modus operandi** that turns the objectives into results (policy or criminal plan). From the perspective of the events (results), an inductive task: a need to identify and characterize possible **patterns**, i.e., similar characteristics of the crimes and the relationship between them, as their occurrence is necessary to meet the objectives of the criminal plan.¹⁶¹ Crimes and patterns act as the link between policy or criminal plan, *modus operandi*, characterizing **organized or planned violence** and distinguishing it from other forms of violence or criminality. (*See supra* Diagram 2)

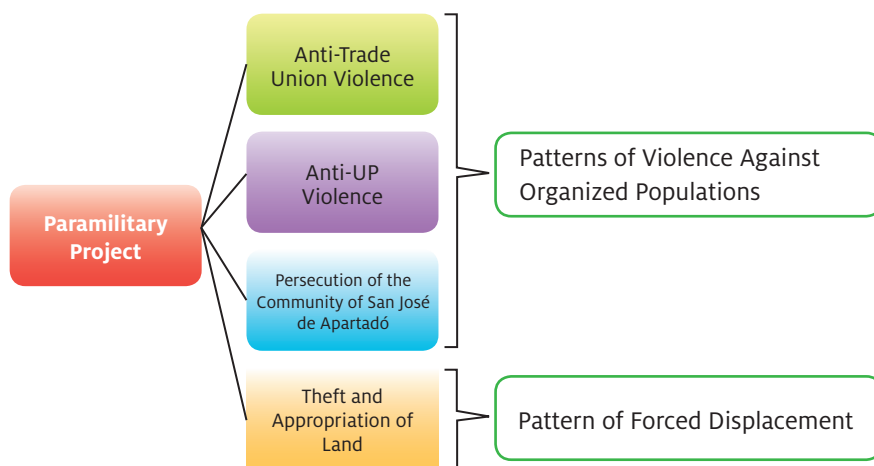
3.5.2. Example: Identifying Two Large-Scale Criminal Plans of the Paramilitary Project in Urabá

Based on the findings of analyzing socio-historic context, conducting the preliminary characterization of the paramilitary project in Urabá, and reviewing the case files, the GU preliminary identified two criminal plans:

In Urabá, and other places, the paramilitary project carried out two large-scale plans: i) a strategy to seize land (usurpation and appropriation); and ii) a strategy of planned violence against organized communities. (*See* Diagram 7)

Diagram 7

Selection of Identified Strategies of the Paramilitary Groups in Urabá



¹⁶¹ The reference points for finding patterns are the criminal organization and its plans (or policies or objectives). Thus, the number of crimes that correspond to the same type of infraction or the similar traits that they may have due to the time and place of their occurrence are not patterns in and of themselves.

3.5.3. International Perspectives on the Importance of Identifying Criminal Plans

International tribunals have also considered it essential to establish a common agreement or plan in order to determine the criminal responsibility of the accused. For example, in the sentencing of Thomas Lubanga, Trial Chamber I of the ICC identified criteria necessary to establish criminal responsibility as a co-perpetrator under Article 25(3)(a):

- At least two people must take part in the commission of the crime.¹⁶²
- There must be sufficient risk that, if events follow the ordinary course, a crime will be committed;¹⁶³ even though the commission of the crime need not be the overarching goal of all the members who take part in the wider plan.¹⁶⁴
- The plan need not be explicit and it can be inferred from circumstantial evidence.¹⁶⁵ In the case of Lubanga, the Chamber was of the view that the common plan consisted of the construction of an army to ensure political and military control of the *Union des Patriotes Congolais/Force Patriotique pour la Libération du Congo* over Ituri. The execution of this plan resulted in the conscription, enlistment and use of children under the age of 15 to participate actively in hostilities, a consequence which occurred in the ordinary course of events.¹⁶⁶ Thomas Lubanga acted with intent and knowledge, being aware of the factual circumstances that established the existence of the armed conflict and of the nexus between those circumstances and his conduct, which resulted in the conscription, enlistment and use of children under the age of 15 in the armed conflict.¹⁶⁷

Recently, Trial Chamber II of the ICC also defined the notion of *plan* (or common purpose) when the accused acts not as the main perpetrator, but as an accessory according to Article 25(3)(d).¹⁶⁸ The chamber has considered that a common purpose need not have been formulated previously; on the contrary, it may materialize extemporaneously and be inferred from the subsequent concerted actions of the group.¹⁶⁹ The chamber confirmed that the group need not pursue the commission of the crime as their ultimate aim; instead, it is sufficient that the common purpose pursued (e.g., a goal of a political-strategic nature) involves the commission of crimes and that the accused shares the same intent as the group.¹⁷⁰

162 See *Prosecutor v. Lubanga*, Case ICC-01/04-01/06-2842, 2012: paragraph 980.

163 Ibid. at paragraphs 984 & 987.

164 Ibid. at paragraph 985.

165 Ibid. at paragraph 988.

166 Ibid. at paragraphs 1136 & 1351.

167 Ibid. at paragraph 1357. The Pretrial Chamber I interpreted direct intent in the second degree regulated in Article 30(2)(b) as knowledge that there is a risk that the consequence will occur in the future. A low risk is not sufficient. Ibid. at paragraph 1012.

168 Article 25(3)(d) of the Rome Statute criminalizes the contribution of any person to the “commission or attempted commission of such a crime by a group of persons acting with a common purpose.”

169 *Prosecutor v. Katanga*, Case ICC-01/04-01/07-3436, 2014: paragraph 1626.

170 Ibid. at paragraph 1627. Articles 25 (3)(a) and 25 (3)(d) refer to two types of distinct contributions to the perpetration of crimes. Article 25(3)(a) refers to the commission of crime as an individual, jointly with another person or through another person, whereas Article 25(3)(d) addresses individuals that “in any other way contribute[s] to the commission or attempted commission of such crime by a group of persons acting with a common purpose.” Furthermore, Article 25(3)(d) does not require that the accused be part of the group or plan.

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