Faculty of Law
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THE MEANINGS OF VICTIMHOOD '*FROM BELOW*':

How Victims of Mass Atrocity Use the Category of Victim in Colombia and its Relevance for Victims at the International Criminal Court

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ACADEMIC DISSERTATION

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Abstract

This dissertation focuses on victims of mass atrocities, subjects who are often portrayed in international law discourses as disempowered, passive, defenceless and docile. This portrayal prevents international law operators from evaluating the potential of domestic practices that are not only agentic, but may contribute to the development of international law. In focusing on victims of mass atrocities moreover, this thesis connects international law with domestic practices of victims of mass atrocities that resort to the category of 'victim' as well as other categories from international law in their struggles. The main contention of the dissertation is that domestic practices of those who use the language of international law, such as victims of mass atrocities, do not merely adopt such language as it is. Instead, they infuse this language with meanings that support their particular struggles and, through their actions, they also influence the formation of an identity associated with the category of victim.

The dissertation consists of four articles and a summarising report. It has two main focal points: first, it focuses on the practices of the International Criminal Court (ICC) with regard to victims of mass atrocities; second, it focuses on cases of victims of mass atrocities that resort to the category of victim and other categories from international law, in Colombia. By contrasting these two, I suggest that there are varied and rich contributions through which victims of mass atrocities themselves can influence not only the shaping of legal categories, but more importantly, their own representations and identity.

In Article I, I refer to the work of Jacques Rancière on politics, to reflect on victims of mass atrocity and their participation in the International Criminal Court. In practice, despite including a framework for victims' participation, the International Criminal Court does not really provide victims with any spaces for self-representation. The reason is that this framework is based on an understanding of these victims as essentially disempowered individuals that must, therefore, be represented by others. This exclusion, I conclude, perpetuates the limited depiction of victimhood.

Article II deals with the Peace Community of San José de Apartadó and its use of the category of victim. I show the group has a complex identity that challenges the representations of victims as defenceless and disempowered. I suggest that the group does not simply embrace international law, but attempts to develop it further in creative ways. Article III deals with the Movement of Victims of State

Crimes (MOVICE). I show that through the category of victim, Movice attempts to introduce an alternative narrative of the internal armed conflict. I suggest that Movice is an example of how a movement of victims can adopt categories of international law to frame their struggles, and in doing so, infuse them with new meanings. While still focusing on Colombia, Article IV zooms out to include actions that are considered as agentic, as well as those that support the stereotype of the passive and defenceless victim. I suggest that the different actions of both victims and the government contribute to the formation of an identity of the victim, an identity that is never fully realised but always in dispute.

Finally, in the summarising report, I reflect upon how the method of this dissertation combines a critical approach to law with an approach *from below* that considers domestic practices as relevant for international law. Moreover, I discuss three concepts that represent three different perspectives from which I consider the victims of mass atrocities, namely as political subjects, as subalterns, and as a disputed identity. I conclude by reflecting on the possibility of emancipation through the struggles that utilise the language of the law.

Abstrakti

Tämä väitöskirja käsittelee vakavien kansainvälisten rikosten uhreja. Kansainvälisen oikeuden diskursseissa uhrit esitetään usein voimattomina, passiivisina, puolustuskyvyttöminä ja alistuvina. Uhrien esittäminen tällä tavalla estää kansainvälisen oikeuden toimijoita arvioimasta potentiaalia sellaisissa kansallisissa käytännöissä, jotka korostavat toimijuutta ja voivat osallistua kansainvälisen oikeuden kehittämiseen. Keskittymällä kansainvälisten rikosten uhreihin väitöskirja yhdistää kansainvälisen oikeuden kansallisiin käytäntöihin, joissa uhrit käyttävät 'uhrin' kategoriaa ja muita kansainvälisen oikeuden kategorioita. Esitän, että kansainvälisen oikeuden kieltä käyttävät uhrit eivät ainoastaan omaksu kansainvälisen oikeuden kieltä sellaisenaan. Sen sijaan uhrit kyllästävät kansainvälisen oikeuden kielen merkityksillä, jotka tukevat heidän kamppailujaan. Uhrit myös vaikuttavat oman toimintansa kautta kansainvälisen oikeuden uhri-kategoriaan liittyvän identiteetin muodostumiseen.

Väitöskirja koostuu neljästä artikkelista ja tiivistelmästä. Väitöskirja keskittyy kahteen kontekstiin. Ensinnäkin väitöskirja keskittyy kansainvälisen rikostuomioistuimen kansainvälisten rikosten uhreihin liittyviin käytäntöihin ja oikeuskäytäntöön (Artikkeli I). Toiseksi väitöskirja käsittelee Kolumbiaan sijoittuvia esimerkkejä, joissa kansainvälisten rikosten uhrit hyödyntävät uhri-kategoriaa ja muita kansainvälisen oikeuden kategorioita (Artikkelit II, III ja IV). Rinnastamalla nämä kaksi kontekstia esitän, että kansainvälisten rikosten uhreilla on useita ja rikkaita tapoja vaikuttaa omaan identiteettiinsä, oikeudellisten kategorioiden muodostumiseen sekä siihen, miten uhrit esitetään kansainvälisessä oikeudessa sekä kansallisissa yhteyksissä. Väitöskirjan yhteenvedossa käsittelen lisäksi väitöskirjan metodia. Metodi yhdistää kriittisen lähestymistavan oikeuteen sekä 'alhaalta ylös'-lähestymistavan (approach *from below*), joka pitää kansallisia käytäntöjä relevantteina kansainväliselle oikeudelle. Käsittelen kansainvälisten rikosten uhreja kolmesta eri näkökulmasta käyttäen apuna poliittisten subjektien, alistettujen (subalterns) ja kiistellyn identiteetin käsitteitä. Lopuksi pohdin emansipaation mahdollisuutta oikeuden kieltä käyttävien kamppailujen kautta.

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During the first two years of my doctoral studies, I often had the chance to read other doctoral dissertations as part of my research. The acknowledgment section always puzzled me… so many names, so many people to thank to. I thought of my own experience and could not really see it reflected in that long enumeration of names. Of course, that impression changed radically during the second half of my doctoral studies. Today, when I turn back to think of all the people who, in one way or another, in smaller and larger degrees, influenced, helped, contributed, commented, criticised, praised, or supported my work, I understand how their participation was simply essential to my research. Thus now, the notion that the doctoral thesis could better be described as the result of a collective process – a notion often present in acknowledgments sections – seems far from an exaggeration and I can fully endorse it as one that describes my own process. There is no way in that I could have arrived to this point without the interaction with different scholars who allowed me to see the flaws and values of my work.

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Finally, in this list of acknowledgments, I must thank the person who undoubtedly became my pillar during this process: my husband Daniel. He not only provided emotional support, patience and love, but he also heard me countless times rehearsing arguments, ideas, possibilities for my research. Any attempt to put into words the many different ways in which his support was fundamental for this achievement, would be vane.

Contents

List of original publications
This thesis consists in the following publications:

I **Tapia Navarro**, **Nadia**, 'Victims of Mass Atrocity: Meaningful participation through Rancière's lens' (2019 — Submitted) *London Review of International Law*.

II —— 'A stubborn victim of mass atrocity: the peace community of San José de Apartadó' (2018) 50 *The Journal of Legal Pluralism and Unofficial Law*, 188.

III —— 'The Category of Victim "From Below": the Case of the Movement of Victims of State Crimes (MOVICE) in Colombia' (2019) 20 *Human Rights Review,* 289.

IV —— 'The disputed identity of the victim of mass atrocity and the strategic use of international legal concepts in Colombia' (2019 — Submitted) *No Foundations: An Interdisciplinary Journal of Law and Justice*.

Preface

In 2012, I had the chance to intern for Judge Elizabeth Odio Benito at the International Criminal Court, in The Hague. She was one of the three judges of Trial Chamber I, responsible for the first case to be taken to trial, the case of *The Prosecutor vs. Thomas Lubanga Dyilo.* I arrived at a special moment: As the first verdict had already been rendered declaring Mr. Lubanga guilty, the first decision establishing principles and procedures for reparations to victims was about to be delivered. Although my contributions as an unpaid intern were, of course, only marginal, I was thrilled to feel part of this landmark decision. One of the novelties of the ICC was precisely the possibility for victims of mass atrocities to participate in the proceedings and to seek reparations against the convicted person. The common word when talking about this feature was that, at the ICC, victims were, for the first time, central to the international criminal system, thus overcoming the limitations of previous international criminal tribunals. Unlike the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the ICC had granted victims rights that were absent from those other tribunals. Because of this, the decision felt not only as a landmark for international justice, but also, as a symbolic landmark for the victims, namely children that had been abducted and forced to take arms and commit terrible atrocities.[1]

As the former prosecutor stated, at least a couple of times: 'My mandate is justice, justice for the victims.'[2] This sentiment, namely the idea the ICC was an institution working to deliver justice for victims of mass atrocities when this could not be done domestically, seemed to drive a lot of the work that was done at the ICC. Certainly, it was inspiring to see so many bright professionals from different

[1] In 2012, Thomas Lubanga Dyilo was found guilty of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities and was sentenced to 14 years of imprisonment. See: https://www.icc-cpi.int/drc/lubanga

[2] This particular phrase was used at least a couple of times, see: https://www.icc-cpi.int/Pages/item.aspx?name=press%20release%20media%20advisory_%20icc%20prosecutor%20visits%20egypt%20and%20saudi%20arabia and http://www.lse.ac.uk/humanRights/events/ICC.aspx

corners of the world working guided by the idea that the ICC was an institution working to fight impunity and bring justice to affected communities. Judge Odio Benito herself, was profoundly committed to that idea, and I found her commitment truthful and inspiring.

However, after having worked at the Court for a few weeks, I was told that a victim was coming to testify before the Court and encouraged to take the morning off and attend the hearings where the victim would testify as it would allow me to better comprehend the complexities of the work of the Court.

A victim. One Victim.

There was a certain dissonance between what I was working on — the draft text of the first decision establishing principles on reparations for victims, based on the idea that victims of the crimes were central to the ICC —and the fact that having one victim at the court seemed to be a rare event that I should not miss. It was not until later though, during my doctoral studies, that I was able to articulate that dissonance. It was disappointing to see that, in an institution whose work is often legitimised by the claim that justice is being brought to victims, the presence of a single victim was exceptional enough so that, in a six—month period, this would occur only a few times. As I articulated this idea, I realised I had found the core problem that would inspire my doctoral research.

Thus, the dissonance between the importance attributed to victims of mass atrocity and the absence of actual victims in the context of the ICC became the starting point of this thesis.

1. Introduction

This thesis seeks to contrast the way victims of mass atrocities are usually represented as essentially disempowered in international law institutions, and more specifically, in the international criminal court, with the actions of these victims that use the language of international law and the category of victim domestically. I use the term 'mass atrocity' as circumscribed to crimes affecting large amounts of individuals, and more particularly, international core crimes recognised by the statutes of the main international criminal courts, namely genocide, crimes against humanity and war crimes.[3] The suffering experienced by the victims of these crimes has a compelling force. It inspires empathy towards the persons who endure it, which motivates others to do something to alleviate that suffering. This force has lately become an essential pole in contemporary politics: It is present in its discourses and is a constant source of legitimisation for its practices.[4] Similarly, this force has prompted several scholarly works that deal with victims of mass atrocities from different perspectives, often inspired by a profound and truthful interest in the suffering of many individuals around the world. This force, also inspired me to write this thesis.

The different areas of law dealing with victims of mass atrocities

Though mass atrocities and its victims have existed for a long time in our history, it was only recently that a variety of judicial and quasi-judicial responses have been specially developed with the aims of achieving societal reconciliation and addressing victims' needs. Furthermore, victims' needs have been identified in the law and concretise in the concepts of truth, justice, reparations and guarantees of non-repetition. The variety of responses that have been devised in the aftermath of mass atrocities include international tribunals — such as, the ICTY, the ICTR and the ICC — but also other non-judicial responses like truth commissions, administrative reparation

[3] See: UN Security Council, *Updated Statute of the International Criminal Tribunal for the former Yugoslavia* (September 2009), Articles 1-5; UN Security Council, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*, (November 1994), Articles 1-4; UN Security Council, *Statute of the Special Court for Sierra Leone* (January 2002), Articles 2-4; UN General Assembly, R*ome Statute of the International Criminal Court (last amended 2010),* (July 1998), Articles 5-8.
[4] Didier Fassin, *Humanitarian Reason* (University of California Press, 2012), 1.

programs, lustration measures, and symbolic measures, such as, official apologies, the construction of memorials, among others. Thus, when thinking of victims of mass atrocities from a legal perspective, different legal frameworks, fields and sub-fields should be considered.[5] In particular, the most relevant areas of international law are international human rights law, international criminal law, and the practice of transitional justice that deals with these two areas but is, at the same time, acquiring a certain distinctive scope, mixing domestic and international features. Let me briefly develop some ideas in order to sketch the relations between these areas of practice and academic thought.

International human rights law is often described as having emerged in the aftermath of World War II with the Nuremberg trials and the passing of the charter of the United Nations.[6] As an area of public international law, it is said to be distinctive in that — breaking with the tradition of states being the subjects of international law — it gives individual persons the possibility to appear before international law institutions through the right of petition.[7] This possibility is granted to the individual person when she suffers from a violation of one of the basic rights that are acknowledged by this area of law to all individual persons by virtue of being human.[8] Moreover, while all human rights are thought to protect the most basic liberties of individuals, only some

[5] The word 'field' in this thesis should only be loosely related with Bourdieu's conception of field as an area of structured, socially patterned activity or "practice", disciplinarily and professionally defined. Richard Terdiman, Translator's Introduction to 'The Force of Law: Toward a sociology of the juridical field' (1986-1987) 38 *Hastings Law Journal* 805. Specifically, I am not convinced that transitional justice can be considered as field. For a discussion on the contested quality of transitional justice as a field or discipline see: Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field"' (2009) 3 *International Journal of Transitional Justice* 5 and Catherine Turner, *Violence, Law and the Impossibility of Transitional Justice* (Routledge, 2017), 13-45. In turn, international criminal law has been described as a field riddled by an anxiety that affects its own definition, its professional practice, and its institutions. Frédéric Mégret, 'The anxieties of International Criminal Justice' (2016) 29 *Leiden Journal of International Law* 197.

[6] See for instance: Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context* (3rd edition, Oxford University Press, 2007) 133. The charter's preamble stated that it would set the basis for a system of international law that would 'reaffirm faith in fundamental human rights (and) in the dignity and worth of the human person.' United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, preamble. Recent accounts have contended that the role of human rights in the charter of the UN was actually extremely limited and that the actual development of human rights as a discourse took place later, during the seventies and eighties, and not in its early formulation. See: Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap Press, 2012).

[7] Cf. Antônio Augusto Cançado Trindade, *The Access of Individuals to International Justice* (Oxford University Press, 2011).

[8] Discussing human rights, Hannah Arendt shows that the idea of rights being granted only because of one's humanity, clashes with the need to belong to a community that would be able to enforce these rights. Thus, the problem is not if a person has rights or not, but that the person belongs to a community that would enforce them. Hannah Arendt, *The Origins of Totalitarianism* (Harcourt, 1973), 290 -302.

of these violations can be considered as mass atrocities. Finally, international human rights law is traditionally considered as a limitation to state power.[9] According to this idea, when a breach is asserted, it is the state that is internationally responsible for it and must cease the violation, repair, and guarantee its non-repetition.

In turn, international criminal law is 'a body of international rules designed to both proscribe certain categories of conduct (…) and to make those persons who engage in such conduct criminally liable.'[10] Moreover, according to Fisher, an international crime is distinguishable from other crimes in that it is an extremely severe violation whose perpetration involves a certain degree of political organisation.[11] Just as in international human rights law, the aftermath of World War II and the Nuremberg trials are often cited as the seminal events that gave rise to the current system of international criminal law. However, it was only in 2002, that the first permanent institution applying international criminal law began its work, namely the International Criminal Court (ICC).[12] While a breach to international human rights norms can give rise to international responsibility of the state, breaches to international criminal norms entail individual criminal responsibility. Moreover, the Statute of the ICC included not only the idea of individual criminal prosecution under international norms, but also, the possibility of victims of the crimes to participate and seek for reparations. Especially with regard to victims, and victims' reparations, the practice of international human rights courts has significantly influenced the ICC.[13]

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[9] Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context* (3rd edition, Oxford University Press, 2007) 1385: 'The centrality of the state is one of the defining features of international law and the human rights system build upon this by seeking to bind states through a network of treaty obligations to which, in the vast majority of cases, only states can become parties.'

[10] Antonio Cassese, *International Criminal Law* (2nd Edition, Oxford University Press, 2008), 1.

[11] She groups these two characteristics in two thresholds, namely, a severity threshold, according to which, it must represent a severe violation to the most urgent human rights, that is, physical security rights; and an associative threshold that refers to the way in which this right is violated, as it involves political organisation. Kirsten Fisher, *Moral Accountability and International Criminal Law* (Routledge, 2012), 9-25.

[12] Prior to this, two *ad hoc* tribunals had been created, namely the International Criminal Tribunal for the former Yugoslavia, established in 1993 and the International Criminal Tribunal for Rwanda, established in 1994. It should be noted that, unlike those two predecessors, the work of the ICC follows a principle of complementarity according to which, the court only acts if the states fail to prosecute. Cassese, *supra* note 10, 342-344.

[13] Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge, New York, 2014) 4, 41 *et seq* and 158-159. Moreover, the very idea of including measures for victims in the context of the international criminal procedure has been seen as the result of the influence of restorative justice ideas together with human rights law and transitional

Finally, transitional justice is 'the conception of justice associated with periods of political change, characterised by legal responses to confront the wrongdoings of repressive predecessor regimes.'[14] Wrongdoings in transitional justice are often connected to the notion of mass atrocities.[15] Though its origins are also often traced back to the aftermath of World War II, the term was coined only in 2000.[16] Furthermore, for Uprimny and Saffón, the notion of transitional justice is fairly recent as it refers to a particular way of responding to past atrocities that balances between full retributive justice, on the one side, and absolute impunity, on the other.[17] In order to meet this requirement, different — retributive and restorative — mechanisms, such as, individual criminal prosecution, administrative reparations, truth-seeking initiatives, institutional reform, and others, have been developed.[18] Moreover, transitional justice stands somewhere in between the domestic and the international, as it entails 'differing levels of international involvement (or none at all).'[19] At the normative level, however, both soft-law documents drafted in international institutions as well as decisions of international courts are often considered guiding principles in transitional justice processes.[20]

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justice. See also: Brianne McGonigle, *Procedural Justice?: Victim participation in international criminal proceedings* (Intersentia, Cambridge, 2011).

[14] Ruti Teitel, 'Transitional Justice Genealogy' (2003) 16 *Harvard Human Rights Journal* 69, at 69. Another often cited definition describes transitional justice as: 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.' UN Security Council, *The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary-General*, 23 August 2004, S/2004/616, para. 8.

[15] However, its scope is in constant expansion and today there are discussions related to the inclusion of violations to human rights that do not necessarily amount to mass atrocities as described here, such as, violations to economic, social and rights. This discussion is based in the idea that transitional justice mechanisms should take into account the root causes of conflict and repressive rule, among these, historically constructed socioeconomic inequalities, that is, violations to economic, social and cultural rights. See: Lars Waldorf, 'Anticipating the Past:Transitional Justice and Socio-Economic Wrongs' (2012) 21 *Social & Legal Studies* 171 and OHCHR, *Transitional Justice and Economic, Social and Cultural Rights,* HR/PUB/13/5 (2014).

[16] Teitel, *supra* note 14; Teitel is credited with coining the term in: Ruti Teitel, *Transitional Justice* (Oxford University Press, 2000).

[17] Rodrigo Uprimny and Maria Paula Saffón, 'Justicia Transicional y Justicia Restaurativa: Tensiones y Complementariedades' en Angelika Rettberg (ed), *Entre el Perdón y el Paredón: Preguntas y dilemas de la justicia transicional* (Ediciones Uniandes, 2005).

[18] UN Security Council, *supra* note 14 at para. 8.

[19] Id.

[20] E.g. UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly*, 21 March 2006, A/RES/60/147; UN Commission on Human Rights, *Report of the independent expert to update the Set of Principles to combat impunity*, 18 February 2005, E/CN.4/2005/102; UN Security Council, *supra* note 14. Also, in

Thus, these three areas — international human rights law, international criminal law, and transitional justice — overlap in that they all represent different responses to mass atrocities. A breach of international law can give rise to both international responsibility of the state (under international human rights norms) and international criminal responsibility of an individual (for instance, in the case of heads of state). Also, transitional justice measures in response to that breach can arise both from a domestic political decision and from a decision of international human rights courts and can co-exist with a decision finding individual criminal responsibility from an international criminal court. In Colombia, for instance, the involvement of the ICC in overseeing of the situation and evaluating the possibility of initiating criminal prosecution has influenced the way that transitional justice measures are considered domestically by the state.[21] In addition, there are decisions of the Inter American Court of Human Rights that find the Colombian state responsible for violations to human rights committed by illegal armed groups.[22]

Moreover, these three areas pay attention to the situation of the victims of mass atrocities. This is reflected especially in the different measures of redress that can be awarded in their benefit. In this sense, for instance, after establishing state responsibility under international human rights norms, a decision by a regional court such as the Inter American Court of Human Rights or the European Court of Human Rights can also award victims different remedies.[23] Similarly, in the context of the ICC, the

2011, the Human Rights Council decided to appoint a Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. The Special Rapporteur's mission is to deal with situations in which there have been gross violations of human rights and serious violations of international humanitarian law. See: https://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/Index.aspx (last accessed: 19 October 2018).

[21] Jennifer Easterday, 'Beyond the "shadow" of the ICC' in C. De Vos, S. Kendall, & C. Stahn (eds.) *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015).

[22] IACtHR, Case 19 Merchants v. Colombia. Preliminary Objection. Judgment of June 12, 2002. Series C No. 93; Case of the Pueblo Bello Massacre v. Colombia. Merits, Reparations and Costs. Judgment of January 31, 2006. Series C No. 140; Case of the Ituango Massacres v. Colombia. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006. Series C No. 148; Case of the Rochela Massacre v. Colombia. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 163.

[23] It should be noted, however, that the practice of the European Court of Human Rights and the Inter American Court of Human Rights vary with regards to the different remedies awarded to victims. In this regard, the practice of the Inter American Court is said to be more progressive, having developed a rich jurisprudence with regards to reparations to victims. See for instance: Douglas Cassel, 'The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court' (2016) 7 *Revista do Instituto Brasileiro de Direitos Humanos* 91; Thomas M. Antkowiak, 'An Emerging

Rome Statute has explicitly included the possibility to award reparations to victims.[24] Thus, after establishing individual responsibility, the court can decide to order reparations against the convicted person. Finally, in the context of transitional justice, many of the different measures that have been developed to address past violence are particularly aimed at redressing victims. These measures include administrative reparations programs aimed at providing reparations to large numbers of victims, as well as, symbolic measures, like official apologies or the construction of memorials.

The research questions and contributions of this thesis

The research questions that guided this research have been refined at various stages of the research process. In its final version, the thesis first asks whether the international criminal court recognises victims as subjects with agency when it provides spaces for victims' participation. It further asks how the domestic practices of victims who invoke the category of victim from international law take shape, what their effects are, and how they can potentially contribute to international law.

The main contention of this dissertation is that domestic practices of subjects such as victims of mass atrocities that use the language of international law, do not limit themselves to adopting it passively; instead, they infuse this language with meanings that align with their struggles and, with their actions, they also influence the formation of an identity associated with the category of victim. These influences are especially relevant for a subject who is often portrayed as disempowered, passive, defenceless and docile, thus preventing international law operators from evaluating the potential of domestic practices that are not only agentic, but may, at times, contribute to the development of international law.

This thesis contributes to the existing literature that focuses on victims of mass atrocities first in its approach that connects the practice of an international institution

Mandate for International Courts: Victim-centered Remedies and Restorative Justice' (2011) 47 *Stanford Journal of International Law* 279.

[24] The Rome Statute established this possibility for the first time in international criminal law. This possibility is contained in Article 75 of the Rome Statute.

such as the international criminal court and its framework for victims' participation and contrasts it with the actions of victims of mass atrocities that wield at the domestic level the category of victim and its associated legal frameworks. This dissertation further contributes to the literature by studying the ways in which the category develops at the grassroots level and reflecting on how these practices are relevant for international law.

Defining an approach

Throughout my doctoral studies, I rehearsed different ways of looking at the topic of victims of mass atrocities. At the beginning of my studies, the focus of my research was on discerning the specific realm of international criminal law so as to determine the place of the victim in this context. The creation of the ICC with its framework for victims' participation and reparation, departed from the earlier exclusive focus on individual criminal responsibility of the embryonic international criminal law. Indeed, until the creation of the ICC, victims of mass atrocities had not taken part of international criminal courts but as witnesses and, because of this, their inclusion as more than that brought all sorts of tensions and ambiguities. My aim was to find coherence between the different areas of international law that deal with victims of mass atrocities. The assumption here was that each of the areas dealing with victims of mass atrocities had its own specific realm that could be defined or deciphered like a frontier separating one territory from the other. My aim, then, was to decipher the specificity of international criminal law and its connection with its framework of victims' participation and reparations *vis-à-vis* other areas dealing with these victims.

Yet, such a doctrinal approach was eventually influenced by the critical legal approach to international law practised as the University of Helsinki.[25] I became increasingly disappointed with the lack of presence of actual victims, and victims' actions in

[25] Andrea Bianchi has described the 'Helsinki School' entirely around the figure of Martti Koskenniemi. Indeed, his work is influential not only in Helsinki but in other parts of the world. Andrea Bianchi, *International Law Theories* (Oxford University Press, 2016) 163 et seq. However, when thinking about the critical legal approach of the University of Helsinki, I am thinking of the influence that my work received from different scholars that — based permanently or tem-

the context of international criminal justice mechanisms.[26] I began to observe how victims' assumed interest in justice was often used to legitimise the actions of different organs of the ICC.[27] In this context, I came saw that victims' central place in the context of the ICC does not translate in victims' presence at the Court, but instead, in different legal rights coupled with the practice of often being invoked by different actors within the Court. Invoking victims grants legitimacy to the work of the Court as the moral strength of their suffering is the stated reason justifying the work of different organs at the Court.[28] However, there are very few opportunities in which actual victims can present themselves at the Court, both before the judges and in discussions where administrative and strategic decisions are made. In the absence of victims, the discourse of others, speaking in their behalf, builds a certain identity of the victim of mass atrocity where these appear as subjects defined mainly by a suffering that seemingly renders them unable to act on their own behalf. Others are then called — and legitimised — to act for them and on their behalf.

Thus, coherence stopped being a goal. Instead, I became convinced that it was crucial to see that there were both political motivations and effects at play in the different areas dealing with victims' of mass atrocities. In this light, the law regarding victims of mass atrocities, despite its seemingly harmless motivations, could also be understood as 'a mechanism for creating and legitimating configurations of economic

porarily in Helsinki — have influenced my way of thinking in their writings, or in conversations, or in academic discussions. I probably cannot make a list without leaving someone behind as, indeed, this was the result of a gradual process where the influence was felt more as a slow, but strong, current that I eventually went along with. I will develop further how this thesis has a critical approach in the section on method.

[26] This may be an effect of what Bourdieu has called, the 'institution of a monopoly' where the 'judicial space' entails the establishment of a line that separates those who are qualified to act in it from non-specialists. Non-specialists' sense of fairness, in the judicial context, is disqualified. In this context, the inclusion of victims as participants in an international criminal court finds a qualified limitation in the fact that the 'juridical field is a social space organized around the conversion of direct conflict between directly concerned parties into juridically regulated debate between professionals acting by proxy.' Victims, as lay actors, find their participation always mediated by the legal professionals. Pierre Bourdieu, 'The Force of Law: Toward a sociology of the juridical field' (1986-1987) 38 *Hastings Law Journal* 805, 828-831. In my view, the decision to include victims as participants in a judicial procedures such as the ICC's should seriously consider to bridge this invisible gap, thus opening a way for lay actors to have a significant participation.

[27] In this, two works were particularly thought-provoking: Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood' (2014) 76 *Law and Contemporary Problems* 235; and Laurel Fletcher, 'Refracted Justice: The imagined victim and the International Criminal Court' in C. De Vos et al (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015).

[28] Ibid.

and political power.'[29] Similarly, the way in which victims are represented by others, as defenceless, passive, and docile, has different effects, on the one hand it justifies the intervention of others. On the other, it is problematic both for victims who do comply with the stereotype and for those who do not. The latter may struggle for to be recognised as actual victims, while the former's recognition is dependent on an understanding of victims as lacking agency.[30] Therefore, the law had to be seen in its interaction with these political motivations and effects both enabling and limiting its achievement.[31]

But the approach of this thesis is also, and perhaps more crucially, defined by an interest in connecting international law with local practices of victims of mass atrocities themselves. My interest was to show that the inclusion of the category of victim in the context of the ICC cannot have the effect of acknowledging victims' agency as an actor in the process if victims remain absent from it. At the same time, I could not fully accept the idea that the main effect of this discourse has been and still is the disempowerment of the individual person.[32] Instead, I believed that, together with that effect, at the local level, the discourse of human rights could result in the empowerment of individuals and groups of victims as it allows them to articulate claims in a common language that provides legitimacy.[33]

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[29] Joseph William Singer, 'The Player and the Cards: Nihilism and Legal Theory' (1984) 94 *The Yale Law Journal* 1, 6.
[30] Christine Schwöbel-Patel, 'Spectacle in International Criminal Law: The fundraising image of victimhood' (2016) 4 *London Review of International Law* 247, 250.
[31] Indeed, the idea that 'law is politics' is one of the main and most popular propositions of the critical legal studies movement (CLS) that began in the seventies in the United States. This idea is meant to counter the traditional position that understands the law as removed from the political, thus neutral and objective. See: Bianchi, *supra* note 25 at 135 et seq.
[32] Some of these critiques can be found in: René Urueña, *No Citizens Here: Global Subjects and Participation in International Law* (Brill, 2012), at 93; Richard Wilson, 'Representing Human Rights Violations: Social Contexts and Subjectivities' in M. Goodale (ed.), *Human Rights: An Anthropological Reader* (Wiley-Blackwell, 2009), at 215; applying these ideas to the context of the ICC: Adam Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (Oxford University Press, 2011), at 182; Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights'(2001) 42 *Harvard International Law Journal* 201.
[33] I should note here that there is a variety of critiques and that some of them also acknowledge this point. This is precisely the point that Koskenniemi makes in an piece in which he asks 'what is international law for?,' the answer to this question reveals the indeterminate character of international law as it serves, at the same time, 'to advance the repertory of substantive values, preferences and practices that those in dominant positions seek to realize in the world' and to 'give voice to those who have been excluded from decision-making positions and are regularly treated as objects of other peoples' policies' by providing a platform through which 'claims about violence, injustice, and social deprivation may be made even against the dominant elements.' Martti Koskkeniemi, 'What is International Law For?' in Malcom D. Evans (ed) *International Law* (Oxford University Press, 2003), 110.

In order to examine these two effects, I had to connect the international with the local. My assumption was that true agentic behaviour by victims of mass atrocity that resort to the language of international law could be found there. As I will show below, this is an unusual connection: I focus on the institutional sphere at the international level and contrast it with the non-institutional actions by non-institutional actors at the domestic level. Despite it being unusual, I believe that this connection provides a fertile ground to assess the potential and limitations of the language of international law as it strengthens the argument for an inclusion of victims' presence at the ICC.

The connection of international law with local practices has been addressed in different ways and through different disciplines. In anthropology, several works have sought to track the connections between the global and the local with regard to human rights.[34] In this area, Sally Engle Merry's work is worth mentioning as it coins the concept of 'vernacularisation' to refer to the process through which the language and institutions of human rights are adapted to local realities.[35] She focused on the role of intermediaries such as community leaders, people participating in NGOs, or activists in 'translating' the concepts from the global to the local and back. In this context, ideas from transnational sources are vernacularised, that is, adapted to local institutions and meanings. But this process, she said, 'falls along a continuum depending on how extensively local cultural forms and practices are incorporated into imported institutions'.[36] In this way, they could be simply replicated, if the imported institution remains untouched and the adaptation is superficial; or hybridisation may occur, that is, local symbols and institutions may merge with the ones imported for the purposes of the human right intervention.[37]

[34] Two important compilations in this area are: Mark Goodale and Sally Engle Merry (eds), *The Practice of Human Rights: Tracking Law between the Global and the Local* (Cambridge University Press, 2007) and Mark Goodale (ed) *Human Rights: An Anthropological Reader* (Wiley-Blackwell, 2008).
[35] Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle' (2006) 108 *American Anthropologist* 38.
[36] Ibid, 44.
[37] Ibid.

Other example of this connection is Luis Eslava's work — a legal scholar drawing on insights from different disciplines — who focuses on the ways in which international law reflects in everyday practices, not necessarily connected to extraordinary and crisis-oriented description and events, such as global summits, international interventions, or international criminal tribunals.[38] In his work, he shows that international law shapes everyday practices by ordinary people in often unnoticed ways. Focusing on how international law shapes ordinary practices that, in principle, appear as absolutely unrelated to it, reveals its pervasive effect in the globalised context.

In turn, with an emphasis on social movements, Neil Stammers focuses on connecting the question of human rights with social movements and seeks to unveil in which way human rights have actually been shaped by social movements' actions.[39] In his view, both academic disciplinarity and the ideological predispositions and commitments of the authors have shaped the way that human rights are studied and understood, and obscured the role that innovative and creative social movements have had in shaping ideas and practices of human rights.[40]

Moreover, a number of works have developed an approach that has been known as 'from below,' an expression increasingly used to refer to:

'a "resistant" or "mobilising" character to the actions of community, civil society and other non-state actors in their opposition to powerful hegemonic political, social or economic forces."[41]

Taking this approach, Santos and Rodriguez-Garavito propose a bottom-up approach to law and globalisation.[42] This approach focuses on the empirical study of domestic practice by oppressed groups — from grassroots organisation to community leaders — that use or create law in their struggles to resist the effects of neo-liberal

[38] For instance, Luis Eslava, 'Istanbul Vignettes: Observing the Everyday Operation of International Law' (2014) 2 *London Review of International Law* 3.
[39] Neil Stammers, *Human Rights and Social Movements* (Pluto Press, 2009).
[40] Ibid, 9-18.
[41] Kieran McEvoy and Lorna McGregor, 'Transitional Justice From Below: an agenda for research, policy and praxis' in Kieran McEvoy and Lorna McGregor (eds) *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart, 2008), 3. In what follows I use the terms 'from below' and 'bottom-up' approach indistinctively.
[42] Boaventura de Sousa Santos and César Rodríguez-Garavito (eds), *Law and Globalization From Below: Towards a cosmopolitan legality* (Cambridge University Press, 2005), 4-5.

legality.[43] This empirical study is meant to counter the hegemonic nature of neo-liberal legality which makes invisible third-world resistance that creates non-official forms of law.[44] Similarly, Rajagopal contends that dominant approaches to international law fail to consider a subaltern perspective that would enable to appreciate the role that social movements have in the development of international law.[45] In his view, only certain forms of resistance have been granted legitimacy, the main being the discourse of human rights.[46] Popular resistance by social movements, must be considered to re-think human rights in international law by studying it in concrete contexts to understand how these concrete strategies often constitute 'another kind of human rights, aimed at building radical alternatives to the received models of markets and democracy.'[47] He calls for the development of a theory of resistance in international law, a theory that, in his view, should pay attention to at least for questions: against what resistance is exercised; to what end; using which strategies; and what role does the postcolonial state have in resistance.[48]

In contrast with this approach *from below*, in the specific context of the ICC, domestic practices are often viewed following a top-down approach. For instance, an important aspect of the way in which the connection with local communities has been framed in the context of the ICC is the principle of complementarity. According to this principle, the jurisdiction of the ICC is complementary to national criminal jurisdictions.[49] This means that national jurisdictions — and not the international jurisdiction — have a primary role in the prosecution of the crimes contained in the Rome Statute. In practice, this is evaluated during the exam of admissibility according to

[43] Ibid, 10.
[44] Ibid, 5-12.
[45] Balakrishnan Rajagopal, *International Law From Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, 2003), 1.
[46] Ibid, 9.
[47] Ibid, 170.
[48] Ibid, 13.
[49] See: Sarah Nouwen, *Complementarity in the Line of Fire* (Cambridge University Press, 2013) 35 and Rome Statute, Preamble and Article 1. The notion that the Court is complementary of national jurisdictions is a departure from the practice of the earlier *ad hoc* tribunals that had primacy over national jurisdictions. I thank Immi Tallgren for this precision.

which, the Court determines that a case is inadmissible if it is being or has been investigated or prosecuted by a national jurisdiction, or the person has already been tried for the conduct. Even when those elements are there, however, the Court may still, determine that the case is admissible if the state is unwilling or unable to *genuinely* carry out investigations or prosecutions.[50] But the principle of complementarity, has also been interpreted as possibly having a catalysing effect at the domestic level, which would materialise in domestic prosecutions and investigations as well as reforms to the domestic justice system.[51] In turn, the concept of 'positive' complementarity takes this idea a step further as it entails that notion in which the Court has a more active role, 'not merely stepping in where national courts fail to prosecute, but actively encouraging prosecutions by national governments of crimes within the ICC's jurisdiction.'[52] In this way, local practices — in this context, restricted to national criminal prosecutions — are often viewed as influenced by international criminal law's developments.

Thus, despite the fact that the principle of complementarity puts local jurisdictions over the international jurisdiction of the ICC, the way in which the connection of the ICC with local communities has been explored is often defined by two elements: First, the notion that international law is an external force from above that influences domestic law; and second, a focus on domestic practices understood as institutional or jurisdictional responses, and more specifically, criminal prosecutions. Thus, a common approach concerning the issue of complementarity has been on the domestic prosecution of crimes under the Rome Statute and the assessment of their sufficiency

[50] Article 17 of the Rome Statute.
[51] Nouwen, *supra* note 4925 at 9.
[52] William W. Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice' (2008) 19 *Criminal Law Forum* 59, 60.

in satisfying the threshold of the Court.[53] Also, some works have explored how international criminal prosecution influences local prosecution of international crimes.[54] A similar top-down approach can be observed with regard to the criteria for the prosecutorial decision of not proceeding with an investigation or prosecution when these may not be in the *interests of justice* (article 53 of the Rome Statute). This question has been explored specially with connection to the situation of Uganda and its peace process, in which the possibility of granting amnesties to the commanders indicted by the ICC was being discussed. Here, the question explored was how the intervention of the Court may or may not have been in the interest of justice as it may have interfered with the local peace processes. Moreover, traditional methods for dispute resolution were also being assessed as alternatives to prosecution.[55]

Finally, though not so researched, attention to local realities also takes place as the Court itself aims at reaching local communities through outreach activities.[56] Outreach encompasses those actions aimed at making the Court's judicial proceedings accessible

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[53] On the principle of complementarity: Rober Cryer et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2007) 127 et seq. Example of this approach are: Luke Moffett, 'Complementarity's Monopoly on Justice in Uganda: The International Criminal Court, Victims and Thomas Kwoyelo' (2016) 16 *International Criminal Law Review* 503; G Dancy and F Montal, 'Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions' (2017) 111 *American Journal of International Law* 689; Brighton Claire, 'Avoiding Unwillingness: Addressing the Political Pitfalls Inherent in the Complementarity Regime of the International Criminal Court' (2102) 12 *International Criminal Law Review* 629; connecting the idea of complementarity with a focus on domestic traditional mechanisms and the provision of article 53 see: Michael A. Newton, 'A synthesis of community-based justice and complementarity' in Court' in C. De Vos et al (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015).

[54] See for instance, various contributions to the topic: 'The Impact of International Criminal Proceedings in Mass Atrocity Cases' in the proceedings of the Annual Meeting of the American Society of International Law, 2009. Various authors, Proceedings of the Annual Meeting (American Society of International Law) Vol. 103, 2009 (Published by: Cambridge University Press), 203-226. Putting to test the assumption of the catalysing effect of ICC intervention: Nouwen, *supra* note 49. Darryl Robinson, 'Serving the Interest of Justice: Amnesties, Truth Commissions and the International Criminal Court' in Joanna Harrington et al (eds) *Bringing Power to Justice? : The Prospects of the International Criminal Court* (McGill-Queen's University Press, 2006).

[55] Branch, *supra* note 32; Terry Beitzel and Tammy Castle, 'Achieving Justice through the International Criminal Court in Northern Uganda: Is Indigenous/Restorative Justice a Better Approach' (2013) 23 *International Criminal Justice Review* 41; Ketty Anyeko et al, '"The Cooling of Hearts": Community Truth-Telling in Northern Uganda' (2012) 13 *Human Rights Review* 107; Amelia Katan and Daniel Komakech, 'Peace and Prosecution: An Analysis of Perceptions Towards the International Criminal Court Intervention's in Northern Uganda' (2017) 10 *African Journal of Criminology and Justice Studies 1*; Steven C. Roach, 'Multilayered Justice in Northern Uganda: ICC Intervention and Local Procedures of Accountability' Thordis Ingadottir et al (eds) *The Realities of International Criminal Justice* (Brill, Nijhoff, 2013).

[56] Some works discussing outreach are: M. Hellman, 'Challenges and limitations of outreach. From the ICTY to the ICC' in C. De Vos et al (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015); Norman Henry Pentelovitch, Seeing justice done: the importance of prioritising outreach efforts at international criminal tribunals (2008) 39 *Georgetown Journal of International Law* 445.

to those communities affected by the situations and cases before the Court.[57] For this reason, the attention to the local here is not focused on national prosecutions, but instead, on non-institutional actors and non-governmental organisations. Here, the question is how better mechanisms of communication of the Court's work can improve its legitimacy in the affected communities.[58] As I discuss in Article I of this thesis, the overall assumption of the ICC's outreach activities, is that if local communities have a better understanding of the Courts' activities their confidence in the Court will increase.

Finally, victims' needs and perceptions have been studied as they could or should influence the way reparations are implemented. This question has been explored by the Court itself, for instance, in the case against Thomas Lubanga Dyilo, the Trust Fund for Victims organised missions on the ground aimed at seeking victims views for the purposes of designing its implementation plans.[59] In other cases, NGOs and Universities have undertaken studies to ascertain the needs of victims in relation with certain cases or situations before the ICC.

So, overall there is a tendency to adopt a top-down approach when focusing on the study of domestic practices in relation to the workings of the ICC, but there are some exceptions. For instance, focusing specifically on the International Criminal Court and Sub-Saharan Africa, Kamari Clarke problematises even further the relations between the international and the local. She explores the frictions that the Court's intervention produces with regard to different questions, such as the role of NGOs, the role of the victim in international justice, the relationship between traditional methods of conflict resolution and the ICC, among others.[60] She contends that, at the

[57] ICC, Regulations of the Registry (ICC-BD/03-03-13) Regulation 5*bis*.3. I discuss the question of Outreach in Article I.
[58] I discuss the problems of this assumption in Article I.
[59] See for instance: *Prosecutor* v. *Thomas Lubanga Dyilo,* First submission of victim dossiers, ICC-01/04-01/06-3208, TFV, 31 May 2016;
[60] Kamari Clarke, *Fictions of Justice: The International Criminal Court and the challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press, 2009).

intersection of the global and the local, there are conceptions of justice that are culturally constituted. In this context, local practices are 'neither merely shaped by transnational relations nor are they merely translated by local agents into vernacularised forms,' instead, there are multiple domains of interconnection that allow for notions of law and justice to travel.[61] Similarly, Phil Clark focuses on different intersections between the ICC's work and African domestic actors, institutions, networks and processes, including the study of a diversity of actors from institutional to non-institutional ones or 'every-day citizens' from both the capital and villages.[62] As a result of this work, Clark submits that even though the ICC describes its relation to domestic actors and institutions in terms of complementarity, in practice, it adopts a 'distanced approach to justice, seeing itself as superior to the domestic realm and often actively undermining it.'[63] Moreover, Clark suggests that the ICC has often undermined community-based practices that entail a different way to resolve the conflicts that the ICC deals with. The multi-sited methodology of this authors' contribution combines a top-down approach with a careful consideration of local non-institutional actors in order to understand how the ICC shapes African politics but at the same time how the ICC is shaped by Africa.[64]

This thesis adopts an approach *from below* which contrast with the prevailing approach *from above,* which considers international law as an external force shaping domestic practices. This has two consequences. First, domestic practices are considered as important in that the use of international law may not reduce itself to wielding its concepts against domestic powerful actors. Instead, by paying a close look to these practices, this thesis concludes that they may also entail to produce meanings. Second, local practices are considered as potentially shaping of international law. I begin by looking at international law in the first article and then proceed to examine how local

[61] Ibid, 6.
[62] Phil Clark, *Distant Justice The Impact of the International Criminal Court on African Politics* (Cambridge University Press, 2018) 6-8.
[63] Ibid, 17.
[64] Ibid, 11.

practices incorporate the language of international law in their own struggles in meaning-creating ways. Though there are a number of works using this approach, it would be inaccurate to say that there is a unitary approach *from below* and, in writing the different articles that compose this thesis, I have gradually defined mine. In my view, evaluating local practices as potentially contributing to international law's development requires to redirect our gaze to local actors' potential to, as I propose in Article III, 'manipulate' international law.[65]

Moreover, focusing on local practices does not deny the fact that the creation of an institution such as the ICC may have the effect of influencing the way in which domestic responses to mass atrocities are discussed and implemented. While accepting that this is a reality in some cases, such as in the case of Colombia,[66] this thesis seeks to pay attention to other practices that may also be influential but that are normally obscured in a focus that privileges institutional practices. In this sense, I have found that anthropological perspectives are specially inspiring and influential in the way I conceive the relation of the local and international law. As I will explain further in Section 3 of this report, I have used a variety of methods for the articles, but I have not used ethnography. If anything, I have used ethnographies done by anthropologists that focus on studying experiences of victims of mass atrocities in Colombia. In this sense, this thesis attempts to consider these works and its implications as relevant for the understanding of the complex connections between international law and domestic practices.

My approach is similar to Eslava's in that it does not focus on institutional actors and actions, but rather, on how groups of victims of mass atrocities in Colombia make use of international law as tools for framing their demands of justice. It is different, in that it places attention on events that can be considered as extraordinary as they are

[65] This is a suggestion I made in Article III. Here, 'manipulative' is not meant in a negative way, but instead, as referring to the skill of handling a tool, in this case, a legal category, in a skilful manner.
[66] See for instance: Easterday, *supra* note 21; Isabella Bueno and Andrea Diaz Rozas, 'Which Approach to Justice in Colombia under the Era of the ICC' in Thordis Ingadottir, James Meernik, and Dawn Rothe. *The Realities of International Criminal Justice* (Brill Nijhoff, 2013).

linked with mass atrocities. At the same time, my approach is similar to Stammers in that it focuses on actions that can be considered agentic and assumes that some degree of social change is possible.[67] In this sense, the use of international law concepts by victims of mass atrocities may have effects in modifying practices, laws, or policies by institutions. The extent to which this social change is possible through law is a matter that I will return to towards the end of this summarising text when I discuss the possibility of emancipation, as it constitutes one of the important reflections that arise from this thesis.

Finally, an important consideration in this thesis is that, just as victims are invoked by different actors in international law to legitimise their actions, victims of mass atrocities sometimes also invoke international law to legitimise their demands of justice. As the actions of different actors in international law become justified *because* they are done on behalf of the victims, the actions of victims of mass atrocities may become influential *because* they invoke international law. It is here, where the political motivations and political effects of victims' actions in using the law, can be discerned. And it is because of this that I decided to study cases of victims of mass atrocities who use the category of victim, in Colombia.[68]

The contents of this summarising report

This thesis is comprised of four original articles and this summarising report. Article I focuses in theoretical questions around the concept of the political subject as developed by Jacques Rancière and proposes a reflection on victims' participation at the ICC in light of such concept. The three subsequent articles, in turn, focus on the local practices of victims of mass atrocities in the context of Colombia's internal armed conflict and transitional scenario. In this report, my aim is to build a bridge between the two poles of my thesis, namely the international and the local, all through critical

[67] Stammers, *supra* note 39 at 24.
[68] I reflect further on the choice of Colombia, in the method section. For a context of the internal armed conflict see Articles II, III and IV.

lenses. On the one hand, victims represent an important legitimising token for international organisations, in particular the ICC, which relies on an identity of the victim that is built in the discourses of others, and in the near utter absence of actual victims. On the other, international law represents an important element that allows victims' claims to gain legitimacy and potentially influence political discussions domestically.

The contents of this summarising report are as follows. First, I present a brief description of the articles situating them within the route of my intellectual journey. Here, before describing the articles, I begin by reflecting about some of the characteristics of this intellectual process (Section 2). Next, I present methodological considerations by first describing in more depth the approach of this thesis and its two major influences, namely the critical and the approach *from below* (Section 3). I then go on to describe the methods applied and sources used in each of the articles. Finally, I dedicate a core section of this report to highlighting how the local cases of victims of mass atrocities can be relevant to think about international law (Section 4). In order to do this, I focus on different concepts that emerge from the articles, through which I reflect about the question of the victim of mass atrocity between the local and the international. Specifically, I will reflect about victims of mass atrocities first as political subjects, then as subalterns, and finally as an identity. In the conclusions, I reflect about an assumption of this thesis, namely that the actions of victims of mass atrocities that invoke the category of victim itself and the legal framework that deals with it, may change the norms, their interpretations, and practices associated to such norms. This is done through pondering about the concept of emancipation as developed by two authors that influenced the approach in this thesis, namely Jacques Rancière and Boaventura de Sousa Santos. By exploring the main differences between these two approaches, I am able to ascertain my own positioning and suggest that these actions of victims of mass atrocities can be emancipating in that, through the process of wielding this category, they may achieve cultural change and find articulation for their own identities and the stories that precede them.

2. The articles and a description of my intellectual journey

In this section, I will describe the different articles that compose the thesis. I would like to do it in a way that also enables me to describe my intellectual journey and how I came to formulate each of the articles. Before I do that, however, I would like to reflect upon three related ideas that can better describe the way in which this intellectual journey took place. These are not meant to be, at this point, methodological considerations.[69] Instead, for the moment, these reflections will simply explicit my raw — and perhaps even naïve — sensitivities towards my research. I wish to make them explicit as an act of honesty towards myself, my peers, and other doctoral students that may read these words.

A non-linear research process

As described in the introduction, throughout the years of my doctoral studies, I rehearsed different approaches to the issue of victims of mass atrocities in international law. As I found an approach I felt comfortable with, re-assessing it was a constant exercise. Because of that, the process of writing the papers that compose this thesis was not linear. Instead, it was a constant back and forth iteration through which I continuously challenged my previous ideas and reassessed what I had thought in the past. I am aware that this is not a particularly original way of doing research. However, I find that the non-linearity of the research process is often concealed because research is mostly presented as a swift progression, first exposing theoretical considerations, then explaining a method that is later applied to a particular object, and finally exposing the conclusions of that operation. My process was far from this and, instead of a line, it felt more like a constant oscillation between the different parts of each texts and the different texts I was producing.

The four articles that compose this thesis are a result of such a process. Article I was definitely the most challenging, taking on many different revisions as I continued

[69] Considerations regarding method can be found in Section 4.

to work on the subsequent articles. While they all built on the ideas developed in Article I, they also influenced it. In this, the process of presenting my work in different colloquia and seminars was particularly fruitful. I encountered misunderstanding, support, and different suggestions on how to improve or modify my work altogether. Similarly, the submissions, revisions, and rejections resulting from the interaction with academic journals further contributed to the re-examination of my work and the way I was framing my ideas. As I finished working on one manuscript and submitted it to an academic journal for the first time, I began to work on the next article. The earlier papers came back, with news of rejection or major revision decisions, three or four months into working on the following one, in which I had already changed some of the views expressed in the first article. I tried to incorporate these new considerations into the earlier articles, and this process of revision also helped to rethink the following paper. Here, the feedback provided by peer reviewers from the different journals to which I submitted my work proved essential, and often motivated the reassessing process.

The initial unawareness of disciplinary boundaries

In the earlier stages of my doctoral studies, I was very unaware of the boundaries that separated different approaches to international law from the different disciplines that study topics related to international law. In searching for materials, I encountered several different perspectives coming from different disciplines, with different styles, using different methods, and reflecting different lenses through which the world is viewed. Some of these works, in one way or another, influenced my thinking without me being completely aware of how they situated themselves *vis-à-vis* other works. As I went ahead in my research, I often found myself in the situation of describing my research to colleagues, and I was often surprised that what I had characterised as being a critical research about international law, was often characterised by my interlocutors as belonging to different areas of expertise/approaches, such as development, transitional justice, third world approaches, and juridical anthropology, among others.

Thus, I first became aware of my utter lack of awareness of the terrain in which I was moving. It took time for me to become more mindful of the different influences shaping my research and to trace a sort of 'map' of the different areas that informed it. Certainly, even though there is some anxiety in academia to assign a label to research, the limits that separate one area or field or approach from the other, are not as clear as the lines on a map.[70] Similarly, there are overlapping labels to assign to a work as it is being formulated in a particular discipline (e.g. law) and sub-discipline (e.g. public international law) with a particular approach (e.g. critical legal research). Despite these caveats, to actually draw a map of the terrain I walked through during my doctoral studies, and to locate the position of each article within this map, was an important aspect of my intellectual journey. It allowed me to become increasingly aware of the different perspectives/disciplines, which in turn, enabled me to better interact with my peers, and to understand where their comments came from. It also allowed me to gain a stronger sense of where I would position myself within this landscape, and what was outside of my positioning.

Drawing a map in order to be aware of where one is in terms of one's research, is different to drawing it to establish the limitations of one's research. Thus, regardless of my current awareness of these boundaries, I still agree with the idea that a researcher should not be so concerned with them if these boundaries represent a limitation to her inquiry. As Schultz describes,

'the challenge is to ask who we are, where we came from, where we aim to go, and how we aim to get there. If one needs to go beyond the narrow boundaries of the analysis of legal materials and open up to insights from different disciplines in order to do so, this should not be seen as an abdication of authority but rather as a necessary intellectual inquiry into the meaning and purpose of law and its application.'[71]

[70] Just as the map is in itself only a representation of a terrain. Using a metaphor of the law as a map which inspired this idea, see: Boaventura de Sousa Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' (1987) 14 *Journal of Law and Society* 279.

[71] Thomas Schultz, cited by Bianchi, *supra* note 25 at 5-6.

Thus, though my lack of awareness of the disciplinary boundaries was a cause of anxiety at times, and perplexity at others, I consider it a strength of my research because it allowed me to think of and focus on the problem I was analysing without considering the limits of the discipline of law, or the sub-discipline of international law, as a restriction. This, in turn allowed me to analyse the questions of this thesis in a way that I consider richer in terms of complexity and depth.

*Serendipity in my rese*arch

As stated earlier, the process of my research was not linear, and instead, it can be better described as an oscillating process that took me back and forth to reassess constantly and rehearse new possibilities. In this process, serendipity played an important role. As I presented parts of my work to different academic circles, I was often asked questions such as, *Why this author? Why do you need such a framework?* The truth is, I do not *need* any such framework. Towards the end of my studies it became increasingly clear that I could have arrived at similar conclusions by having read very different authors… I just happened to come across a certain text at a given moment, which led me to think or re-think the problem I was concerned with in a certain way. Different texts allowed me to make sense of — perhaps only intuitive — notions I had not clearly articulated in my mind, or they opened a way for me to think differently about my topic.

Of course, this does not mean that I simply incorporated any text that made sense to me without questioning how it would suit my purpose or my questions. In fact, in earlier versions of some papers, I did try to use frameworks that were eventually discarded for different reasons. An example of this, is the concept of agency as developed by feminist accounts which I explored in order to think of the victims as agents. Kathryn Abrams' work was particularly important, as she argues that traditional liberal conceptions of autonomy have neglected to consider some attributes of human subjects, such as emotional or relational interdependence and strong gender-

related socialisation.[72] In this context, the exercise of autonomy is commonly understood as a process in which the individual discerns her own wishes and desires to make free decisions. As a response, social and feminist theorists emphasise the central effect of complex social formation within which agency operates. Though these ideas were important, I did not analyse the question of victims' actions through them, as I felt that this framework was largely focused on the individual, highlighting the social or relational aspects that affect the way individual agency works. Yet, the initial exploration of these ideas allowed me to re-define my inquiry and to differentiate between individual or group-based forms of political subjectivity. As such, the cases that I selected all reflect group-based actions instead of individual ones.[73]

To this extent, my research process was also delineated by serendipity. Of course, this does not mean that serendipity defined altogether the choices of my thesis. Instead, my interest in studying the emancipatory potential of the concepts of international law for victims of mass atrocity in light of their virtual absence in the ICC was the guiding principle that led me to discard some theoretical inspirations and adopt others. The sources I eventually used and the works that influenced my work are related to the specific problems I dealt with. Thus, what this means in practice is that I am aware that there are other texts and theories out there that can also be connected to these problems. The fact that I have chosen these specific ones is partly a decision, but it is also the result of serendipity. In other words, the texts I use and cite to back my theoretical arguments are the ones that inspired those arguments, but one could have arrived those same arguments, or similar ones, using other theoretical backgrounds.

The articles

As explained earlier in the introduction, after rehearsing and discarding other ways of approaching the topic of victims of mass atrocities, I began by inquiring into the

[72] Kathryn Abrams, 'From Autonomy to Agency: Feminist perspectives on self-direction' (1998-1999) 40 *William and Mary Law Review* 805.
[73] In article IV, however, I did zoom out to cover a wider spectrum, including also the actions of individual victims as actions that contributed to the formation of the disputed identity of the victim.

concept of 'the victim' in human rights law. Among the different overlapping areas of the law that deal with victims of mass atrocities, international human rights law is perhaps the most influential as individual persons are its 'fundamental units of analysis.'[74] But the individual person that is generally allowed to present claims before international institutions,[75] is the one 'who is capable of recognizing himself as a victim.'[76] I studied different criticisms that resonated with my thinking about the notion of the victim in human rights law and its effects. According to these criticisms, the notion of victim often relies on the construction of a helpless and passive subject that is unable to enact her own rights.[77] This notion grants legitimacy to different kinds of actions, coming from actors who are not necessarily victims themselves but whose actions are justified to the extent that they are done on behalf of victims.[78] Victims, then, become a legitimising token. This is true for international criminal law, where an abstract notion of the victims is constantly invoked by others, but the actual victims rarely appear.[79] Some of these criticisms come from approaches to international law, such as critical legal studies and third world approaches,[80] others come from political philosophy,[81] and anthropology.[82] Similar criticisms can also be found for the notion of victim in international humanitarian law,[83] international criminal law[84] and transitional justice.[85]

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[74] Urueña, *supra* note 3225 at 100.
[75] Susan Marks and Andrew Clapham, *International Human Rights Lexicon* (Oxford University Press, 2005), 403.
[76] Alain Badiou, *Ethics: An essay on the understanding of evil* (Verso, 2001), 10.
[77] E.g., Wilson, *supra* note 32; Fassin *supra* note 4; Clarke, *supra* note 60.
[78] The humanitarian act of identification with the victim, in the words of Meister, 'is also the ideological basis for using military force against those whom we believe to have forfeited their claims to a common humanity by avowing and/or acting upon these forbidden desires. The tragic irony' — he concludes — 'is that our own atrocities become (indirectly) thinkable by projecting the desires to commit atrocity on our enemy.' Robert Meister, 'Human Rights and the Politics of Victimhood' (2002) 16 *Ethics & International Affairs* 91, 102.
[79] Fletcher *supra* note 27; Emily Haslam, 'Subjects and Objects: International Criminal Law and the Institutionalization of Civil Society' (2011) 5 *International Journal of Transitional Justice* 221; Kendall and Nouwen, *supra* note 27.
[80] E.g., Urueña, *supra* note 3225 at 93 et seq; Mutua, *supra* note 32.
[81] E.g., Badiou, *supra* note 76 at 10-14.
[82] E.g., Wilson, *supra* note 32; Fassin *supra* note 4; Clarke, *supra* note 60.
[83] Valerie M. Meredith, 'Victim Identity and Respect for Human Dignity: A terminological analysis' (2009) 91 *International Review of the Red Cross* 259.
[84] Fletcher, *supra* note 27; Haslam, *supra* note 79; Kendall and Nouwen, *supra* note 27; Schwöbel-Patel, *supra* note 30.
[85] E.g., Tsepo Madlingozi, 'On Transitional Justice Entrepreneurs and the Production of Victims' (2010) 2 *Journal of Human Rights Practice* 208; Kieran McEvoy and Kirsten McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame' (2013) 22 *Social & Legal Studies* 489.

However, I was not fully satisfied with the description that the effects of the discourse of human rights, in building a victim that is essentially passive and defenceless, were completely undesirable.[86] Having grown up in Chile, I had observed for years that the language of human rights worked for the actual victims of mass atrocities — such as the victims of Pinochet's dictatorship — to address the society as a whole, international organisms, and domestic authorities, by allowing them to present political claims. Though I agreed with the criticisms over the effects of constructing victimhood in a certain way, I also believed that there was usefulness in the discourse of human rights. Reading Jacques Rancière's work on politics, allowed me to begin reflecting on a philosophical level on how victims of mass atrocity could be considered as a political agent when using the language provided by international law. In this context, the possibility of formulating claims on a common stage, where political subjects can be heard, is crucial. But this is a possibility that is absent from avenues such as the ICC, where victims have virtually no opportunities for self-expression. The result of these reflections is: **Article I 'Victims of Mass Atrocity: Meaningful participation through Rancière's lens'**.

Thus, Article I begins with a critical legal assessment of the concept of victim in human rights, transitional justice and international criminal law, but it incorporates in the process ideas of political philosophy to understand how victims can be considered as political subjects. Here, the notion of political subjectification, as developed by Rancière, is central.[87] In his view, the political subject is not a fixed identity but the result of a process of subjectification, in which an individual or a group is able to show how they are excluded from what counts in society. In a democratic society, this exclusion is a paradox because all these individuals or groups are, in principle, included

[86] It would be an oversimplification to pretend that this is the necessary outcome of a critique of human rights. As highlighted by McLoughlin, 'post-Marxist thought provides two very different approaches to the political possibilities offered by human rights. The first retains a fidelity to the revolutionary critique of rights by rejecting the language and conceptuality of human rights as too deeply implicated in the liberal political order that needs to be resisted. The second acknowledges the limitations of human rights while arguing that they also offer important tools for democratic political struggle.' Daniel McLoughlin, 'Post-Marxism and the Politics of Human Rights: Lefort, Badiou, Agamben, Rancière' (2016) 27 *Law and Critique* 303.

[87] The ideas referred here can be found in different works of Rancière, the one that I considered the most was: Jacques Rancière, *Disagreement: Politics and Philosophy* (University of Minnesota Press, 1999).

in the political process (as part of the residual category of the *demos*). However, the process of defining categories, identities, permissions and prohibitions, present in every society, always produces spaces of exclusion. The political subject appears when she is able to show this exclusion in a way that is heard by those in power. The result of this is a disturbance in the order of things, which allows us to reassess, re-accommodate and modify that order.

Moreover, an important effect of using Rancière's work is that, coming from political philosophy, he works with categories that do not necessarily assign a specific realm to the law. Although this may not be exclusive to his work, for me it was a strength as it allowed me to view things from a different perspective, which does not focus exclusively on the law, and understands it as part of a set of practices, not all legal, that establish boundaries of inclusion/exclusion. Indeed, the law, as 'the guardian of order'[88] is an important part of what Rancière calls the 'police', which designates the institutional order that assigns hierarchies, categories, and names to groups forming a society.[89] I found this to be particularly fruitful because the criticisms over the category of victim in the discourse of human rights do not relate to its positive content but instead, to the way in which victims are represented. And these representations, unnoticeable in a strictly legal approach, form part of that 'police' order, and are relevant for an analysis of the law because they influence the way the law is interpreted.

The main findings of Article I relate to the value of the possibility of disruption. In the article, I show that victims of mass atrocities do at times embark upon political actions, disturbing the swift progression of certain processes. In a Rancièrian approach, there is value in such disruption, because it allows for a reassessment and perhaps a modification of the institutions, the norms and the representations that lie beneath them. However, in order to be able to disrupt, political subjects must first be able to create a common space in which their speech — normally deemed as 'noise'

[88] Susanna Lindroos-Hovinheimo, 'Rancière and the legal subject Coming to terms with non-existence,' in López Lerma, Mónica and Etxabe, Julen (eds), *Rancière and Law* (Taylor & Francis, 2017), 83.
[89] From here on I will refer to the 'police' as the 'institutional' including in it, the institutions, its agents, their institutional practices, and the assumptions upon which these are based.

— is heard by power. In the article, I show that the process of the victims' participation at the ICC, though seemingly based in the recognition of the victim as a legal subject, offers limited opportunities for the victims' self-expression. I suggest that this hinders the very possibility of the political from occurring and that, because of this, it is important to provide more opportunities for self-expression. If victims remain invoked only by others, they will continue to be represented as defenceless subjects and these representations will continue to influence the way norms are interpreted, in a sort of vicious cycle that reinforces itself to the detriment of victims.

The contrast between the ICC — where victims of mass atrocities appear almost always represented by others as defenceless and passive — and the actions of victims of mass atrocities that were highly political, and thus emancipating, became the main interest of my research. My aim was now to contrast the image of the helpless victim with the cases where victims of mass atrocities themselves used the language of international law to frame their demands. I became interested in understanding the concrete ways in which victims of mass atrocities used the category of victim from international law and the (subsequent) effects such uses of this category have had. It is because of this that, during a research visit in Colombia, I decided to continue my research by studying cases of victims of mass atrocities in that country. Of course, approaching the cases had its own challenges that brought new elements to my intellectual journey. I will reflect on the methodological questions in detail in the section on method. In this section however, I am interested in reflecting on how approaching the cases led me to include elements of analysis in my research.

Article II, 'A stubborn victim of mass atrocity: the peace community of San José de Apartadó' was the first case study. As the title suggests, it focuses on a group of victims that formed the Peace Community of San José de Apartadó, a fascinating experiment of a bottom-up created safe area that uses the language of international law and that has established a number of unofficial norms that explicitly refer to international law. In the article, I show how the Community embodies a special kind of victim that is both suffering and stubborn. These two features contradict each other

in that victims seem to be expected to behave in a particular way, by accepting the government's aid. Instead, as Colombia began to adopt the language of transitional justice in 2005, including reparations to victims of mass atrocities in its legislation, the Community cut ties with the government and radicalised its position. What is more, the Community added to its duties the rejection of individual reparations. This means that, if a member wishes to apply for reparations, they have to leave the Community.

Though I first learned about the Community through texts analysing its legal aspects, I soon realised that there were a number of anthropological works about it. Furthermore, when in Colombia, I had the chance to meet with different anthropologists who had studied and written about the Community. These discussions had a profound influence in the way I approached the case of the Community. As a lawyer, I would have perhaps been initially more interested in the strictly legal aspects of the Community, but a remarkable feature of the Community was precisely how it organised itself around concepts of international law, such as the principle of distinction and the concept of victim, to the point of including them in their own unofficial legal texts. These notions are either explicitly referred to or reflected in the duties members had to fulfil. Thus, for instance, members of the Community have to abstain from carrying any weapons or interacting with any of the armed groups (including the army). As a result, the article does not only focus on the use of legal categories before adjudicating organs. Instead, it tries to understand the way that the legal categories affect the lives of the members of the group in a more encompassing way.

In studying the case of the Community, I considered their unofficial laws as part of the materials that would allow me to understand how the Community related to international law. I also considered these unofficial norms, as actual norms in the sense that they were followed by Community members and were, at times, even more effective than official domestic laws, at least in the life of Community members. In studying the Community then, I identified three normative orders, namely the international, the domestic, and the Community's unofficial law. In identifying these three normative orders, I was influenced by works coming from legal pluralism and legal anthropology

as these provided lenses through which the unofficial law created by the Community could be assessed in its interactions with official norms, instead of being simply disregarded.

The main findings of this article were that the case of the Community shows that the interaction of different — official and unofficial — legal orders can have diverse levels and effects, as well as many contradictions. While it is clear that the Community is resisting violence, it is not resisting the official law. Instead, through their own articulations of this law — in their own unofficial norms — they are strategically selecting international law norms that allow them, through the category of victim, to maintain neutrality in the conflict. But the Community also has a creative capacity as it produces an unofficial law that is based on international norms and develops it further. The main example of this is the creation of the Community as a bottom-up safe area and of its humanitarian zones. International law is developed through these experiences, regardless of their official recognition. But there is perhaps a more subtle way in which the Community engages with a category of international law, specifically with the category of victim. In identifying themselves as victims, the innocence and vulnerability associated with the category are important factors to differentiate themselves from armed groups and find protection. But as victims, the Community does not entirely coincide with the image of a docile, passive, defenceless subject. In acting as a 'stubborn' victim, they are able to influence the very image of victimhood, reshaping the contours of the category itself.[90]

An important consideration that emerged as I wrote this article is how victims of mass atrocities can often be understood as subalterns. I say it 'emerged' from the article, because as I wrote it, I realised how important it was for the Community that it defined itself as an alternative one. In reading, for instance, interviews with its leader, it was clear that this was a central aspect to it. This is, of course, reflected in the article, but what remained in the subtext is how this implied that the Community was a group

[90] I borrow this expression from Laura Quintana, 'Derechos, desacuerdo y subjetivación política' in A. Fjeld, L. Quintana and Ë. Tassin (eds.), *Movimientos Sociales y Subjetivaciones Políticas* (2016).

of oppressed people who used the language of the law to communicate with the hegemonic powers. This aspect will be analysed in this summarising text, as it is one of the aspects that I found through the study of the victims as well as a prism through which I can understand the use of the category of victim.

The second case study was **Article III — 'The Category of Victim "From Below": the Case of the Movement of Victims of State Crimes (MOVICE) in Colombia.'** After working with the case of the Community, I approached the case of Movice in a way that is both similar and different. It is similar to the extent that, just like in the case of the Community, I tried to focus on the social use of the legal concepts, more than on the way Movice used legal concepts before adjudicating organs. Unlike the Community, which had interacted at different times with the regional system of human rights, Movice's actions had a domestic approach, with actions before the Constitutional Court. However, there are two reasons why I decided not to pay attention to such actions. First, these had been thoroughly studied before.[91] Second, and more importantly, because of Movice's organisation, actions before domestic courts were conducted in connection with other organisations that also form part of Movice. This made it difficult to actually appreciate Movice's own formulations and agenda apart from those of the other organisations.

Moreover, the case of Movice is different from the case of the Community in different ways. While the Community is a small group, the former is a large movement. This means that the Community is much more cohesive than Movice, and its structure much simpler and centralised. While the Community is a rural group, Movice has members throughout the whole country. This means that all members of the Community are peasants sharing a similar background and a common story. Instead, Movice gathers victims of different crimes, caused by two perpetrators, the state and the

[91] E.g. Gabriel Gómez Sánchez. *Justicia Transicional en Disputa* (Universidad de Antioquia, 2014), Catalina Diaz, 'Challenging Impunity from Below: The Contested Ownership of Transitional Justice in Colombia' in Kieran McEvoy and Lorna McGregor, *Transitional Justice from Below* (Hart, 2008); Nathalia Sandoval Rojas, *Movilizarse ante la corte: trayectoria y efectos de tres episodios de movilización legal constitucional de feministas, indígenas y víctimas de crímenes de Estado en Colombia* (Uniandes, 2015).

paramilitary groups.[92] While the Community has only individual members, Movice includes individuals as well as organisations. All of these features make it much more difficult to talk about Movice as a group with a common identity, as in the case of the Community. Indeed, because the Community comprises a limited number of members, its identity is much richer and complex, and I explore this in Article II. Instead, understanding Movice was more about understanding the contexts and effects of the movement's actions in wielding the category of victim in order to discern the meanings they created with this use and their impact.

Thus, in Article III, I focused on three political opportunities in which the movement deployed the concept of victim. First, the moment of their creation in 2005 came as a consequence of the approval of the Justice and Peace Law, which incorporated for the first time the figure of the victim as a part of the transitional justice discourse. In defining the victim, this law excluded victims of state crimes. Only three days after the passing of this law, Movice was created as a way to counter the underlying assumption of that law: that paramilitaries and the state had been enemies negotiating a peace agreement instead of being, as Movice asserts, complicit in committing crimes against civilians. The second moment takes place in 2008, when a rally supported by the government against the FARC-EP gained massive attendance and international attention. Here, Movice decided to call for a second rally against paramilitary violence, one month later. Despite being stigmatised by the government, the march gained massive support in Colombia, giving visibility and strength to the idea that paramilitaries and the state were important armed actors that also affected the civilian population with their violence. Third, during the Habana negotiations between the government and the FARC-EP, Movice was at the forefront of demands for the inclusion of victims in the negotiation process. In this opportunity, the group advocated for the inclusion of victims of both sides of the negotiating table: the guerrillas and the government. Here, the context was substantially different as the legal category of victim now

[92] Movice treats crimes coming from these two perpetrators as coming from the state. The reason is that they aim at highlighting that the state is also responsible for paramilitary violence.

included victims of state crimes. The success of adopting the category of victim came with a price, however, as now victims had become a sort of legitimation for different proposals during the negotiations.

In analysing a social movement such as Movice in its use of a legal category, I ended up resorting to a number of concepts developed by sociologists of social movements. Here, Tarrow's work was particularly important as it summarises the way in which different works have developed categories aimed at explaining the works of social movements.[93] Moreover, this work builds upon those previous works in order to propose a dynamic framework in which the importance of the context in the workings of social movements is highlighted. This was particularly fruitful as Movice's work, and the contentious character of its actions, can only be understood if the context of their actions is analysed. Moreover, understanding the movement's actions as essentially contentious,[94] allowed me to make sense of the non-institutional means that Movice uses and the ways in which the category of victim, and its associated legal frameworks, can be used to create meanings and to frame their demands. The fact that the category of victim comes from a human rights framework, moreover, provides legitimacy to the movement.

The main finding of the article is that the category of victim allows the movement to introduce claims that relate to their own struggles and that are not strictly part of the content of that category. I suggest that these three moments show that Movice's use of the category of victim is highly strategic. On the one hand, identifying themselves as victims and using the language of international law grants them a veil of legitimacy to address power. On the other, grounding the category of victim in the domestic context allows them to discuss the circumstances surrounding the violations, such as the identity of the perpetrator, the modes of perpetration, and the connections

[93] Sidney Tarrow, *Power in Movement. Social Movements and Contentious Politics* (3rd ed., Cambridge University Press, 2011).
[94] According to Tarrow, 'collective action becomes contentious when it is used by people who lack regular access to representative institutions, who act in the name of new or unaccepted claims, and who behave in ways that fundamentally challenge others or authorities.' Ibid, 7.

between different perpetrators. In the context of Colombia, this opens up the possibility to suggest different narratives of the conflict, which is precisely what Movice does. For them, the category works as a sort of Trojan horse, through which they can introduce other deeper claims of justice. I suggest that, in infusing meanings to the legal category, the use that this organisation makes of legal categories is emancipatory.

Finally, **Article IV 'The disputed identity of the victim of mass atrocity and the strategic use of international legal concepts in Colombia'**, is an effort to think on the effects of the use of legal categories by grassroots organisations and individual victims. It is perhaps the most ambitious article as it attempts to zoom out and cover a greater perspective than the previous two articles of cases in Colombia. While I had previously reflected on the cases of two groups, in this paper I also examine how individual victims interact with the system in accepting the benefits offered to victims of mass atrocities in Colombia. I describe the sinuous trajectory of the category of victim from international law, to victims and NGOs, to domestic law, as well as the way in which victims of mass atrocity interact with the category in domestic law either by accepting it in order to obtain the benefits offered by the state, or by challenging it. When challenging the category, victims of mass atrocity can continue to resort to international law as a mechanism that provides legitimacy as well as indeterminacy to sustain different — and at times contradicting — claims.

These are, of course, ideas that I had been grasping at in the earlier articles. In this article, however, I sought to also reflect on the effects of the varying interactions between the different victims and the state, around the category of the victim of mass atrocity. What I observed in different works that have documented these interactions is that victims who accept the domestically constructed category of the victim, recognise the state as the one who is legitimised to administer their stories of suffering, to define which stories qualify, and how to tell them.[95] In turn, following the analysis of

[95] Fredy Mora-Gámez, 'Reconocimiento de víctimas del conflicto armado en Colombia: Sobre tecnologías de representación y configuraciones de Estado' (2016) 82 *Universitas Humanística* 75, 95.

Jaramillo,[96] when the state recognises a certain debt to the victim in principle, it seems as if it is putting itself in a hierarchical relation towards the victims in which these have a seemingly higher status. But, unlike other debtors, the state is able to both acknowledge the debt and postpone — or simply fail to fulfil — payment. In failing to pay it — as is the case for most victims in Colombia — the State is not really putting itself in a lower hierarchy, but on the contrary, it reinforces its authority.[97] The victim that emerges from this interplay is a victim who recognisnmes the state as the legitimate authority to interpret and administer her stories of suffering, in exchange for a promise of redress that does not arrive. This situation, I believe, reinforces the stereotype of the victim as a defenceless, passive, and docile subject.

Moreover, victims who challenge the category as constructed domestically, problematise its contents, its contexts, and its effects. These victims, such as the ones in the two previous articles, use the category of victim from international law to suggest the inclusion of different features of victimhood, such as, gender, or political agency, or to suggest a different context that needs to be considered, such as, historical peasant struggles, or the systematic persecution of political opposition. The identity that emerges from these actions is highly political and agentic.

The main finding of this article is that the different uses of the category of victim contribute to the construction of an identity associated to that category. In the different ways in which actors wield the category of victim, an identity of the victim of mass atrocities emerges, an identity that is always in dispute, and never fully achieved.[98] I suggest that, for victims, this means that the use of international law to frame their claims of justice has an enabling effect in that it allows them to introduce claims that are different from the mere assertion of victimhood. In this, the indeterminacy of the international norm allows them to introduce specific claims that relate to their own

[96] Pablo Jaramillo, 'Deuda, desesperación y reparaciones inconclusas en la Guajira, Colombia,' (2012) 14 *Antípoda* 41.
[97] Ibid, 41 and 55.
[98] In this idea, one article was particularly influential: Stuart Hall, 'Introduction: Who Needs Identity?' In: Stuart Hall and Paul Du Gay (eds) *Questions of Cultural Identity* (Sage, 1996).

conceptions of justice, which may differ from the prevailing conceptions that may be the basis for a certain norm or its interpretation.[99] This is a strategic use of the international norm. Yet the state can also respond strategically by complying with the legal standards without necessarily addressing the deeper claims. It is here where the use of international law finds an important limit because the institutional responses, often sought by the groups wielding international law categories, can also use international law's indeterminacy by arguing compliance without necessarily addressing the other meanings infused by victims. However, despite this limit, the use of international law is still important as it allows victims to introduce their claims into the political debate and to slowly challenge the identity of the victim as presented by the state. In this back and forth movement, the disputed identity of the victim has, as one of its elements, the very struggle of the victims themselves.

[99] Furthermore, indeterminacy allows for different meanings to be infused when wielding the category of victim. This means that contestations does not necessarily go in one direction from the victims as a homogenous group against the state. It is truth that, in this dissertation, the cases feature victims wielding the category of victim against the state, but one should look at the larger context. As such, the identity of the victim can be infused with meanings that may undermine the very status of other victims. In Colombia, because of the existence of different armed groups (state, guerrilla and paramilitary groups) this is actually the case. While there are few that would challenge the status of guerrilla victims, the struggle of Movice (Article III) was initially a struggle for recognition of their status as victims in a context that did not recognised the existence of state crimes. Moreover, both Movice and the Community of Peace (Article II) are often suspected — sometimes by other victims - of belonging or sympathising with the guerrilla, which would undermine their status as victims. Another case is the one of victims who belong to the army, and who, perhaps in light of the visibility acquired by cases of victims of state crimes, have begun to assert their own identity as victims. This need to assert this identity could also be seen in connection with a context in which, as a result of victims' activism, several cases revealed the responsibility of Colombian security forces in extrajudicial killings. An example of this is the so called 'false positives' which describes a widespread practice in which random people — often of poor background - were kidnapped, killed, and dressed as guerrilleros by security forces in order to respond to the pressures of the institution to increase their body counts of guerrilla members killed. See: Nathalie Pabón Ayala et al, *Memoria y Víctimas en las Fuerzas Militares* (Editorial Universidad del Rosario, 2018); Omar Eduardo Rojas Bolaños and Fabián Leonardo Benavides Silva, *Ejecuciones Extrajudiciales en Colombia 2002-2010* (Ediciones USTA, 2017).

3. Method

In this section I would like to reflect on questions of method on two levels. First, a general level, in which I identify two different approaches that have influenced this thesis as a whole and that explain the research choices made. To say that they have influenced the thesis means that they have affected the way in which I have thought about the question of victims of mass atrocities, but that they have not necessarily determined it.[100] Second, on a more specific level, I will explain the way in which these two approaches reflected upon the decisions made in each article, which sources were used, and the challenges encountered.

A critical approach and Article I

This thesis is premised upon a critical approach to the law. What does that mean? In this section I reflect upon two different ways in which this thesis is critical, a 'softer' sense and a 'stronger' one which, in turn, implies at least three different questions. In a softer sense, all research at the doctoral level is expected to be 'critical.'[101] As Minkkinen puts it, 'critical judgement" is a generic intellectual skill that all researchers are supposed to be able to apply in relation to the object of their research.'[102] Thus, in this 'softer' sense, being critical entails an 'attitude and a willingness to continuously question and to be put into question,'[103] which was precisely what I described in Section 3.1 when I discussed what I called the non-linearity of research. Though described there in terms of its temporality, this non-linearity implied an attitude of openness not only to be put into question by others, but also, to put myself into question. Taking others' criticisms seriously, involved embarking upon a process of thought that allowed me to reformulate several times my own ideas and preconceptions, and 'become

[100] An example of this is the critical approach. While some contend that a critical approach should not propose solutions, I did propose a specific suggestion in my first article, namely that victims of mass atrocities should be granted more opportunities for self-expression in the international criminal court.
[101] Panu Minkkinen, 'Critical legal "method" as attitude,' in Dawn Watkins and Mandy Burton (eds) *Research Methods in Law* (Routledge, 2013), 119.
[102] Ibid.
[103] Ibid, 135.

aware of the self-imposed limitations' that prevented me from seeing a wider picture.[104] In this process, a crucial element was the interaction with other researchers and scholars who studied the law from the standpoint of extra-legal disciplines, such as anthropology, philosophy, and sociology.

But, even though my research is critical also in this 'softer' sense, in this section, I am more interested in fleshing out the 'stronger' meaning of a critical approach and its consequences. In this sense, being critical first means to refute the idea that my own positioning towards my research comes from a neutral place from which I then pick a method to apply to my research in the assumption that the outcome will be objective. Moreover, even though some publications about method have in fact included the 'critical method' as a part of the variety of methods the scholar can choose to apply to her research, such a thing as a coherent 'critical legal method' does not really exist.[105] As Koskenniemi has argued, this idea entails an assumption 'that there is some overarching standpoint, some nonmethodological (sic) method, a nonpolitical academic standard that allows that method or politics to be discussed from the outside of particular methodological or political controversies.'[106] This is the reason why I have made a concerted effort to explicitly reflect upon my own experience of research, its challenges, and its pitfalls.

A second consequence of this 'stronger' sense in which my approach is critical, is that it evaluates the law 'not as apolitical and objective'[107] but as profoundly pierced by political questions of power, inclusion and exclusion. Being critical, in this sense, entails to be critical *of* something, namely the traditional view of the mainstream lawyer that views the law as 'an autonomous, rational, consistent and coherent system of

[104] Ibid.
[105] Ibid, 120; Martti Koskenniemi, 'Letter to the Editors of the Symposium' (1999) 93 *The American Journal of International Law* 351, 352; also, Kaarlo Tuori, 'Law, Power and Critique,' in Kaarlo Tuori et seq (eds) *Law and Power: Critical and Socio-Legal Essays.* (Deborah Charles Publications, 1997) at 29: 'there is no single Narrative told by the critical legal scholar, only narratives by legal scholars.'
[106] Koskenniemi, *supra* note 105 at 352.
[107] Singer, *supra* note 29 at 5.

norms.'[108] This traditional view puts questions of power outside the realm of the law, perhaps including it only in discussions with reference to the coercion needed in order to guarantee the realisation of the law, or to the way the law acts as a limit to power.[109] In contrast, the standpoint through which I approach the law in this thesis aims at viewing the law as an expression of power itself, and is thus critical of the 'alleged objectivity and neutrality of the law.'[110] This entails an effort to see the law in its context and understand how the law can help draw boundaries of inclusion and exclusion that are defined by the letter of the law but also, by the social practices that surround its application.

Finally, a more implicit consequence is that this critical approach entails taking a perspective through which the law is treated as a discourse. Certainly, though critical studies commonly see the law as a discourse, treating the law as a discourse does not always imply a critical stance towards it.[111] In my case, the understanding of the law as a discourse did not occur as an explicit methodological decision. Instead, it reflects an analytical standpoint that was the influence of different critical works that resonated with my ideas, which implicitly led me to understand the law as a discourse encompassing 'an interrelated set of texts, and the practices of their production, dissemination, and reception.'[112] In this sense, understanding the law as discourse entails the rejection of the notion that the text of the law has meaning in a vacuum that can be discerned solely through its reading. Instead, it implies accepting the notion that the law's meaning is necessarily enmeshed in its context, that is, the interactions between social groups and the complex societal structures in which it is embedded.[113] Moreover, as stated earlier, this is an analytical standpoint and not necessarily an assertion

[108] Tuori, *supra* note 105 at 7.
[109] Ibid.
[110] Bianchi, *supra* note 25 at 136.
[111] Though critical studies are common in discourse analysis, there is a variety of approaches. Phillips and Hardy propose two key dimensions to differentiate the different styles of research that deal with discourses. These two key dimensions are, first, the degree to which the research emphasises individual texts or their context; and second, the degree to which research focuses on power dynamics or on processes of social construction. A critical discourse analysis will focus, in this view, more on the context and in the power dynamics, while a social linguistic analysis will focus more on the text and on the process of social construction. Nelson Phillips and Cynthia Hardy, *Discourse Analysis* (SAGE, 2002), 18 et seq.
[112] Ian Parker, cited in Nelson Phillips and Cynthia Hardy, *Discourse Analysis* (SAGE, 2002), 3.
[113] Ibid. 4

on the law's nature. Thus in treating law as a discourse I still acknowledge the privileged position of the law as a discourse that has the threat of force associated to its compliance. A consequence of this is that, even though any actor can freely produce this discourse, the effects of this production vary depending on the position of the actor.

I would like to elaborate a little further upon the concrete decisions that these three interconnected aspects of the critical approach of this thesis have led me to take, as well as upon some of the challenges involved. The first aspect actually reflects an attitude towards research and to its expected outcomes. I have actively sought to highlight the ways in which victims of mass atrocities can act in agentic ways because I believe this to be a question of justice. Indeed, as explained in the Preface of this summarising report, it was a sense of injustice which inspired this thesis in the first place,[114] namely the idea that victims of mass atrocities were constantly invoked by others in the context of the ICC but were not given an opportunity to appear in person. This positioning inspired me to choose cases in which victims' political actions were apparent, at least at first sight.[115] At times, my own positioning towards this issue was an important challenge as it unconsciously made me reflect upon the effects of the actions of victims in an overly positive way. In this, the role of my advisors, as well as the anonymous referees in the academic journals, were fundamental in making me confront my own arguments with the cases I was studying.

The second aspect I described above involves an understanding of the law and its effects that is contrary to a traditional approach to the law. I believe that this understanding of the law is apparent in virtually all of the articles of this thesis because it is reflected in the way I analyse not only the cases, but also, the role of victims at the ICC. Understanding the questions of power that underlie the application of the law was a core question of this thesis, as was an understanding of how the law can serve

[114] In identifying this injustice and viewing it as a valid starting point for a doctoral research I am grateful to Martti Koskenniemi, who encouraged me to 'keep the eyes on the ball', the ball being the injustice as a core question in my doctoral research.
[115] In the next section, I will reflect about the choice of cases and how I interpret their meaning.

as a tool for oppressed groups. It is because of this, that the contexts and the effects of the legal materials are always highlighted in the different articles, as well as the meanings that victims' groups created in utilising legal categories.

Finally, the third aspect of this critical approach entails focusing on a particular quality of the law (as a discourse) and allows us to see more concretely how the law connects with questions of power and exclusion. This was reflected mainly in the choice of materials for each article. Moreover, seeing the law as a discourse soon reveals one important feature: that the law relates to power not only in that it delineates frontiers of inclusion and exclusion, but also, in how access to the law is restricted. This, in itself, is a specific power resource that limits the ways in which lay actors, such as victims of mass atrocities, can also participate in the ways that law works as a discourse.[116] This idea relates with the next important influence of the approach used in this thesis, namely the approach *from below* as a way to understand how victims of mass atrocities, as lay actors, also use the language of international law.

Moreover, although the critical approach certainly influenced the other articles, this is more clearly seen in Article I, which evaluates how the representations of the victim in the context of the international criminal law — as highlighted by different critical scholars — may be reinforced by its absence. This article has two main lines of inquiry that are initially treated separately. First, a philosophical inquiry into the question of political subjectivity following the works of Jacques Rancière which, together with the critical approach, served as a major theoretical background. In earlier versions of the paper, this philosophical part was the main question of the article. However, as a result of the publication process (and necessary revisions), a second line of inquiry was strengthened and became more important in the overall argument of the paper. This second line of inquiry relates to the question of victims' participation in the ICC. In order to study this, I looked at primary and secondary sources, such as, the Court's

[116] On the idea of power as control over access to specific sources of discourse, see Van Dijk, 'Critical Discourse Analysis' in Deborah Tannen et al (eds) *The Handbook of Discourse Analysis* (2nd ed, John Wiley & Sons, 2015) 469 et seq.

statute and regulations regarding the question of victims' participation, court's decisions, transcripts, as well as documents from the Assembly of States Parties, all regarding victims' participation inside and outside the trials. This second line of inquiry allowed me to establish the virtual absence of possibilities of self-representation for victims of mass atrocities which contrasted with the discursive centrality of victims as legitimators of the international criminal enterprise. This became important because of the theoretical background, which allowed me to understand the importance of the possibility to appear, create a 'theatrical space' and disrupt and, in that process, become a political subject. The absence of possibilities for self-expression, plus the access obstacles that the international setting presents victims with, made it virtually impossible for victims to create that theatrical space. This was the basis for the main contention of the article: that more opportunities for self-representation should be provided to victims of mass atrocities at the ICC.

An approach from below*: Case studies in Articles II, III and IV*

As explained in section 3.2, after analysing the absence of actual victims in the context of the ICC, I became interested in studying the actions of victims of mass atrocities in using concepts of international law and the very category of victim. In doing this, I was influenced by works calling for a bottom-up approach, or an approach 'from below', to international law.[117] This approach has at least two important meanings for my thesis: on the one hand, it explains the focus on domestic practices by non-institutional actors that use international law; on the other, it entails formulating the hypothesis that these practices may develop international law beyond its official development. The underlying idea in this approach is that international law has been traditionally understood from an actor-based perspective that focuses on the actions in institutional places such as courts, international organisations, and in some

[117] Rajagopal, *supra* note 45; Santos and Rodríguez-Garavito *supra* note 42; a review of the perspective 'from below' can be found in McEvoy and McGregor, *supra* note 41, 2 et seq.

cases, NGOs.[118] But this focus neglects non-institutional actors, such as social movements that utilise the language of international law to frame their demands. Thus, an approach that looks at international law 'from below' requires taking seriously the usage that subaltern groups make of international law and the possibility that these usages can influence the way international law may be understood (hence, '*from* below').

In adopting this approach, an important assumption of this thesis is that a better understanding of the variety and richness of actions in which victims of mass atrocities use the concepts of international law, and the category of victim itself, is relevant for international law and for international law institutions. More precisely, the call for increasing victims' self-representation at the international level in the context of the ICC, which was the main suggestion of Article I, is supported in this thesis by the close examination actions of victims' actions domestically. In this sense, I embarked upon the study of such actions with the hypothesis that these would offer complex, varied and enriching uses of international law that should be taken seriously by international law as a field of practice and study. Moreover, I found that victims do not simply 'use' international law categories but infuse them with contents that sometimes allow them to question deeper injustices.

It is because of this bottom-up approach that the thesis proceeds to study cases in Colombia. I chose cases in Colombia for different reasons, both substantive and more practical. First, Colombia is a country that endured a long-term internal conflict, with high amounts of victims, where transitional justice measures have been applied. Moreover, the close examination of the situation in Colombia, opened at the ICC, has implied that the ICC has substantively influenced the implementation of transitional justice measures in the country.[119] This influence reflects in the way that the government as treated the question of the victims, fully embracing the language of transitional justice, as well as the way in which victims themselves often refer to the ICC as a relevant actor in international law in questions regarding the internal armed conflict.

[118] Cf. Rajagopal, *supra* note 45 at 2.
[119] Easterday, *supra* note 21.

Second, in Colombia there are not only a vast number of victims, but victims who have gained political visibility, and are perceived by scholars as becoming an important political actor.[120] This visibility is mainly due to the different ways in which victims have organised and mobilised around concepts of international law. As such, Colombia seemed to provide several examples of victims of mass atrocities that could potentially be used for my research. Third, there are practical reasons that made Colombia attractive for me: I am a native Spanish speaker and, as I spent four months on a research visit to Universidad de los Andes, Bogotá, I was well aware that the country has a well-developed academy, especially strong in the area of transitional justice and interdisciplinary studies. This meant that there were several cases of victims of mass atrocities that had been documented and studied from different disciplines. This was important as my articles have strongly relied on a variety of existing studies.

Thus, Article II studies the case of the Peace Community of San José de Apartadó, the first case I decided to study. The reason for this, is that this is a case that had been studied from different perspectives and thus, there was abundant material that allowed me to become acquainted with the case without having to apply empirical methods. In order to approach this case, I first identified, selected, and studied research materials describing the project of the Community. The article was largely based on the study and analysis of the contents of these secondary sources, as well as some primary sources available online.[121] These contents were analysed considering the theoretical framework of Article I, the notion of political subjectivity of Jacques Rancière. This notion allowed me to assess the actions of the Community as non-compliant with the stereotypical image of the victim. In addition, I met with scholars, who had studied

[120] Angelika Rettberg, 'Victims of the Colombian Armed Conflict: The Birth of a Political Actor.' Available at http://dx.doi.org/10.2139/ssrn.2317270; Juan Pablo Vera Lugo, 'Transitional Justice, Memory, and the Emergence of Legal Subjectivities in Colombia' in Sandra Brunnegger and Karen Faulk (eds) '*A Sense of Justice: Legal Knowledge and Lived Experience in Latin America*' (Stanford University Press, 2016); Mariana Delgado Barón, 'Las Víctimas como sujetos políticos en el proceso de justicia y pa zen Colombia: discursos imperantes y disruptivos en torno a la reconciliación, la verdad, la justicia y la reparación' (Doctoral Thesis, Flacso México, 2011).

[121] It was only by the end of the writing process that I had the chance to visit briefly the Community. There, I had informal conversations with community leaders that, for the most part, confirmed my impressions about the project as one that is not merely defensive, but instead, it is largely about preserving a way of communal life.

the case of the Community, in order to have a better sense of their impressions and to address some questions about the Community.[122] These conversations influenced the way I approached the case of the Community in that I was not only interested in the ways they approached legal institutions, but in how the Community shared values, identities and views of the world. Finally, as a result of the process of publication, the framework of legal pluralism became relevant and allowed me to assess the different legal frameworks interacting in the case of the Community.

Article III, studies the case of Movice. I chose to study the workings of Movice because the group represented a totally different case from that of the Community.[123] While still in Colombia, I met with two members of Movice, and also with a legal scholar whose doctoral research had dealt with the earlier work of Movice, to informally discuss about the organisation.[124] This allowed me to have a preliminary sense of what the organisation looked like and how I could examine its work in my thesis. When I began working on the article, I first identified several sources, including books published by Movice itself, and some secondary scholarly works reflecting on different aspects of its work. In addition, I also used primary sources retrieved from Movice's website, especially Movice's communiqués. However, unlike the case of Article II, there was not a lot of ethnographic material that I could rely on. I thus proceeded to collect online newspaper material that contained the word 'Movice' and gathered them in a file containing newspaper clips from 2008 until 2017. These clips were retrieved from newspapers and magazines with national (*El Espectador* and *Semana*) and regional (*El Colombiano*, *El Heraldo*) coverage, as well as virtual media (*Silla Vacia*, *Colombia Plural*). I then studied these clips. After studying this material however, I considered it was not sufficient so as to properly understand the work of Movice, particularly its most recent years. To address this challenge, I designed a semi-structured interview for Movice members aimed at ascertaining how they viewed the identity of the victim,

[122] I met with Juan Ricardo Aparicio, Gwen Burnyeat, Christopher Courtheyn, Laura Quintana and Pedro Valenzuela.
[123] See section 2.2, in which I reflect on these many differences.
[124] Gabriel Góme z Sánchez from Universidad de Antioquia; Alejandra Gaviria from Movice and *Hijos e Hijas* and other former members of Movice.

the differences of Movice *vis-à-vis* other victims' organisations in Colombia, Movice's main achievements, the current political contexts and challenges to Movice's work, and the impact of the peace agreement on Movice's work. I travelled to Colombia to conduct interviews with Movice members, whom I contacted through one of the spokeswomen of the organisation that I knew because of her work on Movice as an academic. I conducted six interviews in total, all in Bogotá. Three of the interviewees held a special position in the organisation, two of them were spokesmen, and one was the contact person for the Bogotá chapter. The other three actively participated in Movice's activities in the Bogotá chapter. The material obtained was transcribed onto paper and then analysed in order to identify recurring topics. The information obtained through the interviews was used to complement the research already initiated.

On the value of these cases — Movice and the Peace Community of San José de Apartadó — it is important to clarify that they do not attempt to serve as general examples. On the contrary, they are chosen on purpose, *because* they are the exception. As such, they merely attempt to present an exploration of the different ways in which victims use the category of victimhood and its effects. Indeed, I have chosen cases that appear to show victims acting in agentic ways, but my contention is not that victims of mass atrocities *always* act like this. Thus, my exploration attempts to decipher the logics of this exception, its possible effects and meaning in connection with its context.

Article IV, in turn, presents a wider narrative of different attitudes of victims of mass atrocities that includes the cases studies in Articles II and III, as well as other cases. Here, I wanted to include not only cases of disruption, as in the previous articles, but also cases of victims that acted in a docile way, identifying with the category without challenging it. In this, the work already done for previous articles was important for the reflections it had triggered on the limits of the use of the discourse of international law. Moreover, there were a number of sources that I had identified and studied earlier in the process of preliminarily assessing the cases to study in the thesis, but that

I had not used because I had considered that they did not represent cases of disruption. These materials became the first materials of study for this article, as well as new material I identified for the purpose of this article. I divided the materials into two groups, those representing docile victims — that is, those victims whose actions did not problematise the category of victim's underlying representations, according to the Rancièrian theoretical framework developed in Article I — and those representing challenging victims — that is, those who, in Rancière's terms, become political subjects with their actions. I also examined the different laws concerning the question of victimhood and examined them again with more attention on the question of the identity being constructed in each of them.

Moreover, an aspect that is important about the way I approached the cases is the connection between theory and practice in the way the cases are defined. According to Ragin, the question of what a case is, finds different answers among researchers.[125] The cases in this thesis are viewed as 'neither empirical nor given' which means that, in approaching the cases, there is an interaction between ideas — i.e. the theoretical framework — and the evidence. This means that I attempted to discern the theoretical significance of the cases without necessarily determining their empirical limits.[126] In practice, this allowed me to have a flexible approach to the cases which meant that both theory and case were constantly revisited as I developed the significance of the case. Thus, there was a dialogical process between the cases and its theoretical framework, that I attempted to describe in section 2, as the study of the cases opened way to different theoretical frameworks that, in turn, allowed me to make sense of them. While I initiated my inquiry by viewing the first case of the Community through the framework of the political subject as developed by Jacques Rancière, studying the Community's use of their unofficial law allowed me to see that these unofficial norms sheltered an alternative way of living that was critical to neoliberalism. It is because of this that the idea of the Community as subaltern began to take shape in the subtext of

[125] Charles Ragin, 'What is a Case?' in C. Ragin and C. Becker (eds.), *What is a Case?: Exploring the Foundations of Social Inquiry* (1992), 7 et seq.
[126] Ibid, 10.

the article. Similarly, the question of how an identity of 'the victim' emerged both from the contentious actions and the docile actions of victims of mass atrocities was an idea that came from the study of the different cases in Article IV.[127]

In studying cases of victims, an important concern is how my own act of portraying their actions reflects my views and my own wish to assign a particular political significance to them. Just as in the reflections upon the critical approach of this thesis — which rejects the idea that my own positioning towards my research comes from a neutral place from which I then pick a method — also, in approaching cases of victims of mass atrocities, I reject the notion that I do that from an epistemologically neutral place, in which my words 'do not prescriptively affect or mediate the experience of others.'[128] In studying victims' actions, I have to draw a representation that allows the reader of my articles to understand the way that I see them. As such, I am in a way, 'engaging in the act of representing the other's needs, goals, situation, and in fact, who they are.'[129] As Alcoff has highlighted, 'this act of representation cannot be understood as founded on an act of discovery' and, instead, it must be understood that I am actively producing that representation.[130]

This has been a preoccupation in approaching the cases, as I have attempted to study them in a way that allows me to understand different views and different ways of interpreting the actions of victims. Moreover, I do not believe that this representation is needed for them to be seen in the domestic context, where victims of mass atrocities have been portrayed in different and, at times, conflicting ways as they are recognised as important political actors. Instead, I think that this representation is needed in the international context, where victims' self-representation — especially in the context of venues such as the ICC — occurs rarely, if ever. In this sense, Alcoff concludes her illuminating article with the following thought:

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[127] Other theoretical frameworks I resorted to in the articles were the sociology of social movements and legal pluralism.
[128] Linda Alcoff, 'The Problem of Speaking for Others' (1991-1992) 20 *Cultural Critique* 5, 20.
[129] Ibid, 9.
[130] Ibid. This is why Alcoff argues that speaking for others also includes representing that other.

'The source of a claim or discursive practice in suspect motives or manoeuvres or in privileged social locations, I have argued, though it is always relevant, cannot be sufficient to repudiate it. We must ask further questions about its effects, questions that amount to the following: will it enable the empowerment of oppressed peoples?'[131]

I do think that the aim of this thesis, in reflecting at an academic level upon victims' representation as defenceless, and in contrasting it with victims' political actions domestically, may contribute to victims' empowerment. If anything, it aims at problematising their absence and lack of opportunities of self-representation at a venue such as the ICC.

[131] Ibid, 29.

4. Victims of mass atrocities: political subjectivity, subalternity and identity

As stated earlier in the introduction, my aim in this summarising report is to bridge the gap between the questions that emerged from the articles and the initial query, that is, victims of mass atrocities at the ICC. In what follows, I will do this by discussing different concepts that I used to analyse, or which emerged in the different articles, namely the concepts of political subjectivity, subalternity and identity. These three concepts reflect the ways in which I thought about victims' cases in the different articles. As explained in the section on method, the case studies in this thesis were thought of as having a dialogical relation to theory. In concrete, this means that the concepts I develop here relate to the articles in two alternative ways, either as a concept that I approached the question with as part of the theoretical framework (Article I and concept of political subjectivity); or as a concept that emerged from the articles (Articles II and III and the concept of subalternity, and Article IV and the concept of identity). In this sense, especially the concepts of subalternity and identity, in their connection with the category of victim, are both theoretical frameworks and findings of my research. Thus, I believe that these concepts offer a key to understanding my thesis as they highlight the ways in which I looked at the actions of victims of mass atrocity in Colombia.

Before I begin, let me briefly recap and explain how these concepts relate to the different articles. In Article I, I focused on the question of victims' participation in the context of the ICC. Here, the concept of political subjectivity was central to the article as I explored how Jacques Rancière's ideas on the political subject could allow me to rethink victims and their participation at the ICC. From here on, I studied the specific ways in which this political subjectivity could take shape in cases of victims' groups in the specific context of Colombia. In Article II, I studied the case of the Community of San José de Apartadó. Here, legal pluralism was central as a way to see that certain practices of the Community could be seriously considered as forms of unofficial law. Here, an underlying idea that began to shape my thinking was that the practices of groups such as the Community could be considered what Santos and Rodríguez-

Garavito call 'subaltern cosmopolitan legality.'[132] This concept encompasses a bottom-up approach to the study of law in globalisation that focuses on case studies of counter-hegemonic legal forms. The aim of this approach is to achieve a conception of the legal field that is suitable for reconnecting law and politics and reimagining legal institutions from below.[133] Thus the idea of victims as subalterns and how international law could be used, modified, and even created from below was at the core of Article II, although it remained in the subtext. A similar idea also permeated Article III, in which, the limits of the law as a tool for political mobilisation became apparent to me. Finally, in Article IV, a core concept that emerged during the writing process was that of identity and how the disruptive actions of victims of mass atrocities, the docile actions of victims of mass atrocities, the actions or inactions of the government, all contributed to the formation of an identity of the victim of mass atrocity, which was always in dispute and never fully realised.[134]

In this section, while connecting these concepts with the articles, I also reflect on why it is relevant to consider the victims in light of such ideas for the purposes of international law institutions, such as the ICC.

Victims as political subjects

The claim, advanced in Article I, that victims of mass atrocity can potentially be political subjects is only innovative in a context in which these individuals are usually portrayed as defenceless and passive. Saying that victims can be political subjects contradicts such a portrayal. Becoming a political subject requires agency, action and the capacity to provoke disruption, characteristics that are in contradiction with the assumed passiveness and defencelessness of victims. This contrast seems to be even sharper in the case of victims of mass atrocities because of the gravity of the violations these victims have suffered. Thus, in the articles of this thesis, I was interested first,

[132] Boaventura de Sousa Santos and César Rodríguez Garavito, 'Law, Politics and the Subaltern in Counter-Hegemonic Globalisation' in Boaventura de Sousa Santos and César Rodríguez Garavito (eds) *Law and Globalisation from Below* (Cambridge University Press, 2005)
[133] Ibid, 14-15.
[134] Hall, *supra* note 98.

in simply showing that there was a paradox in the idea of the victim of mass atrocity as a political subject. On the one hand, victims of mass atrocity have suffered from the worst kinds of violations of international law and this suffering is usually represented as accompanied by extreme need. Victims of mass atrocity, in this depiction, are not worried about political issues, they are worried about more pressing needs: Preserving their lives, fleeing from violence, finding food and shelter, recovering from injuries and trauma. On the other hand, there are others who can help them by bringing justice and offering different forms of redress. Thus, victims do not need to worry about political questions, there are others who can do that for them, namely all the bureaucracy of human rights, international criminal law, and transitional justice.

Yet, there is some truth in this depiction of victims of mass atrocity as individuals who are often in dire need, only concerned with securing their basic needs. Claiming that victims can be understood as political subjects does not imply completely refuting the partial accuracy of this stereotype. Indeed, Colombian victims of forced displacement suffer a tragedy that largely corresponds to this representation.[135] Paramilitaries often arrived to towns with lists of the people who supposedly supported or belonged to the guerrillas and killed them in particularly violent and public ways, as a warning to all the other people, often also giving them a deadline for leaving the towns.[136] Sometimes, towns were attacked later by guerrillas who also accused them of supporting the paramilitaries. As a response, people abandoned their homes taking with them only the essentials, which meant abandoning their basic source of income: The land on which they lived. In some cases, these victims had also lost a family member, having had to flee from their homes in grief and poverty. When I met victims who participated in Movice in Bogotá, some of them referred to this as obstacles to political

[135] Victims of forced displacement make for the overwhelming majority of victims. According to the Unified Registry of Victims, over seven million victims of the conflict in Colombia have suffered from forced displacement.
[136] Only in the region of Montes de María, between 1999 y 2001 there were 42 massacres with 354 casualties. A famously shocking massacre was the case of the town of El Salado, occurred in 2000, with 60 casualties. Here, paramilitaries forced inhabitants of the town of El Salado, to gather in the soccer court and, as they played music with percussion instruments taken of the House of Culture of the town, they killed several people that had been signalled as collaborators of the guerrilla. See: GMH, *La Masacre de El Salado: Esa guerra no era nuestra* (GMH, 2009) 9 and 35 et seq.

mobilisation: Some members simply did not have time to participate in the activities organised by Movice because they had more urgent needs.[137] However, I also had the chance to meet others who would still participate in the activities in spite of the economic difficulties they faced.[138]

The problem with the stereotype of the victim of mass atrocity, then, is not its inaccuracy, but instead, that it prevents institutional actors that interact with these victims from seeing some of their actions as profoundly political and agentic. And this is important for an institution such as the ICC because the Court's Statute includes measures for victims' participation, but this participation is heavily influenced by the depiction of the victim as essentially passive and defenceless. Moreover, it seems that all the incentives are there to perpetuate this image: In their search for legitimacy, different actors of the Court often invoke the legitimating power of the victims' suffering and,[139] in the meantime, the victims never appear directly before the judges, leaving their representation in the hands of actors whose work is legitimised through the idea that they are bringing justice to the defenceless victims. This is a vicious cycle in which, the victims' absence allows others, whose work relies upon the assumption of victims' passiveness, to speak for them. This cycle, in turn, can influence how victims are viewed by other institutional actors, such as, the Trust Fund for Victims, the main institution handling victim reparation at the ICC, the Assembly of States Parties of the ICC, or also, national institutions that aim at following international standards, such as the Victims Unit, in Colombia.

Moreover, by showing the contradiction between the stereotype that victims of mass atrocities are often represented as essentially defenceless, docile and passive and their agentic behaviour, I do not necessarily mean to fully embrace the idea that the inclusion of the individual as a subject in international law is decidedly emancipatory.[140] Instead, by showing this contradiction I call for an analysis that considers the

[137] Lucía Osorno Ospina, Interview (11 April 2018).
[138] This was the case of Gloria Inés Alvarado Cárdenas and Blanca Nubia Diaz.
[139] See: Kendall and Nouwen, *supra* note 27; and Fletcher, *supra* note 27.
[140] This contention has been made, for instance, by: Antônio Augusto Cançado Trindade, *International Law for Humankind Towards a New Jus Gentium* (2nd Edition, Martinus Nijhoff, 2013), 252.

context in which processes of political subjectivity take place, because it is in relation to this context that political subjectification actually occurs. This is why, in exploring the cases of victims, I sought to show that the depiction of the victim was inaccurate in representing victims whose actions could be understood as political. Legal approaches that study victims' political actions tend to focus more on the actions of victims before official institutions such as courts or parliamentary discussions.[141] Instead, because my approach was influenced by the idea of political subjectivity as developed by Jacques Rancière, I looked at other actions in which victims were able to disrupt the social space using concepts of international law. In this way, I show that the political actions of victims of mass atrocity can take different shapes and textures, the meanings of which depend on the context in which they occur. Some of these shapes were political rallies in which the category of victim is deployed to assert that a specific perpetrator is being excluded from the public discourse;[142] safe areas, invoking not only the category of victim, but also principles of international humanitarian law;[143] photo galleries in public spaces showing victims engaging in politics;[144] an unofficial Truth Commission telling stories of women not only being victimised but also showing their recovery;[145] or the very formation of a nation-wide coalition of victims of a specific armed actor, in a specific national context.[146]

Why, then, is it relevant to look at these actions? Rights, as inscriptions that define roles, hierarchies and procedures, necessarily define limits of inclusion and exclusion. Political actions are disruptive in the sense that they call into question the exclusions delineated by these rights, or by the assumptions upon which rights are interpreted, or by for the practices that those assumptions support. Naturally, this means that political actions can certainly be uncomfortable for the institutional actors, whose work is based on, and whose practice supports these assumptions. But an understanding of

[141] E.g. Sandoval Rojas, *supra* note 91; Gómez Sánchez, *supra* note 91.
[142] This is the case of Movice, described in Article III.
[143] This is the case of the Peace Community, descibed in Article II.
[144] This is the case of *Hijos e Hija*s, described in Article IV.
[145] This is the case of the *Ruta Pacífica*, described in Article IV.
[146] This is also the case of Movice, Article III.

the political as disruption assigns an important value to disruptive practices, as these are now up held as potentially enriching for the institutions. Indeed, the effect of the political action is that it forces institutions or communities to re-evaluate, to re-assess and perhaps modify practices and imaginaries that influence the way laws are understood and applied. The strength of human rights, as a tool for political actions, lies precisely in this constant movement between their inscription and political *dissensus*.[147]

Let us now return to the question, posed earlier in this section, of why it is important to think of victims as potential political subjects in the context of an institution such as the ICC. Thus far, I have suggested that the work of the ICC with regard to victims, can be seen as a cycle in which the victims' absence reinforces the stereotype of the victim as defenceless. This happens in spite of the existing legal measures to ensure the participation of the victims because their representation as defenceless is part of an institutional practice of different actors within the Court (not only of those who directly represent them). In this context, victims' disruptive political actions would allow an institution such as the ICC to, slowly and progressively, re-evaluate the underlying image of the victim.

Finally, if one understands the political action as a disruptive action, it follows that the political cannot really be truly incorporated in the institutional realm. If it was, the political would lose the disruptive effect that characterises it and that provokes re-evaluation and eventually institutional change in favour of the excluded. Because of this, in Article I, I suggested that victims of mass atrocities should have more opportunities for self-representation in different areas of the ICC's institutional discussions, be they trials or policy discussions. It is true that the effect of this inclusion may be only marginal because, in the end, it is for the victims themselves to act disruptively. Thus, I am advocating for an opportunity for the political to occur. And this is necessary because, unlike in the domestic context where — as shown in the articles of this

[147] Ari Hirvonen, 'Fight for your rights: Refugees, resistance, and disagreement', law' in López Lerma, Mónica and Etxabe, Julen (eds), *Rancière and Law* (Taylor & Francis, 2017), 65.

thesis — the political can occur, an institution like the ICC is far too removed from the local communities directly affected by the crimes it deals with.

Of course, for all of this to make sense, one has to first believe that incorporating a greater or more meaningful degree of participation for victims is a positive thing. Thus far, I have referred to the idea of victims as political subjects. In my view, this idea only allows us to understand two things: First, that there is value in seeing disruption as a political device because it allows us to appreciate the importance of practices that occur in the margins of the institutions in the re-assessment and, possibly, the transformation of institutions, institutional practices and the assumptions upon which those are based. Second, through disruptive action, victims of mass atrocities may be able to challenge institutions, institutional practices, and the related assumptions, including their institutional representations. But to evaluate that a greater inclusion of the victims of mass atrocities in the ICC is a positive outcome, requires an additional step. Indeed, following Frost's analysis of Rancière, both progressive and regressive arguments can be political if they challenge the distribution of the sensible, and ask for the given order to be redistributed in their favour.[148] I believe that, in order to evaluate the greater inclusion of victims of mass atrocities within the ICC as a positive development, one must first acknowledge that there is an imbalance of power at the core of institutions such as the ICC, in which, oppressed groups are over represented on the side of the victims, while the elites are over represented among the different actors that compose the Court. Thus, the question of how the category of victim may be used to question this imbalance of power is a different concern that, in my view, relates to evaluating the potential of the category of victim for subaltern groups.

Victims as subalterns

The different articles of this thesis show that the concerns that victims of mass atrocities voice in the discussions in which they intervene through political disruption

[148] Tom Frost, 'Rancière, human rights, politics of process' in in López Lerma, Mónica and Etxabe, Julen (eds), *Rancière and Law* (Taylor & Francis, 2017).

can be deeper than the mere affirmation of victims' rights as a legal matter. For example, they can express deep criticism of the exclusion of narratives of female victims of the conflict;[149] of the official story of a 50-year internal conflict and its causes;[150] of the way that victims are usually portrayed in transitional justice measures;[151] or of the neoliberal system.[152] All these criticisms show structural injustices that may remain unaddressed despite the application of transitional justice measures. A particular question that I explored in this thesis, therefore, is how victims of mass atrocities in Colombia, a country in which the ICC has opened an investigation, have actually used the language of international law, including the category of victim, to support these various claims.

As Reyes Posada has contended, the struggle to dispossess peasants (including indigenous and ethnic peasant communities) of their lands and their resources in favour of great land-owners, is at the heart of Colombian violence.[153] In this context, one may wonder how this language works for the purposes of the victims considering that many of them belong to groups that can be considered as subaltern. Following Otto, I use the term 'subaltern' loosely to identify groups that are in positions of subordination that make them opposite to dominant or hegemonic groups. This position of subordination is determined with accordance to varying systems of hierarchising difference into relations of domination and subordination, i.e. social class, gender, religion, age, ethnicity.[154] Systems of hierarchising difference are deeply connected to the specific contexts in which they take place. Because of this, viewing victims as subalterns, necessarily entails looking at the specific contexts in which victimisation occurs. Thus, this concept remained in the subtext in the articles, implicit in the notion

[149] As shown in Article IV with the case of the Ruta Pacífica.
[150] As shown in Article III about Movice.
[151] As shown in Article IV with the case of *Hijos e Hijas*.
[152] As shown in Article II with the case of the Peace Community.
[153] Alejandro Reyes Posada, Guerreros y Campesinos. Despojo y restitución de tierras en Colombia (2nd Ed., Editorial Planeta, 2009), 50.
[154] Dianne Otto, 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference' (1996) 5 *Social & Legal Studies* 337, 361.

that, in the universe of victims of mass atrocities in Colombia, ethnic and racial minorities, as well as, poor socio-economic classes, are grossly overrepresented.[155]

The territorial dimension of the Colombian conflict is crucial to understand these questions. The appropriation of lands and resources is at the core of the Colombian armed conflict. This aspect, moreover, has prompted scholars to explore how transitional justice measures can respond to structural questions related to land through public policy and normative regulation.[156] However, here, the question I am asking is different because it does not relate to the specific measures that transitional justice, human rights or international criminal law can deliver to address the question of land. Instead, the question of land dispossession in Colombia relates to deeper injustices that explain how subaltern groups are epistemologically excluded from the public sphere and how the language of international law can allow them to access public discussions and influence these public discourses.

Now, in Rancière's account, all political practices are emancipatory.[157] Certainly, if we understand a political practice as one that enables us to reassess exclusion, there is certainly an emancipatory potential for excluded subjects. Moreover, for Rancière, the subject of human rights is the one who *makes something* of the inscription of equality contained in it.[158] In this sense, human rights are a tool for political action in the sense that they provide a declaration of equality against which the political actor can demonstrate its exclusion. In this context, the language of rights can certainly serve as a tool. But this account does not consider how the hegemonic nature of human rights, and

[155] For instance: García Arboleda groups victims who were included in his multi-method study in four categories, namely, peasants, afro-descending and indigenous communities, social movements, and urban marginality. See: Juan Felipe García Arboleda, *El Lugar de las Víctimas en Colombia* (Pontificia Universidad Javeriana, 2013), 52 et seq; similarly, the Historical Memory Group, in its seminal report 'Basta Ya!' has contended that the Colombian conflict especially falls upon poor communities, afro-Colombian and indigenous peoples, dissidents and opposition and particularly affects women and children. Centro Nacional de Memoria Histórica (CNMH), *Basta Ya! Colombia: Memorias de Guerra y Dignidad* (Imprenta Nacional, 2013), 25.

[156] For instance, Nelson Camilo Sánchez León, *Tierra en transición: justicia transicional, restitución de tierras y política agraria en Colombia* (DeJusticia, 2017).

[157] But what counts as political is very specific in Rancière. As explained in Article I, equality in Rancière is presupposed, not given or achieved. Political actors do not demand equality, they act as already equal, and in doing so, they become political subjects. It is this equality, which produces emancipation. See: Todd May, 'Wrong, Disagreement, Subjectification' in J. Deranty (ed.), *Jacques Rancière: Key Concepts* (Routledge, 2010), 72-73.

[158] Jacques Ranciére, 'Who is the Subject of the Rights of Man?' (2004) *103 South Atlantic Quarterly* 297.

their distinctively Western origin, may also play a role in silencing the voices of subaltern groups. This is what I want to discuss in this section.

Post-colonial scholars have shown that many institutions of international law that today are considered as 'neutral,' have in fact a colonial origin and served to legitimise the colonial enterprise.[159] Moreover, as argued by Angie, the use of international law to further imperial policies is a feature of the discipline that persists until today as, in its civilising mission, it seeks to transform the internal characteristics of diverse societies.[160] In this context, the UN Charter, often viewed as the seminal development for the different areas that take interest in victims of mass atrocities — ICL, IHRL, transitional justice—, actually reflects the European history of the evolution of the international community, despite its purported universality.[161] Thus, as Santos has suggested, human rights are universal only when they are viewed from a Western standpoint, because they rest on a set of presuppositions that are distinctly Western.[162] International law is a powerful forum in which dominant narratives of social reality are produced and reproduced as not only normative but also as universal. The result is that alternative discourses are silenced.[163]

In this landscape, a question I seek to explore here is what degree of emancipation can there be in using a device that also sustains hegemonic power? This is precisely the kind of question that subaltern and post-colonial studies pose and it represents a different perspective from the one explored through the concept of the political subject. Indeed, a question common to these approaches is whether international law can be used to advance the interests of subalterns.[164] Or, as Spivak famously asked, 'Can

[159] See for instance, Anthonie Angie, 'The Evolution of International Law: colonial and postcolonial realities' (2006) 27 *Third World Quarterly* 739.
[160] Id. 751.
[161] Otto, *supra* note 154 at 339.
[162] Boaventura de Sousa Santos, *Toward a New Legal Common Sense* (2nd ed, 2002, Cambridge University Press), 269 and 270. Some of these presuppositions are, that there is a universal human nature that can be known by rational means; that human nature is essentially different from and higher than the rest of reality; that the individual has an absolute and irreducible dignity that must be defended against society or the state; that the autonomy of the individual requires that society be organised in a non-hierarchical way, as sum of free individuals.
[163] Cf. Carol smart (1989) cited in Otto, *supra* note 154 at 351.
[164] Ibid, 338, Otto asks 'whether it is possible to imagine processes whereby non-dominant, non-elite, *subaltern* individuals and groupings could participate as subjects of international law.' Similarly, Angie: 'The questions that then arise are

the subaltern speak?'[165] This entails looking at the limits of international law as a device for political mobilisation that is in itself built around concepts that are distinctively Western. In this sense, Spivak's answer is that the subaltern does not really have a possibility to speak through 'the epistemic violence of imperialist law and education.'[166] She contends that this is so because — in ideological and scientific production as well as in the institution of law — great care has been taken to obliterate the textual ingredients with which the subaltern subject could express her own self. [167] I acknowledge that the possibilities of subalterns as subjects to express their way of viewing the world are uncertain as these may simply not be intelligible when expressed through the language of international law. But, as Otto explains, this does not mean that they are unable to talk but, rather, that they are not admissible in their own terms.[168] In this sense, the language of international law is one of those few forms of resistance that has been granted legitimacy.[169] It is important not to understand resistance as mere opposition, instead, forms of resistance that can be successful are those that transform the dominant discourse so as to establish cultural difference within that dominant discourse.[170] Thus, for Said, the partial tragedy of resistance is that it must, to a certain degree, work to recover forms already established, influenced or infiltrated by the dominant culture.[171]

This means that, subalterns are admissible in the terms provided by the discourse of human rights, one of them being precisely the category of victim of mass atrocity. In exploring the cases of victims of mass atrocities using the category of the victim,

whether, how and to what extent international law can be used for the purposes of furthering the interests of Third World peoples—protecting them against the excesses of the authoritarian and sometimes genocidal state, on the one hand, and advancing their interests in the international sphere on the other.' Angie, *supra* note 159 at 752; also, Santos, *supra* note 162 at 439 et seq, where he dedicates the final chapter of his book to the question 'Can law be emancipatory?'

[165] Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in Patrick Williams and Laura Chrisman (eds) *Colonial discourse and post-colonial theory, a reader* (Columbia University Press,)

[166] Ibid.

[167] Ibid, 75.

[168] Otto, *supra* note 154 at 354.

[169] Rajagopal, *supra* note 45154 at 9. Here, I use the word resistance as developed by postcolonial studies. Even though resistance movements arouse against European empires demanding for independence, postcolonial studies concentrate in more subtle forms of cultural resistance. Bill Ashcroft et al, *Post-Colonial Studies: the Key Concepts* (Routledge, 2013) 229.

[170] Bill Ashcroft and Ahluwalia Pal, *Edward Said* (Routledge, 2008) 104.

[171] Edward Said, cited in Bill Ashcroft and Ahluwalia Pal, *Edward Said* (Routledge, 2008) 105.

what I found is that this category provides a platform from which subalterns can communicate with the institutions that incorporate the language of international law in the domestic context. Thus, if victims of mass atrocities are understood as subalterns, the category of victim *may sometimes* work as a vehicle — a sort of 'Trojan horse' — granting legitimacy to their claim and allowing them to question deeper injustices. At the same time, the category of victim can serve to challenge from within the assumptions on which the category itself is based. I believe that, especially in cases such as the community of San José de Apartadó, the language of international law provides an intelligible device through which a Community, otherwise silenced, can address official institutions. Not only can they address them, but also, influence the potential reassessment and modification of exclusionary institutions, institutional practices, and the assumptions underlying these two.

To be sure, I am not claiming that this is the only or the best vehicle to introduce such concerns. One thing that comes out as a conclusion after studying cases of victims of mass atrocities using the category of victim, is that its reach is actually limited. This is my conclusion in Articles III and IV. While the indeterminacy of the international norm is a feature that allows victims to appropriate it, and give it a specific content to support their demands of justice, it is also a feature that allows others to appropriate it. Moreover, it is a feature that allows the government to comply with the international standards — often formulated in broad terms — without addressing the deeper demands of the victims. Thus, while appreciating the possibilities of the language of rights in terms of its potential reach that go beyond the level of the strictly legal, at the same time, one must appreciate the limitations inherent in political demands that are based on the language of rights. Basically, a demand using the language of rights seeks a normative response — regardless of the other effects it may have — that can be addressed by the institutions only in the language of rights without changing other relevant institutional elements that create exclusion.

Furthermore, as much as I believe that the category of victim has (limited) potential as a tool for political mobilisation of victims' group in the domestic context, I am

not so optimistic about its reach in the international context. And this relates to my initial concern in this thesis, namely participation of victims at the ICC. As I suggested in Article I, the context of international institutions, such as the ICC, poses a number of barriers that hinder victims' direct interaction in a way that allows them to provoke disruption. My idea in that article was that if the inclusion of victims as participants in the procedure before the ICC is based on the assumption that this participation is a matter of justice, the least they could do was to allow for victims to appear in person. Only this could ensure that the Court incorporates, at least, the possibility of disruption.

However, as much as I would like to remain hopeful of the possibility of victims appearing in person before the court, I do not think that such a measure is able to really bridge the epistemological gap between elites — often over represented in institutions such as the ICC — and subalterns — often over represented on the side of the victims. To do this, a more radical approach may be needed as, among other things, international institutions such as the ICC represent, not only a particular — western — way of conflict resolution, but also, a particular — western — way of evaluating which grievances are considered severe enough so that their prosecution is of the interest of the 'international community.'

The disputed identity of the victim of mass atrocity

Another way of understanding the different uses of the category of victim that victims themselves do, is to see them as contributing to the formation of an identity that is always disputed. This is what the exploration in Article IV led me to conclude. Here, I decided to look not only at those cases that I identified as political, but also those other cases in which the victims would, in fact, correspond more to the stereotypical image of the victim as disempowered and defenceless. Appreciating the dimension of identity allowed me to explore how the interaction of the institutional and the disruptive — the *political* and the *police*, in Rancière's account — could unfold. Surely, my exploration is only superficial, as such a project would deserve a much greater

degree of depth. But, my intention was not really to embark on such a project for its own sake. Instead, my intention was only to contrast the actions that supported the stereotype of the passive victim with what I had previously studied about victims of mass atrocities' use of international law categories for political mobilisation. In other words, since my research of the cases of victims of mass atrocity in Colombia had, until that point, been more focused on the side of the political/disruptive, I zoomed out in order to appreciate also the side of their actions at the domestic level that was not disruptive but, instead, complying with the institutional. This allowed me to conclude that a better way to describe the victim's identity was to see it as constantly disputed.

That the category of victim is disputed means that there are different practices that pull in different directions, thus contributing to different ways of representing the victim of mass atrocities. On the one hand, institutional practices tend to reaffirm the stereotype precisely because this representation justifies the institutional intervention in the first place. Here, both victims who seek for some forms of redress as well as the government officials contribute to pulling in a similar direction. Moreover, other actors who I suspect contribute to this may be international NGOs working in Colombia.[172] Victims who go to governmental offices and ask for these institutional interventions, are more often than not, in acute need. In this, they certainly comply with the stereotype of the victim as defenceless.[173]

On the other hand, disruptive practices tend to challenge the representation of the victim as defenceless and passive. The cases of Movice and the Peace Community are examples of organised groups of victims that use the language of international law to frame their demands of justice. But their demands of justice have deeper meanings that are connected with their projects as organisations. A collateral effect of these actions is that victims represent themselves an identity that is in contradiction with the

[172] Although I did not focus my attention on these actors in the articles.
[173] It is important to make explicit that in this analysis I do not mean to essentialise the victims as many different characteristics may coexist in the same individual. An individual victim who seeks redress before the state may also be part of a contentious group and with those actions also support another stereotype of the victim.

assumed passivity of the victim. Thus, the identity of the victim in Colombia is the one that comes out of the interplay between the different practices that use the category victim and represent the victim in different ways. It is because of the actions of victims' groups such as Movice, the Peace Community of San José de Apartadó, the *Ruta Pacífica* and *Hijos e Hijas,* that today in Colombia, it is now a common place to say that victims of the conflict are important political actors.[174]

Furthermore, in studying the case of Colombia, I realised that many of the institutional responses to victims of mass atrocity also ended up reinforcing this identity because, in dealing with victims in need, they simply failed to deliver what they had promised. In the article, I examined two specific 'promises' that failed in their implementation, namely the promise of reparations to victims and the promise of victims' participation.

Admittedly, administrative reparations programs for the benefit of the victims face important challenges because, unlike individual reparations established by courts, they are meant to address massive numbers of victims. In Colombia, the Unified Registry of Victims currently counts a total of more than eight million victims of the conflict, who are included in it for the purposes of reparations.[175] The challenges to this kind of administrative program are so significant that they have prompted renowned experts, such as Pablo de Greiff — the former Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence — to suggest that a different conception of justice should serve as basis for these reparations efforts.[176] Instead of following the classic principle of *restitutio in integrum,*[177] for this author, reparations for the purposes of mass reparations programs should be considered as part of a wider

[174] Rettberg, *supra* note 120; Vera Lugo, *supra* note 120; Delgado Barón, *supra* note 120; Cinep, *El Reto de las Víctimas: El Reconocimiento de sus Derechos,* (Cinep, 2009).
[175] See the Unified Registry for Victims (*Registro Único de* Víctimas) https://rni.unidadvictimas.gov.co/RUV.
[176] Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff (ed.) *The Handbook of Reparations* (Oxford University Press), 451.
[177] According to this principle, 'reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.' Permanent Court of International Justice, Factory at Chorzów, Germany v Poland, Judgment, Claim for Indemnity, Merits, Judgment No 13, (1928) PCIJ Series A No 17, ICGJ 255 (PCIJ 1928), (13th September 1928).

political program aimed at the 'reconstitution or the constitution of a new political community.'[178] As such, reparations in transitional contexts should have less strict requirements than in the traditional approach.

However, regardless of the conception of justice and the — more or less strict — requirements of reparations, a failure to deliver reparations has effects that must be considered. As noted by Ottendoerfer, the fact that international norms of transitional justice must be differentiated from the design of an instrument as well as from its implementation has often been ignored in the literature. For this author, in reparations programs, 'implementation ultimately decides about the experiences people make with the program, and this in turn lays the basis for many effects to unfold'.[179] With regard to implementation in Colombia, in his ethnography of Wayuu indigenous victims of mass atrocities in Colombia, Jaramillo has described how lack of implementation of reparative measures affects the groups that are entitled to them. This author has suggested that a fundamental question is that, in recognising that a particular victim is entitled to reparations, the government acknowledges the debt it owes to that victim. But, unlike other creditor-debtor relations, in which the recognition of a debt sets a certain hierarchy between the creditor — the victim — and the debtor — the state, the fact that the latter can keep, and actually keeps victims waiting, reverts this relation.[180] Thus, when the official acknowledgment of the debt is followed by sustained and lengthy wait, the government's inaction not only strengthens its sovereignty, but also, maintains the victims — most already in a vulnerable position — in a state of need and suspense, thus reinforcing the stereotype of the victim as defenceless and passive.

[178] De Greiff, *supra* note 176 at 454-5. For De Greiff, there are two fundamental reasons that justify this: First, 'all legal systems work on the assumption that norm-breaking behaviour is more or less exceptional. But this is not the case when programs of reparations are being designed, for such programs attempt to respond to violations that, far from being infrequent and exceptional, are massive and systematic.' Second, to assume a political perspective on reparations opens up the possibility of pursuing broader ends, some of which related to a 'broad conception of justice that goes beyond the satisfaction of individual claims, and that involves recognition, civic trust, and social solidarity.'

[179] Eva Ottendoerfer, 'Translating Victims' "Right to Reparations" Into Practice: A Framework for Assessing the Implementation of Reparations Programs From a Bottom-Up Perspective' (2018) 40 *Human Rights Quarterly* 905, 910.

[180] Jaramillo, *supra* note 96 at 41 and 55.

Moreover, with regards to the 'promise' of participation. Even in these cases where victims were allocated a place to participate in different administrative or judicial contexts, it seems that it would only reinforce victims' representation as defenceless. Indeed, I studied how in the different consecutive legal frameworks, victims' participation was often more limiting than enabling and often used to legitimise the government's transitional justice policies. Especially in the context of the late Victims' Law, it seems that this is because victims' participation was not allocated enough institutional and financial support. But, even though this, as in the case of reparations, is due to practical restraints, rather than explicit political decisions, the effect is that it reinforces a particular stereotype.

In turn, disruptive practices of victims may focus on different questions. In the article, I only examined four groups and their disruptive practices, two of them had already been studied in depth in the previous articles (the Peace Community and Movice) and the other two were new. These actions have sometimes allowed for a reconsideration of the legal responses to the needs of victims of the conflict. For instance, by pushing for the inclusion of considerations of gender that acknowledge the different ways in which the conflict affects women, or the removal of the reference to the perpetrator in a way that excludes victims of state crimes from being considered as beneficiaries of certain measures.

Thus, there are substantive effects following from their actions that can be observed, sometimes, in changes in the legal responses to victims of mass atrocities.[181] But, aside from the possible effect of disruptive practices in the modification of legal responses to victimisation, a question that is particularly relevant for an international venue such as the ICC is how all these actions challenge the representation of the victims as disempowered. What is more, in using the category of victim, the subaltern can contribute to the formation of its own disputed identity as, for instance, indigenous, black, maroon, peasant, poor, women, or any other. This is a form of cultural

[181] However, because of the multiplicity of factors that interplay, it is impossible to establish a causal relation between social movements and the outcomes they produce. See: Tarrow, *supra* note 93, 216.

resistance that relates to the construction of an abstract identity of the victim. This abstract identity is crucial because the decisions that legal operators make are necessarily based on the shared assumptions about the individuals who are victims. Disruptive practices of victims then, are not only relevant in that they may allow for a reassessment of the strictly legal, but also, because they allow for a reassessment of the assumptions that sustain institutional practices. And one of these assumptions is the identity of the victim. That the identity of the victim is disputed in Colombia, is due to the actions of victims themselves who are present in the different debates that concern them, regardless of being given an institutional seat in these debates or not. They can disrupt because they are in the same country, speak the same language, and are able to organise themselves around the category of victim. I believe that the value of victims' self-representation is that they may contribute to the construction of their own identity. And this is an important basis for advocating for more spaces for self-representation in the context of international institutions such as the ICC.

5. Conclusion: Can the category of victim of international law be emancipatory?[182]

Main findings

As explained in this summarising report, this research began with a critical appraisal of the category of victim as one that is often invoked by others to legitimise their intervention. In this light, international criminal law is often described as aimed at prosecuting and judging individual perpetrators of mass atrocities,[183] all within the larger objective of bringing justice to the victims of these crimes.[184] Thus, institutions such as the ICC and its various operators, often present their work as one done for the nameless victims, constructing the latter as a subject who is defenceless, passive, docile, and in need for external support.

This representation, I suggested, is accurate in describing the situation of several victims of mass atrocities who have suffered the worst kinds of human rights violations. However, it fails to represent the agentic actions of victims of mass atrocities who use the language of international law to frame their various demands for justice. But the problem with this representation is not only its accuracy because, as suggested in Article I, the main question is how this representation prevents the various operators of international law institutions, such as the ICC, from identifying and nurturing those actions and from evaluating their rich contributions. Moreover, the stereotypical image of the victim as passive and defenceless is also the representation upon which operators of the ICC base their interpretations of various provisions in the Court's framework that concern the victims of the crimes. In this context, one of the contributions of the victim's agentic actions — that are obscured by their stereotypical image

[182] Here, I am paraphrasing Santos who asked, "Can law be emancipatory?" Santos, *supra* note 162 at 439 et seq.

[183] According to McCarthy, the idea that international criminal proceeding are, and should be, focused upon the punishment of individual perpetrators has been prevalent in international criminal law since its inception, but the framework crated by the ICC supplemented this traditional approach by providing two distinctive forms of victim redress, namely reparations and support. Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press, 2012), 34.

[184] Consider, for instance, the statement of the prosecutor cited earlier in the Preface: 'My mandate is justice, justice for the victims.' https://www.icc-cpi.int/Pages/item.aspx?name=press%20release%20media%20advisory_%20icc%20prosecutor%20visits%20egypt%20and%20saudi%20arabia and http://www.lse.ac.uk/humanRights/events/ICC.aspx. A description of different moments in which victims are invoked as justifiers of the international criminal enterprise can be found in: Fletcher, *supra* note 27.

— is precisely that, with their actions, victims can influence the way in which their identity is constructed, and thus, indirectly influence the way in which legal provisions regarding victims are interpreted.

In order to understand the different ways in which victims of mass atrocities use international law categories, this thesis has sought to connect the international with the domestic by examining how groups of victims of mass atrocities in Colombia use the category of victim. In other words, I sought to understand what these groups actually do with this language. The three concepts examined in the preceding section reflected some of the different perspectives through which I viewed this usage and interpreted its effects in the articles that make up this thesis. One of them, served as the theoretical framework through which I approached the articles, i.e. the concept of political subjectivity; the other two, emerged from the articles as I sought to make sense of what I had learned about the cases I studied. Thus, if victims of mass atrocities are considered through the idea of *political subjectivity*, one can see how the use of the legal concept of victim in a way that challenges the prevailing representation of the victim is already a form of subjectification regardless of the specificity of the victims' demands. If the victims of mass atrocities are, in turn, considered through the prism of *subalternity*, one can see that the category of victim is part of a hegemonic discourse of emancipation, and that, in infusing it with specific contents, the victims can communicate demands that may not find other specific articulation in the language of rights. Although taking a closer look at the specific ways in which this language is used allows to appreciate better the possibilities of this language for subaltern groups, there will always be parts that will remain unarticulated and this is a limitation of such language. Finally, through the idea of an *identity* that is never fully realised and always unfinished, I have shown that the actions of victims in using international law categories contribute to the dynamic construction of this identity by representing themselves as politically engaged agents and thus countering the notion that the victim is irreduc-

ibly defenceless. In this way, victims resistance is not only the opposition to a particular norm of domestic law by invoking international law, but more importantly, the subtle transformation of the stereotype of the victim through their own actions.

Aside from this analysis, the main findings of this thesis are:

- There cannot be a fully theoretical discourse that explains the effects of a legal category such as the category of victim. Looking at the contexts and the actors that use this category is essential in understanding the meanings that are produced through its use.

- In using the category of victim and explicitly referring to international law, victims are not simply adopting this language, they are infusing it with meanings that are often related to their own particular struggles. In this sense, the use is strategic.

- The use of legal categories by victims of mass atrocities does not only produce instrumental effects, such as, the inclusion of a specific group of victims within the domestic legal definition of the victim (as in the case of Movice's demands). Instead, its effects can also be expressive to the extent that they may legitimate alternative values, norms, lifestyles or validate the perspectives and identities of those groups that use them.[185] These expressive effects are sometimes actively sought by groups themselves, such as in the case of *Hijos e Hijas,* described in Article IV, although it seems to me that, they are more often a by-product that movements do not actively seek. My impression is that groups such as Movice are not actively seeking this cultural change, but instead, actively seeking normative modifications.[186]

These results are relevant for various reasons. Firstly, the idea that victims do not simply adopt the language of international law and that they infuse meanings to it,

[185] Neil Stammers, 'Social Movements and the Social Construction of Human Rights' (1999) 21 *Human Rights Quarterly* 980, 988.
[186] This is a question that could be object of further inquiry.

means that their uses may, sometimes, contribute to the development of international law. This is an important finding of the case of the Peace Community of San José de Apartadó and its development of bottom up safe areas, which has been later recognised by the Colombian Constitutional Court and by the Inter-American Court of Human Rights. Secondly, the expressive effect of the use of the language of rights, and the category of victim, is particularly crucial for a reflection on the importance of victims of mass atrocities' self-representation in the context of international institutions, such as the ICC: If victims are afforded these spaces of self-representation they have a chance to contribute to the creation of their own identity, thus validating their own perspectives and identities. Finally, the expressive effect of the use of the language of rights is particularly relevant for the victims of mass atrocities, a subject that is usually represented as essentially defenceless. This representation justifies the intervention of others actors who, in turn, reproduce this imagery. The actual presence of victims may allow them to resist the stereotype and possibly to transform it from within.

Reflections on the emancipatory possibilities of the category of victim

In all the different perspectives through which I examined the question of victims of mass atrocities, an underlying assumption is that the victims' actions may actually change established practices that affect them, both domestically and internationally. This potential for change has remained in the subtext of this thesis, as an underlying assumption which has been, thus far, discussed only with regard to the emancipatory potential of the category of victim.[187] In what follows, I develop my ideas regarding the emancipatory possibilities of the category of victim.

[187] Another connected concept is the concept of resistance. This is a concept that I only discussed briefly in this summarising text. As explained above, the idea of resistance does not necessarily restrict to mere opposition but to the possibility of destabilising the meanings that the dominant power grants to certain words and institutions. To do this, the resistant party must utilise the words or frameworks of the dominant power and re-signify them to include cultural difference. As a cultural expression, the legal categories can be resisted and re-signified, this is actually my point later on in this conclusion. The connection between emancipation and resistance is that the first may be understood to include a greater degree of liberation, while the second is always necessarily confined to working with forms that have already been established by the dominant culture. Ashcroft and Pal, *supra* note 170 at 105. I thank the preliminary examiner Kieran McEvoy for his comment on the importance of discussing the question of resistance in connection with the idea of emancipation discussed here.

The idea that the discourse of human rights — a discourse in which the category of victim plays a central role — offers the possibility for emancipation, is actually one of the main assumptions of the 'traditional' approach to international law. For instance, Cançado Trindade, contends that the inclusion of the individual person in international law, through human rights and the institution of the right to petition, allows for 'the emancipation of the human being *vis-à-vis* his own State for the protection of his rights in the ambit of International Law of Human Rights.'[188] Conversely, different critics have expressed scepticism towards this assumed emancipation of the discourse of human rights. In this, the centrality of the victim plays an important role because the subject that is constructed in this discourse is precisely one that is defined by its suffering. Thus, as I stated in Article I, while the discourse of human rights appears neutral, it actually constructs the notion of a disempowered individual, one that suffers and is in need of others' assistance. For instance, Urueña contends that, while on paper, human rights appear as emancipatory, this emancipation is not really inspired by a thriving human spirit but instead results in the empowerment of bureaucracies and the consequent disempowerment of individuals.[189] Another criticism is that currently human rights discourse occupies the field of emancipatory possibility, implicitly or explicitly delegitimising other emancipatory strategies.[190]

In this thesis I began by problematising these criticisms, suggesting that, although they described some of the effects of the discourse of international law regarding the victim, they did not account for the way in which international law could serve as an important tool for grassroots organisations.[191] Yet, problematising these arguments neither entails embracing their opposite nor to suggest that there is such a thing as a uniform opposite position. Instead, it puts both sides into question. Indeed, perhaps the

[188] Cançado Trindade *supra* note 140 at 252.
[189] Urueña, *supra* note 32 at 93.
[190] David Kennedy, 'International Human Rights Movement: Part of the problem?' (2002) 15 *Harvard Human Rights Journal* 101, 108.
[191] This has been acknowledged by some of the critics of human rights. For instance, Koskenniemi contends that international law does serve to 'give voice to those who have been excluded from decision-making positions and are regularly treated as objects of other peoples' policies' by providing a platform through which 'claims about violence, injustice, and social deprivation may be made even against the dominant elements.' Koskenniemi, *supra* note 33 at 110.

main assertion of this thesis is that it is impossible to determine *a priori* a specific effect of the discourse of international law regarding the victim. In other words, it is not possible to definitely proclaim that the discourse of the victim of mass atrocities in international law is definitely empowering or disempowering without understanding the contexts in which the category is wielded, its actors, and the meanings that they produce in wielding it.

Furthermore, even though the way in which I posed the question in the title of this concluding section suggests that there may be a specific quality of the law that would make it emancipatory (or not), I should begin by discarding from the outset such an ontological view. This is a consequence of the critical approach adopted in this thesis. As a discourse, law does not have a meaning that can be discovered without considering the context and the subjects involved in its use. Just as the law cannot be in itself disempowering — even though it may have disempowering effects — it cannot be in itself emancipatory — even though it may have emancipatory effects. Instead, asking if law can be emancipatory or not, is strictly related to how individuals and groups use it and to the contexts in which it is used, or the context *against* which they use it.[192] This means that there are actions in which the law can be used in an emancipatory way if these actions allow for a greater degree of justice for oppressed groups that use the law in their struggles.

There are two works that influenced the way in which I understand emancipation and its relation to law in this thesis, namely the work of Jacques Rancière and Boaventura de Sousa Santos. As a way to reflect on the emancipatory potential of the legal category of the victim for victims of mass atrocities, in what follows, I will ponder on these two approaches, their differences and similarities. These reflections are not

[192] Santos also concludes that the question 'Can the category of victim of international law be emancipatory' is inadequate because law cannot be emancipatory or non-emancipatory, instead, it is the movements and organisations that resort to law to advance their struggles. Santos, *supra* note 16233 at 495.

meant as an in-depth study of the works of these two rather prolific authors.[193] Instead, they are meant as a way to articulate how these two works have allowed me to elucidate my own position on the subject in light of the cases studied in this thesis.

Both frameworks share similarities as they both attempt to reimagine the idea of emancipation.[194] In Santos' work, emancipation is framed in opposition to regulation, whereas in Rancière, emancipation is articulated through the opposite categories of police and politics. Modern regulation, in Santos, is the set of norms, institutions, and practices that guarantee the stability of expectations.[195] This is a concept comparable to that of police in Rancière, which comprises an 'implicit law' regulating the distribution and legitimation of powers, places, and roles.[196] What is crucial in Rancière's police is the delimitation of inclusion/exclusion frontiers, which appears as an unavoidable consequence of the logic of police, according to which, bodies are put in their place and role according to their name.[197] Instead, what is crucial in Santos' modern regulation is the stability of expectations, which is achieved by establishing a 'politically tolerable relation between present experiences (…) and expectations about the future.'[198] This is a more general concept that, in turn, includes three logics, namely the state, the market and the community. They are similar in that they do not refer to the law only but encompass also institutions and practices.[199] This aspect was a crucial question for the way in which I analysed the cases in this thesis. The law is viewed as

[193] The main works in which these reflections are focused are: Santos, *supra* note 16233; Rancière, *supra* note 87. Other works have also been used to a lesser extent and will be referenced as usual.
[194] In particular, both of these accounts explicitly refer to their differences with Marxist accounts. In Ranciére, the concept of emancipation is counterposed with the concept of emancipation in Marx. In Santos, he refers to the concept of globalisation against the concept of universality of in Marx. Rancière, *supra* note 87 at 103-104; Santos, *supra* note 162 at 180- 181; more generally with regards to Rancière's reconceptualisation, see: Gert Biesta, 'A New Logic of emancipation: The Methodology of Jacques Rancière (2010) 60 *Educational Theory* 39. With regards to Santos' reconceptualisation, see: Boaventura de Sousa Santos, 'General Introduction: Reinventing Social Emancipation, Towards New Manifestos' in: Boaventura de Sousa Santos (ed) Reinventing Social Emancipation: Toward New Manifestos (Vol I, Verso, 2005).
[195] Santos, *supra* note 162 at 2.
[196] Mónica López Lerma and Julen Etxabe, 'Introduction: Rancière and the possibility of law' in in López Lerma, Mónica and Etxabe, Julen (eds), *Rancière and Law* (Taylor & Francis, 2017), 2.
[197] Rancière, *supra* note 87 at 27.
[198] Santos, *supra* note 162 at 2.
[199] What these institutions and practice do, so that they can be understood as part of the police or the regulation pillar, are different things, of course. Moreover, I should note here that Santos does pay a specific attention to the law, and asks if the law can be emancipatory because, for him, in modern law, emancipation has collapsed into regulation as it has been incorporated into regulation. Santos, *supra* note 162 at 21 et seq.

belonging to a larger category that also includes established practices, ideas, concepts, and even stereotypes — like the idea that victims of mass atrocities are without exception passive, defenceless and docile. These practices are reinforced by the representations that legal operators produce, reproduce, and work with, and may remain unchanged if unchallenged.

Furthermore, for Santos, emancipation is a set of oppositional aspirations and practices that aim to increase the discrepancy between experiences and expectations by calling into question the *status quo* by confronting and delegitimising the norms, institutions and practices that guarantee the stability of expectations.[200] An emancipatory struggle, in this account, is successful if it constitutes a new political relationship between experiences and expectations on a new and more demanding and inclusive level or, in other words, if it transforms itself into a new form of regulation.[201] In turn, Rancière's emancipation is the result of the political process in which excluded and invisible subjects are able to create a space in which their speech can be heard by police actors and show their exclusion. In this demonstration, they become political subjects who do not demand equality, but act as equals, and this is emancipatory.[202] In this sense, in Rancière, emancipation comes from the process of political subjectification. This process materialises in a demonstration in which political actors use the same words that are part of the police order to put into question the established institutions and practices that belong to it. This demonstration may result in the reshaping those institutions and practices and the changing the status of those words.[203] But the result of the demonstration does not affect its emancipatory character. Unlike in Santos, Rancière does not speak of the success of the emancipatory struggle, because the struggle itself is the emancipation. This is a core difference in emphasis between the

[200] Ibid, 2.
[201] Ibid.
[202] May, *supra* note 157 at 72-73; Rancière, *supra* note 87 at 35; and 'Politics, Identification, and Subjectivization' (1992) 61 *October* 58, 58.
[203] Rancière, *supra* note 87 at 33.

two accounts that I will reflect upon later. Before that, allow me to consider specifically the way these authors understand the law, as my own research bases itself on the way victims use legal concepts.

As stated earlier, both Santos and Rancière conceptualise the law as within a larger category which the former calls modern regulation, and the latter, police. Despite this similarity, they both assign a different place to the law in their studies. On the one hand, while Santos' concept of modern regulation seems to remain wide enough so as to include different logics — some of which seem to escape Rancière's analysis —[204] he, nevertheless, assigns a central role to the law — and to modern western science — in obscuring and discrediting the experiences of subalterns. Because of this, he explicitly reflects on the emancipatory possibilities of the law itself.[205] On the other, this a question that remains absent from Rancière's approach because his approach considers the political as essentially dynamic. Indeed, Rancière does not specifically reflect on the law.[206] Nevertheless, I believe that they have more in common than what appears at a first glance. Santos' work is certainly influenced by a postcolonial approach to law according to which modern law discredits, silences or negates the legal experiences of large bodies of the population.[207] This way, Santos' unequivocally acknowledges the hegemonic nature of modern law and his quest for emancipation in law relates to opening up a possibility for the law to articulate the interests of oppressed groups. Although Rancière, does not explicitly refer to the law's hegemonic nature and how this affects oppressed groups in articulating their own demands he does suggest that emancipatory struggles are those that allow minorities to affirm their

[204] This division into three logics of the state, of the market and the community, is difficult to translate from Santos to Rancière, because Rancière's concept of politics relies in the principle of equality, understood as the basic capacity of understanding that is assumed of those who obey. This could be connected with the principle of the state in Santos, understood as the 'vertical political obligation between citizens and the state' but also with the principle of community, which 'entails the horizontal obligation that connects individuals according to criteria of non-state, and non-market belongingness.'

[205] Santos, *supra* note 162 at 439 et seq.

[206] Mónica López Lerma and Julen Etxabe, 'Introduction: Rancière and the possibility of law' in López Lerma, Mónica and Etxabe, Julen (eds), *Rancière and Law* (Taylor & Francis, 2017) 1, a notable exception is his piece on the subject of human rights: Ranciére, *supra* note 158162.

[207] Santos, *supra* note 162 at 494.

identity. Indeed, when reflecting on the difference between Marxist emancipation and the 'new emancipation' that he advocates for, he states that in it, 'a multiplicity of local rationalities and ethnic, sexual, religious, cultural, or aesthetic minorities, affirming their identity on the basis of the acknowledged contingency of all identity.'[208] This notion of multiplicity may appear as somewhat contradictory to the idea of equality, central to Rancière's notion of emancipation. But his notion of equality is rather minimalistic and refers only to an inherent quality present in community in which, for some to command and others to obey, the former must recognise that those who obey have a basic capacity to understand their commands.[209] Thus, this basic equality has room for multiple identities to be reaffirmed through the process of political subjectification.

Thus, despite the fact that, unlike Santos, Rancière does not pay much attention to the law,[210] and that, unlike Rancière, Santos does not view the emancipatory value of the process itself, both approaches are similar in that both focus on the struggles of oppressed groups. It is perhaps in this, that my own approach was most influenced by these two authors: The notion that these struggles are worth noticing and studying in order to ascertain their possibilities for social change. Indeed, for Santos, the struggles of oppressed groups that use the law are central, and it is in the struggles themselves, and in their articulations of the law, where the possibility of emancipation should be located.[211] Because of this, he proposes that the sociology of emergencies is the epistemology of a project that he calls subaltern cosmopolitan legality. Emergencies, in this account, entail the interpretation of embryonic experiences of 'initiatives, movements, and organisations that resist neoliberal globalization and offer alternatives

[208] Rancière, *supra* note 87 at 104; similarly, Santos discusses the differences with his conception of cosmopolitanism and Marx's uni-versality of the oppressed, he contends that the main differences is that progressive cosmopolitan coalitions have no essentialist class base and can be mixed in composition, responding to different non-class lines such as ethnicity, gender or nationality, as such cosmopolitanism does not call for uniformity and the breakdown of local differences, autonomies and identities. Santos, *supra* note 162 at 180.
[209] Rancière, *supra* note 87 at 16.
[210] López Lerma and Etxabe, *supra* note 20687 at 1.
[211] These struggles are what he considers as 'counter-hegemonic globalisation' See: Santos and Rodríguez-Garavito *supra* note 42 at 1-23.

to it.'[212] Rancière, in turn, puts emphasis on the process of subjectification: 'the Rights of Man — says Rancière — are the rights of those who make something of that inscription.'[213] The logic of this political subjectification or emancipation, is intimately connected with the question of exclusion, and thus, is certainly connected with the actions taken by oppressed groups. In his words, this logic is 'a heterology, a logic of the other' because it involves both the assertion of an identity and the denial of an identity given by the other in a demonstration that involves that other and that, in the end, entails an impossible identification.[214] His works are thus full of examples of how this process can take place.

Thus, both authors highlight the actions of excluded or oppressed groups or individuals and assert the possibility for them to challenge established concepts, practices and norms by using the very categories that belong to these established concepts, practices or norms, and transforming them. This is what I have done in this thesis: I have sought to reflect upon practices that can be described in those terms but with a specific emphasis on the use of specific legal categories.

When reflecting about emancipation, I believe that these two accounts emphasise different aspects of emancipation, which can be seen as a *process* or as an *end.* Rancière' work puts all the emphasis on the process: Emancipation *is* the process of political subjectification. In this process, the political subjects — that do not exist because they are excluded — use the words that are part of the police order, transform them and, in this demonstration, make themselves count.[215] Santos, in turn, while still emphasising the importance of the process, also considers the end: The emancipatory struggle is successful to the extent that it destabilises the *status quo* and transforms itself into a new form of regulation. The difference is not substantive in that the two accounts are radically different, it is rather a question of emphases. Indeed, by the end of his 'Towards a New Legal Common Sense', Santos acknowledges that the question for the

[212] Ibid, 17.
[213] Ranciére, *supra* note 158 at 303.
[214] Jacques Rancière, 'Politics, Identification, and Subjectivization' (1992) 61 *October* 58, 62
[215] Rancière, *supra* note 87 at 27.

possibility of law being emancipatory or not, is a futile one, and that 'law can be neither emancipatory nor non-emancipatory; emancipatory or non-emancipatory are the movements, the organizations (…) that resort to law to advance their struggles'. This difference in emphasis also reflects in the fact that, while admitting the contextual embedding of the concept of emancipation, Santos also distinguishes between thin and thick conceptions of social emancipation 'according to the degree and quality of liberation or social inclusion they carry.'[216] In turn, in the results of the process of subjectification in Rancière are not relevant to determine its emancipatory character because its character is in its motivation and its presupposition of equality.[217] If the results are relevant in Ranciére, it is to the extent that the process of subjectification manages to demonstrate exclusion, but not in how this demonstration manages to change what he calls the police.

I believe that the two emphases these approaches reveal are useful to reflect about the emancipatory possibilities of the category of victim as these two emphases allow to see the limitations and the possibilities of the law as a device for movements of victims of mass atrocities. Indeed, a central question in my own account of the actions of victims of mass atrocities in using legal categories is that the very process of subjectification, or shall I say, the very process of emancipation, already puts into question the prevailing representations of the victim of mass atrocities in international law. In this contention, the idea of emancipation as a process, present in Rancière, is useful because it allows me to see and to highlight in my articles the value of the process itself. Highlighting the process through the articles of the dissertation did not necessarily require discarding the possible outcomes of this process. Instead, it allowed me to value more subtle outcomes as important possibilities for victims of mass atrocities.

[216] Santos, *supra* note 162 at 471.
[217] Cf. May, *supra* note 157 at 77.

Here, cultural change can be underscored as an important outcome, which is admittedly difficult to measure, but still relevant and should be acknowledged. Thus, in Colombia, it is now a commonplace to say that victims are political actors.[218]

In addition, to becoming an important political actor, victims have also become a crucial constituency. Although in the context of the ICC it has been stated that victims are an important constituency,[219] it would be difficult to say that victims are important political actors. Indeed, outside of court cases, victims associations rarely have chances to participate,[220] while in court cases, out of more than 12.000 victims participating in its proceedings, as stated in Article I, only three victims have actually appeared to present their views and concerns directly to the judges.[221] Such a context, as demonstrated in Article I, provides virtually no spaces for self-representation which is aggravated by the many difficulties that the international process itself imposes upon victims, e.g. geographical distance, language barriers, cultural barriers, etc. This context makes the possibility of political subjectification virtually non-existent. As such, there is no space for emancipation, neither as a process, nor as an end.

At the same time, if we consider emancipation as an end, the limits that the law represents for the actions of victims of mass atrocities in the different cases I studied become apparent. In this sense, in the study of the cases, I found that the law was

[218] See for instance: Rettberg, *supra* note 120; Vera Lugo, *supra* note 120; Delgado Barón, *supra* note 120; Cinep, *supra* note 174.

[219] Frédéric Mégret, 'In whose name? The ICC and the search for constituency' in C. De Vos et al (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (2015).

[220] See for instance the distinction that Haslam makes between civil society as a subject and civil society as an object. The first encompasses expert international NGOs and transnational networks of activists voluntarily entering into the international criminal justice arena, and the second actual groups of victims of mass atrocities, that is, the objects of the purportedly transformative processes of international criminal law. The author argues that international criminal courts have favoured the participation of the first group and that grassroots groups of victims of mass atrocity remain excluded. Haslam, *supra* note 79.

[221] D. Rudy and M. Hirst, 'Victims Appearing in Person Before a Chamber' in K. Tibori-Szabó and M. Hirst (eds.), *Victim Participation in International Criminal Justice* (2017), at 286. As explained in Article I: In the case of *The Prosecutor v. Thomas Lubanga Dyilo,* other three victims were authorised to give evidence as witnesses in the case of, but their request to present their views and concerns was not granted, as the chamber stated that, once they have presented their testimony as witnesses, it would be evaluated 'if relevant, when and by whom any views and concerns are to be presented.' See: *The Prosecutor v. Thomas Lubanga Dyilo,* 'Judgment pursuant to Article 74 of the Statute' ICC-01/04-01/06-2842 (14 March 2012), paras. 21 and 485; and 'Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial' ICC-01/04-01/06-2032-Anx (26 June 2009). In the case of *The Prosecutor v. Jean Pierre Bemba,* other two victims were allowed to present evidence. See: *The Prosecutor v. Jean Pierre Bemba,* 'Judgment pursuant to Article 74 of the Statute' ICC-01/05-01/08-3343 (21 March 2016), para. 24.

both enabling and limiting. As reflected in Article IV, there are two specific qualities of the international law regarding victims of mass atrocities, which allow victims to invoke those norms and infuse them with meanings. One is the coexistence of different legal spaces governing the situation of victims of mass atrocities that operate simultaneously, namely international and domestic laws.[222] This allows the victims to resort to international law in order to challenge domestic receptions of it. The other is the indeterminate character of these norms. As Koskenniemi explains, this means 'there is nothing in the right itself that would decide them: the right receives meaning only when it is viewed by reference to some context or purpose.' [223] However, it is important to precise, that the law does not determine its outcome does not mean that 'anything goes', it means that the patterns of decision making are not explained by the norm itself but instead, that they are explained by other factors, such as institutional culture.[224] Even if this last concept is often used in academia to demonstrate that the same norms allow for different outcomes in judicial decision-making, for the purposes of this thesis, the concept is useful in explaining how the law both enables and limits victims of mass atrocities in their use of categories of international law. It enables them in the sense that it allows them to present their 'grievances as claims of universal entitlement, at the same level as claims made by other members of the community.'[225] At the same time, it limits the victims because their claims can have a response that complies with the international norm but does not address them. As such, emancipation as an end faces this important limitation that is inherent in the law as a device that utilises the written language allowing different conflicting interpretations to be grounded in the same norms.[226]

[222] This is condensed in the concept of interlegality of Santos. Santos, *supra* note 162 at 427.
[223] Martti Koskenniemi, 'The Politics of International Law' in Cursos Euromediterráneos Bancaja de Derecho Internacional (Tirant lo Blanch, 2009) 143.
[224] Jarna Petman, *Human Rights and Violence: The hope and fear of the liberal world* (PhD Thesis, University of Helsinki, 2012), 126.
[225] Koskenniemi, *supra* note 33 at 106 and *supra* note 223 at 134.
[226] In this sense, I believe that this is an important contradiction of Santos' work, which attempts to ascertain the emancipatory potential of counter-hegemonic struggles that resort to the law. In defining the concept of emancipation as an end, Santos' seems to discard the possibility of the struggle as emancipatory.

Another set of limitations that I did not consider explicitly in the articles must be acknowledged here. Lack of enforcement of the law is a reality that, in a country such as Colombia, becomes an important element in analysing the limitations of its use by social movements. After all, law is a language of what it ought to be and not of what is. Indeed, the struggles of social movements using the language of the law are not new in Colombia. According to Tate, a first wave of human rights activists was formed by voluntary-based left-wing solidarity groups supporting guerrilla political prisoners that began to use the language of human rights in the eighties.[227] Similarly, an important movement in the nineties was the student movement that successfully advocated for a new constitution. The result of this movement was the Constitution of 1991, one of the most progressive constitutions of the continent.[228] Multiple movements using the language of international law and the category of victim have followed,[229] including the ones studied in this thesis — formed exclusively by victims of mass atrocities. But despite the many occasions in which social movements used the language of the law and successfully achieved that it declared what the movements sought, violence has prevailed. This is, of course, not a question of indeterminacy, but of failure to comply with the law's mandates. And this is another important limitation of the law as a language that is often resorted to by groups in the hope that it can subvert *de facto* powers responsible for the violence against political opposition, in the case of Movice, and against peasants, in the case of the Community.[230]

Thus, if emancipation is considered as an end that can be measured in the realisation of the substantive aims of the movements in seeking more inclusiveness, equality, and recognition, the law places important limitations to its achievement. If emancipation is considered as a process, in which groups or subjects use the names that the law

[227] Winifred Tate, *Counting the Dead: The Culture and Politics of Human Rights Activism in Colombia* (University of California Press, 2007), 72 et seq.
[228] This episode is beautifully narrated and analysed by Julieta Lemaitre Ripoll in: *El Derecho como Conjuro: Fetichismo legal, violencia y movimientos sociales* (Siglo del Hombre Editores y Universidad de los Andes, 2009), 43 et seq.
[229] Ibid. For instance, Lemaitre Ripoll describes the struggles of feminist, and indigenous and afro-descendant movements in Colombia.
[230] In this sense, Lemaitre explores the question of why, if law seems to impact so little in ending violence and poverty in Colombia, there seems to be so much faith in it by social movements. Ibid.

provides, appropriate them by infusing meanings into them that may challenge the prevailing understandings of those names, then the law is an important device for emancipation. In this view, the law provides a set of categories that grant legitimacy to victims' struggles and allow them to re-signify their own identities. In this sense, considering the importance of the process, allows us to see that the categories of the law, as cultural categories, can be resisted by excluded or oppressed groups. This resistance is not to be understood, as discussed earlier in this summarising text, as mere opposition but precisely as re-signification. Victims may resist the effects of the category of victim by subverting the concepts, practices or norms that relate to the category. Thus, to use categories of the sociology of social movements, it is not so much in the instrumental effects[231] that one may find emancipation in the use of international law categories, but rather in the expressive effects, that is, the possibility of cultural resistance.

Although this is an aspect I did not explicitly discuss to in Articles II and III, both of them show that victims' groups, in resorting to categories of international law, are genuinely seeking a legal response. For instance, in the case of Movice, one of the main aims of the groups' first mobilisations was to achieve the inclusion of victims of State crimes in the legal framework that had, at that moment, excluded them. But this inclusion, in their view, ought to go with an official acknowledgment that, in Colombia, there had been a sustained practice of repression of political leaders of opposition. However, though victims of state crimes were eventually included in the definition of victimhood in the Victims' Law, two things remained: There was no official recognition of the existence of practice of persecuting political opposition by violent means; and violence itself continued to be a problem.

In this sense, the expressive effects of the demands of the victims are more important than the legal ones. These expressive effects relate to, among other things, the

[231] Because I am focusing on the use of legal categories, I depart from Stammers' concept of instrumental use and refer to it to describe the strictly legal response that victims of mass atrocities seek in wielding legal categories. Stammers, *supra* note 39.

very construction of the identity of the victim, but also, to those other meanings that victims infuse in the legal categories, which I studied in the articles that comprise this thesis. The expressive effects then, cannot be fully measured in legal terms and it is here that the victims may legitimate their alternative values, norms, lifestyles or validate their perspectives and identities. Nevertheless, because the law is not interpreted in a vacuum, these expressive effects can also have an indirect effect on the way the law is dealt with by its operators. As such, the different uses that victims themselves do of the category of victim are a form of resistance. I believe that it is here that the possibility of emancipation through the use of a legal category may be found, and it is both emancipation as an end — the end being the cultural change — and as a process — through which oppressed groups may find articulation not for their demands, but also for their own identities and the stories that precede them.

6. References of the summarising text

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