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Criteria for Criminal Imputation against Agents of the State. Particular Reference to the Colombian Case

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Abstract

For some time, the scope of criminal responsibility that falls on agents of the State in cases of serious human rights violations and international humanitarian law in the context of armed conflicts has been discussed. Faced with this problem, this article proposes an imputation method based on widely accepted modern criteria developed in depth in Colombian case law. Based on these criteria, the need to analyze the framework of powers of agents of the State and to corroborate the unique position of guarantors in society is explained. Then, the positive duties required from the position of guarantor in each specific case are examined since non-compliance will determine the criminal responsibility of the State as guarantor of citizen security for creating legally disapproved risks, for instance.

Keywords: position of the guarantor; agents of the State; criminal responsibilities; competence; positive duties; normative expectations.

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Criterios de imputación contra los agentes del Estado. Una referencia especial al caso colombiano

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Resumen

Desde hace algún tiempo se viene discutiendo el alcance de la responsabilidad penal que recae sobre los servidores públicos en casos de graves violaciones a los derechos humanos y al derecho internacional humanitario en el contexto de los conflictos armados. Frente a esta problemática, este artículo propone un método de imputación con base en criterios modernos de ampliamente aceptación en el mundo y desarrollados en profundidad en la jurisprudencia colombiana. A partir de estos criterios se explica la necesidad de analizar el marco de competencias de los servidores públicos y de corroborar la posición singular que tienen los garantes en la sociedad. Luego, se examinan los deberes positivos que se exigen a la posición de garante en cada caso específico, puesto que su incumplimiento determinará la responsabilidad penal del Estado como garante de la seguridad ciudadana, por ejemplo, por generar riesgos carentes de aprobación legal.

Palabras clave: posición de garante; agentes del Estado; responsabilidades penales; competencias; deberes positivos; expectativas normativas.

Introduction

For the correct determination of criminal responsibilities in general and, specifically, in cases of severe violations of human rights and International Humanitarian Law (IHL) by agents of the State in the context of armed conflicts,[1] the proposal in this article is to use the imputation criteria developed by modern criminal law doctrine, based on the determination of areas of competence; that is, starting from what is normatively expected of a citizen faithful to the law. However, in the case that concerns us here, a subject holds a particular position embodying the law as an agent of the State for representing the State in compliance with its essential functions. As observed, the postulates to be explained here are then applicable for the deduction of responsibility in the ordinary justice law as well as in the transitional justice law, or the *Special Jurisdiction for Peace* (SJP), created in Colombia to investigate, judge, and penalize the horrendous attacks to human rights that occurred during half a century of armed confrontation. It is precisely in the framework of the SJP where some exceptional considerations will have to be contemplated concerning the legislative developments that have taken place so far for the implementation of this special justice.

Agents of the State Are Positively Obligated as Institutional Guarantors

All imputation analysis is initially founded on the position of guarantor (*Garantenstellung*) of the subject, that is, knowing the actors' duties in a concrete

[1] The Colombian case is paradigmatic regarding internal armed conflicts since it has experienced them for over 50 years. While it is true that the FARC signed a treaty of peace, the end of violence in Colombia is still far away since there are other rebel groups, like the ELN, the EPL, and even a rebellion faction within the FARC, among other armed actors. See, e.g., Jerónimo Ríos, "From war to peace: Understanding the end of the armed conflict in Colombia," *Rationality and Society* 30, no. 4 (2018): 463; Thomas E. Flores and Juan F. Vargas, "Colombia: Democracy, violence, and the peacebuilding challenge," *Conflict Management and Peace Science* 35, no. 6 (2018): 582; Abbey Steele and Livia I. Schubiger, "Democracy and civil war: The case of Colombia," *Conflict Management and Peace Science* 35, no. 6 (2018): 587; José Antonio Gutiérrez D., "Toward a New Phase of Guerrilla Warfare in Colombia? The Reconstitution of the FARC-EP in Perspective," *Latin American Perspectives* 47, no. 5 (2020): 232; Miguel García-Sánchez and Juan Camilo Plata-Caviedes, "Between Conflict and Politics: Understanding Popular Support for the FARC's Political Involvement," *Journal of Politics in Latin America* 12, no. 3 (2020): 280; Richard Georgi, "Peace that antagonizes: Reading Colombia's peace process as hegemonic crisis," *Security Dialogue* 54, no. 2 (2023): 173, and Óscar Palma, "Self-sustainment dynamics in armed groups systems: Understanding the post-Havana Agreement conflict in Colombia," *Politics* (2023): 2. To understand some of the impacts of the Colombian armed conflict in the lives of soldiers, see Ulf Thoene et al. "Memory and Trauma: Soldier Victims in the Colombian Armed Conflict," *SAGE Open* (2020): 4. Regarding the economic impact, see Adriana Camacho and Catherine Rodríguez, "Firm Exit and Armed Conflict in Colombia," *Journal of Conflict Resolution* 57, no. 1 (2013): 98.

case, what is expected of them, and what their conduct should be. The modern criminal law doctrine has made a great effort to explain the theory of the position of guarantor as a concept that clarifies the normative constitution of society and associated duties, regardless of the characterization of the conduct as an action or an omission.[2]

Today, it is acknowledged that there are *negative* and *positive duties*, which also support two types of competence: *competence for the responsible exercise of freedom* and *competence for the protection of certain institutions*.[3] The question then to hold the subject responsible or not is whether they were competent in any of the two modalities (having a negative or positive duty) and if, in the specific case, the subject acted apart from what was expected of them. It is about establishing the link between a person and their conduct with the criminal event starting, as seen, from criteria of normative attribution and not guided by the simple fact, the author's subjectivity, or the natural rules of association, as traditionally done in criminal law.

This is what Jakobs has said about positive duties: "The subject bound by a positive duty not only must guarantee to another person, group of people or the community that their organization will not be harmful, but also has to deal, either completely or in a sectoral manner (for example, in terms of safety or health), with maintaining their unaltered existence or even fostering an external organization and, in this sense, building with the beneficiary 'a world in common,' in which the spectrum ranges from the duty of protection of parents to (...) the judge's duty to pass neutral legal sentences."[4]

[2] See Günther Jakobs, *Die Strafrechtliche Zurechnung von Tun und Unterlassen* (Opladen: VS Verlag für Sozialwissenschaften, 1996).

[3] See Günther Jakobs, *La competencia por organización en el delito omisivo*, trans. Enrique Peñaranda Ramos (Bogotá: Universidad Externado de Colombia, 1994); copy on the institutional competence, Javier Sánchez Vera, *Pflichtdelikt und Beteiligung. Zugleich ein Beitrag zur Einheitlichkeit der Zurechnung bei Tun und Unterlassen* (Berlin: Duncker & Humblot, 1999); also on the foundations of the two kinds of competence, Jorge F. Perdomo Torres, *Garantenpflichten aus Vetrautheit* (Berlin: Duncker & Humblot, 2006): 153 et seq. See also Javier Camilo Sessano Goenaga, "Responsabilidad por organización y responsabilidad institucional. Una aproximación a la distinción dogmática propuesta por Jakobs, a través del ejemplo de los delitos de incomparecencia y de falso testimonio ante las comisiones parlamentarias de investigación," *Revista Electrónica de Ciencia Penal y Criminología* no. 08 (2006): 2.

[4] Günther Jakobs, *System der strafrechtlichen Zurechnung* (Frankfurt am Main: Vittorio Klostermann, 2012): 83.

So, in the case of agents of the State, we find ourselves facing competence by institution because of positive duties.[5] Indeed, the normative configuration of liberal States envisages not only the responsibility for the inadequate administration of freedom but also the responsibility based on the need to maintain the essential forms of social cohesion, often referred to in social studies as institutions. In this sense, it refers to the State itself as an institution where its agents, those who represent it in fulfilling its legitimating functions, have specific obligations whose fulfillment allows for the proper functioning of the State. If there is, for example, a correct administration of justice because prosecutors, judges, and magistrates fully comply with their obligations and duties, the citizens' confidence in the proper functioning of justice will grow.[6]

The members of the military and police forces are then institutional guarantors; they have positive and special duties to do (or not to do) whatever is necessary so that the functions they have constitutionally and legally been assigned can be fulfilled entirely. This legal obligation and its possible infringement is the first assumption to initiate the objective imputation trial for the case at hand, to determine whether there may be responsibility for committing severe human rights violations and IHL within an armed conflict. Something must be clear: The mere existence of the position of guarantor does not define *per se* the objective imputation judgment; it will be necessary to identify particular duties, the concrete benefits expected in the specific case from such agents, and the respective limits for the conduct and its infraction.

5 See in detail Jorge Fernando Perdomo Torres, "El Estado como garante. Algunas consideraciones a propósito de la sentencia SU-1184 de 2001, Corte Constitucional de Colombia," in *Anuario de derecho constitucional*, ed. Eduardo Montealegre Lynett (Bogotá: Universidad Externado de Colombia, 2003): 239 et seq.

6 Regarding trust in the legal system, see Malini Laxminarayan, "Enhancing trust in the legal system through victims' rights mechanisms," *International Review of Victimology* 21, no. 3 (2015): 274; Scott Liebertz, "Political Elites, Crime, and Trust in the Police in Latin America," *Criminal Justice Review* 30, no. 2 (2017): 177; Francis D. Boateng and Kimberly Kaiser, "Trust and Confidence in Media and Criminal Justice Institutions," *International Journal of Offender Therapy and Comparative Criminology* 63, no. 12 (2019): 2217; Lisa Hilbink et al. "Why People Turn to Institutions They Detest: Institutional Mistrust and Justice System Engagement in Uneven Democratic States," *Comparative Political Studies* 55, no. 1 (2022): 13; and Amber Horning and Joselyne L. Chenane, "The COVID-19 Pandemic: Trust in Authorities and Criminal Justice Systems," *Criminal Justice Review* (2023): 1. About trust in the legal system and crimes against humanity, see Jo-Anne Wemmers and Amissi Manirabona, "Regaining trust: The importance of justice for victims of crimes against humanity," *International Review of Victimology* 20, no. 1 (2014): 103.

Citizen Security as the Primary Duty of the State

From the first underpinnings of the legitimation and necessity of the State, the idea of citizen security[7] has been at the center of the debate. The primary reason for

[7] Concerning the different aspects of public protection, see Daniel Béland, "Insecurity, Citizenship, and Globalization: The Multiple Faces of State Protection," *Sociological Theory* 23, no. 1 (2005): 27. In regards to state protection, public support, and legitimacy, see Jason Jordan, "Policy feedback and support for the welfare state," *Journal of European Social Policy* 23, no. 2 (2013): 135; and Wim Van Oorschot, "Public perceptions of the economic, moral, social and migration consequences of the welfare state: an empirical analysis of welfare state legitimacy," *Journal of European Social Policy* 20, no. 1 (2010): 20. In this way, security has been considered one of the main guarantees the State must provide citizens; see Sven Bislev, "Globalization, State Transformation, and Public Security," *International Political Science Review* 25, no. 3 (2004): 282. The question, then, is what the term security or public security, which is more used in common law, and citizen insecurity in civil law involves. These expressions have been, most commonly, associated with crime; see, e. g., Juanjo Medina, "Inseguridad ciudadana, miedo al delito y policía en España," *Revista Electrónica de Ciencia Penal y Criminología* no. 05 (2003): 2; José Luis Díez Ripollés, "El nuevo modelo penal de la seguridad ciudadana," *Revista Electrónica de Ciencia Penal y Criminología* no. 06 (2004): 8; Graham Farrell et al., "The Crime Drop and the Security Hypothesis," *Journal of Research in Crime and Delinquency* 48, no. 2 (2011): 148; Jeff Garmany and Ana Paula Galdeano, "Crime, insecurity and corruption: Considering the growth of urban private security," *Urban Studies* 55, no. 5 (2018): 1112. However, this vision of security related to a crime does not support its social foundation. Without it, it does not seem enough: Other sources of insecurity must be considered, e.g., labor security (see Alex De Ruyter and John Burgess, "Growing Labour Insecurity in Australia and the UK in the Midst of Job Growth: Beware the Anglo-Saxon Model," *European Journal of Industrial Relations* 9, no. 2 (2003): 224; Ewan Carr and Heejung Chung, "Employment insecurity and life satisfaction: The moderating influence of labour market policies across Europe," *Journal of European Social Policy* 24, no. 4 (2014): 385; Richard Hyman and Rebecca Gumbrell-McCormick, "Resisting labour market insecurity: Old and new actors, rivals or allies?" *Journal of Industrial Relations* 59, no. 4 (2017): 540; Christiane Lübke and Marcel Erlinghagen, "Self-perceived job insecurity across Europe over time: Does changing context matter?" *Journal of European Social Policy* 24, no. 4 (2014): 321; Heejung Chung and Steffen Mau, "Subjective insecurity and the role of institutions," *Journal of European Social Policy* 24, no. 4 (2014): 304; and Travis Scott Lowe, "Perceived Job and Labor Market Insecurity in the United States: An Assessment of Workers' Attitudes From 2002 to 2014," *Work and Occupations* 45, no. 3 (2018): 314. Also, there is food and water security (see, e.g., Joseph M. Dooley et al., "Food insecurity and migraine in Canada," *Cephalalgia* 36, no. 10 (2016): 937; Diganta Das and Haslindahi Safini, "Water Insecurity in Urban India: Looking Through a Gendered Lens on Everyday Urban Living," *Environment and Urbanization ASIA* 9, no. 2 (2018): 178; Dinko H. Dinko et al., "Political Ecology and Contours of Vulnerability to Water Insecurity in Semiarid North-Eastern Ghana," *Journal of Asian and African Studies* 54, no. 2 (2019): 283; Ore Koren et al., "Food and water insecurity as causes of social unrest: Evidence from geolocated Twitter data," *Journal of Peace Research* 58, no. 1 (2021): 67; Colleen Heflin and Xiaohan Sun, "Food Insecurity and the Opioid Crisis," *The ANNALS of the American Academy of Political and Social Science* 703, no. 1 (2022): 264. Therefore, what is understood by insecurity, or security, the less used word, must be determined in each society to be able to affirm that people in that specific society relate a source of risk to unwanted events. The social construction of reality plays a definitive role, specially to distort the reality of crime; see Rafael Velandia-Montes, *La punitividad electoral en las políticas penales contemporáneas, Tomo I* (Bogotá: Instituto Latinoamericano de Altos Estudios –ILAE–, 2015): 171; Rafael Velandia-Montes, *La punitividad electoral en las políticas penales contemporáneas, Tomo II* (Bogotá: Instituto Latinoamericano de Altos Estudios –ILAE–, 2015): 9 and 237; Rafael Velandia-Montes and Alejandro Gómez, "Cadena perpetua y predicción del comportamiento. Un análisis sobre la delincuencia en contra de menores de edad y la política penal en Colombia," *Revista Republicana* no. 25 (2018): 241; Rafael Velandia-Montes, "Medios de comunicación y su influencia en la punitividad de la política penal colombiana," Utopía *y Praxis Latinoamericana* 23, no. Extra 1

the emergence of the modern State has been seen in the assurance of public order, which presupposes the whole exercise of individual liberties.[8] Ensuring public order implies not only the monopoly of force but also, as a corollary, its proportional exercise according to exceptional social circumstances. The State must implement as much force as necessary to compensate for the deficit in the assurance of public order; the State, through its agents, especially the members of the military and police forces, is obliged to combat the dangers that threaten the minimum security required by society. If these dangers come from armed insurgent groups, the State will have to fight them as sources of non-tolerated hazards precisely because citizens need and demand protection. In an armed conflict, the duties of the State and its agents start by protecting the civilian population from the risks and dangers that may arise from the illegal armed actors. The agents of the State go through combat in proportion to the externalized and manifest danger, as foreseen by the rules of IHL, and intervene when citizens need help in situations of lack of protection. In short, the degree of duty requirements for agents of the State in general, especially during "abnormal" situations, such as an armed conflict, is proportional to the need to protect society and citizens, and this should be analyzed on a case-by-case basis.

Recognition of the Position of Guarantor of Military and Police Members in Colombia

The unique position of guarantor of military and police members as representatives of the State has been expressly recognized in the Colombian judicial decisions and legal doctrine. A milestone in this recognition was ruling No. SU-1184 of 2001 of

(2018): 146; Germán Silva García and Bernardo Pérez Salazar, "El papel de la investigación en la educación jurídica: un problema de poder y colonialidad," *Revista de Pedagogía Universitaria y Didáctica del Derecho* 8, no. 2 (2021): 61; Germán Silva García, "La construcción social de la realidad. Las ficciones del discurso sobre la impunidad y sus funciones sociales," *Via Inveniendi et Iudicandi* 17, no. 1 (2022): 105; Pablo Elías González Monguí et al., "Estigmatización y criminalidad contra defensores de derechos humanos y líderes sociales en Colombia," *Revista Científica General José María Córdova* 20, no. 37 (2022): 143; Germán Silva García and Johana Barreto Montoya, "Avatares de la criminalidad de cuellos blanco transnacional," *Revista Científica General José María Córdova* 20, no. 39 (2022): 609; Germán Silva García and Vannia Ávila Cano, "Control penal y género ¡Baracunátana! Una elegía al poder sobre la rebeldía," *Revista Criminalidad* 64, no. 2 (2022): 23; Germán Silva García, "¿El derecho es puro cuento? Análisis crítico de la sociología jurídica integral," *Novum Jus* 16, no. 2 (2022): 49; Germán Silva García et al., "Das distorções da criminologia do Norte global a uma nova cosmovisão na criminologia do Sul," *Dilemas* 15, no. 1 (2022): 179.

8 In extenso, Josef Isensee, "Sicherheit als Voraussetzung und als Thema einer freiheitlichen Verfassung," in *Festschrift* (Tübingen: Mohr Siebeck, 2013): 499 et seq.; Wilhelm Von Humboldt, *Ideen zu einem Versuch, die Grenze der Wirksamkeit des Staates zu bestimmen* (Berlin: Johann Friedrich Unger, 1792): 49 et seq. "Without security, the citizen can neither develop his forces nor enjoy what they can produce, because without security there is no freedom. At the same time, it is something that the human being cannot guarantee for himself."

the Constitutional Court of Colombia (case known as "the Mapiripán Massacre"). In this edict and after a criminal and constitutional analysis, the court considers that the Colombian Constitution in Article 217 assigns military and police forces a position of guarantor, with extraordinary duties: "The military forces will have as their primary purpose the defense of sovereignty, independence, and integrity of the national territory and the constitutional order."

Thus, "It follows that they have a constitutional duty to ensure that sovereignty and constitutional order are not altered or undermined. Key elements of the constitutional order include full compliance ... with the principles, rights, and duties enshrined in the constitution ... (Article 2 of the Constitution) and the preservation of the monopoly on the use of force and weapons in the hands of the State. Concerning the purposes outlined in Article 2, the guarantor role of the military forces does not equate to the functions assigned to the National Police in Article 218 of the Constitution. However, it does not follow that they do not have the basic function of guaranteeing the full exercise of the rights and freedoms of members. Rather, it means guaranteeing collective and structural security conditions—defined in sovereignty, independence, territorial and constitutional order integrity—that allow a harmonious coexistence. The security conditions within structural security are the armed forces' responsibility. ... Respect for members' constitutional rights is a matter that concerns the entire State."

In the same decision, explicit reference is made to the position of guarantor and the duties, especially of the military forces, in the face of the armed conflict: "The structural conditions of security, a task that concerns the military forces, correlate with the State's duty to prevent war. When war is inevitable, the State must temper its effects. Concerning members, it has to avoid, as much as possible, being victims of the conflict so that they can enjoy their rights."

The Chamber of Criminal Cassation of the Supreme Court of Justice,[9] in a decision derived from the same Mapiripán case, had the following legal problem to be solved: Can criminal acts committed by third parties be objectively attributed to a high-ranking official of military and police members? After emphasizing that the Constitution of 1991 established the specific legal duties of individuals in the Social Rule of Law, especially public servants (genuine State duties, as had been highlighted in the previous decision of the Constitutional Court), and an impeccable analysis

[9] C.S.J., Sala Casa., June 5, 2014, P.J.: E. Fernández Carlier, SP 7135-2014.

of Article 25 of the Colombian Criminal Code,[10] the Tribunal answers the question affirmatively by stating that members of the armed forces in general (thus applicable to the case under study) have the legal duty to avoid harmful results for the civilian population. In this case, there were known threats of real dangers (as usual in an armed conflict), and they materialized, but there were no timely rescue actions. The court highlights the need to establish the functional, material, and territorial competence of the officer, agent of the omissive State, over the municipality and the town's inhabitants, the target of the attack.

General duties of protection

As mentioned, the constitutional duty of protection obligates the power of the State to fulfill its tasks (through its agents), always respecting the rights and legal interests of members. This general duty is ultimately the fundamental basis for the proper operation of the State and the strengthening of citizens' trust in the institutions. For instance, the citizen who observes an agent of the State, for example, a soldier, overstepping his power at a roadblock, will no longer rely on the institution of military forces and, at the same time, will surely question the effectiveness of the mission such institution has in the State. There will be a feeling of general insecurity because those who must ensure it do not give full guarantees.

When the danger to the legally protected interests of the population comes from third parties (organized crime groups or armed organizations involved in a non-international conflict, etc.), the duty of protection lies in the establishment of the security conditions for the citizens that face these specific threats (for example, setting up security checks in remote regions or if the specific menace is already known, taking the necessary security measures). If the danger has already materialized because third parties began to damage the legally protected interests of the population, the duty is transformed into doing what is optimal so that the

[10] Thus, Article 25 of the Colombian Criminal Code: "Action and omission. The punishable conduct can occur by action or by omission. Whoever has the legal duty to prevent a result of a typified crime and fails to fulfill it, being able to do so, will be subject to the penalty provided in the relevant criminal law. For this purpose, the agent must be responsible for protecting the legally protected interest or entrusted as guarantor with the surveillance of a certain source of risk, following the Constitution or the law. The following situations constitute guarantee positions: 1. When the actual protection of a person or a source of risk is taken voluntarily within the scope of ownership. 2. When there is close coexistence between people. 3. When several people undertake a risky activity. 4. When an unlawful situation of near risk for the relevant interest has been created previously. Paragraph. 1, 2, 3, and 4 will only be considered concerning punishable criminal conduct threatening life and personal integrity, individual freedom, and sexual freedom and development."

damage does not continue to occur and, as far as possible, restore everything to the previous state.[11] The violation of the duty of protection through active conduct by an agent of the State is legally and criminally comparable to an infraction of that duty by omission, for example, not doing anything when an irregular armed group attacks the civilian population. The fulfillment of the duty of protection does not depend then on acting or omitting.[12]

Although theoretically delimited, the scope of the protection obligation of the agent of the State can have particular manifestations depending on the dangerous situation. For example, in a rescue operation led by military and police members (in other words, the fulfillment of the State duty amidst the creation of legally disapproved risks by third parties), it is expected that they do everything "reasonably" required following the intervention protocols available for each situation. Any excess can be considered negligence in restoring order and would imply entering the orbit of the concurrence of risks.

Adequate management of sources of danger

Maintaining the State's internal security conditions by the military and police forces as part of the monopoly on the use of force is not a task that can be fulfilled without adequate management of risk and danger. The task itself and the use of means to perform it, for instance, the handling of weapons of all kinds, is a risk that we all legally tolerate to fulfill a State's purpose. It is a legally permitted risk, which, if well-administered by the agent of the State (as expected), does not result in any criminal imputation; it will be a conduct without criminal connotation.

However, how this duty can be infringed is quite varied. Think of the simple negligence on the part of a police officer with his service weapon and its later use to infringe upon legally protected interests; the responsibility to safeguard a source of danger and its failure to discharge it creates a normative relationship

[11] The criminal law idea that underlies these types of duties is known as legal interference; see Günther Jakobs, "Teoría y praxis de la injerencia," trans. Manuel Cancio Meliá, in *El sistema funcionalista del derecho penal* (Lima: Tirant lo Blanch, 2000): 97 et seq.; also see Jorge Fernando Perdomo Torres, "La responsabilidad por injerencia en la moderna dogmática penal," in *Estudios penales a partir de libertad y solidaridad* (Bogotá: Universidad Externado de Colombia, 2009): 33 et seq.

[12] Whoever is in command of a military or police structure has the generic duty of not harming anyone; this officer also has a specific institutional obligation to protect citizens against certain dangers (especially assaults against human rights). That protection must be provided precisely by directing the troops under their charge, regardless of whether the danger originates in their troops' actions or comes from other sources.

of connection between at least a negligent activity and the subsequent act also prohibited. Then, there will be the possibility of objectively implicating the police with criminal participation in the result.[13] Another assumption[14] is the facilitation of weapons for the exclusive use of military forces to all kinds of criminal groups in Colombia. It ends up supporting the war by strengthening these groups and being an affront to the prohibition to yield the monopoly on the use of State force, legally and criminally linking the offender to the subsequent criminal event. Once again, note that here, what the legal system disapproves of is the infraction of the agent's special duty and not the technical form as that infraction occurs, whether an action or an omission (the weapons can perfectly fall into the hands of a criminal group by the negligence of whoever should safeguard them).

Special duties for the management and surveillance of the conduct of subordinate security forces

In fulfilling the function of citizen protection by the military and police forces, and due to the very nature of the military and police structure, it is necessary to operate based on a serious and actual distribution of competence. That is to say, the agents of the State that exercise the general function of protecting the population have delimited areas of functional, material, and territorial competence, and this is precisely what allows the criminal imputation process to be carried out based on the expectations and specific duties in each case. Knowing what is expected, for example, from an army colonel assigned to a given region, is relatively straightforward; he is expected to perform the general and special duties assigned to him in the relevant jurisdiction.

The hierarchy as a characteristic of the armed State organization enhances the obligation to establish the functions clearly; regardless of rank, each agent *must know* the origin, content, and scope of their duty (including the extent of obedience) and, consequently, act according to that normative expectation. In terms of accusation,

[13] On the theory of *Regressverbot* (rupture of imputation), see José Antonio Caro John, *Das erlaubte Kausieren verbotener Taten – Regressverbot* (Baden-Baden: Nomos, 2007); Bernardo Feijoó Sánchez, *Límites a la participación criminal. ¿Existe una "prohibición de regreso" como límite general al tipo en derecho penal?* (Bogotá: Universidad Externado de Colombia, 2001).

[14] In the framework of hierarchical relationships, the duties of assurance in traffic also flourish, as the Constitutional Court affirmed, "the dangers for legal rights may arise (...) from our immediate subordinates. In fact, in hierarchical relationships, the superior with authority or command must take extraordinary measures (safety duties in traffic) to prevent people under their effective control from engaging in conduct that violates fundamental rights" (C.C., February 12, 2001, P.J.: E. Montealegre Lynett, Sentencia SU-1184/01, G.C.C.).

this ends up translating into the exercise of a risky *per se* but allowed activity and the validity of the so-called principle of trust[15] since the superior, in relation to the subordinates and vice versa and the lower-ranked among themselves, can always trust that each will act according to their role, that is, fully observing what is expected of them. Suppose a regional military leader organizes a legitimate operation to secure an area where the civilian population is present. In that case, he will expect and *trust* that his subordinates will stick to the plan and carry out the activity with the agreed functional distribution. If, for some reason, there is an excess of the function because the subordinates, for example, infringe upon the rights of the inhabitants of a municipality, the superior *prima facie* will be able to assert this principle of trust before him. Those violations cannot be imputed to the superior objectively.

Notwithstanding, this principle has exceptions, and in this regard, it makes us consider whether the superior as such has special duties of control and surveillance over the activity and the proper means to an operation such as that described, weapons, etc. The answer to this question is usually affirmative, and consequently, these special duties of supervision and diligence are part of the superior's duty. So, in the case of an overreach of the subordinate, if he has not exercised the mechanisms and taken the measures of relevant *control*, the viability of the trust principle cannot be invoked; the adverse result will be imputable to the superior, regardless of the degree and quality of the criminal participation.

From the point of view of subjective imputation, the knowledge or lack thereof of the irregular situation by the subordinates will have to be reconstructed as well to specify the duty of the superior later and establish if there was an infraction.

Command responsibility: Generalities

What is stated in the previous section leads us to a critical issue in our state of affairs (and in the context of transitional justice). Also, it is a topic of ample international development, not only since the issuance of the Rome Statute and its Article 28: the responsibility of the military or civil superior (here we will refer primarily to the military superior *de jure*).[16]

[15] See recent reference, Nathalia Bautista Pizarro, *Das erlaubte Vertrauen im Strafrecht* (Zürich: Dike, 2017).

[16] Responsibility for leadership is not a new issue, at least since Article 86 of Protocol I, in addition to the 1977 Geneva Conventions, ratified by Colombia in 1992. See historical references in Farid Samir Benavides Vanegas, "Formas de imputación," in *Manual de Derecho Penal Internacional*, ed. Farid Benavides Vanegas (Bogotá: Legis, 2017): 94 et seq.

Being in a position of command or control, for example, as a military superior, implies a vast capacity to act and organize and, at the same time, a correlative responsibility so that the structure under command causes no damage to the goods and rights of others, regardless of whether the superior performs the operation personally or not.

This determining position of the person who commands a group of people or an organization is the "guarantor" in charge of controlling a focus of danger,[17] regardless of the recurring argument of self-responsibility, according to which the guarantors are not obliged to control the conduct of other free and responsible subjects.[18] Indeed, Colombian law has made it clear that hierarchical superiors within the armed forces must control the conduct of their subordinates (private law also speaks of *culpa in vigilando*) when they execute first-hand or directly the actions that fall within the functional competence of the superior. Moreover, that duty correlates with the superior's responsibility for the crimes committed by the subordinates before its breach.

This is clear in the field of international criminal law; one who neglects to prevent crimes when they should do so or deliberately tolerates them has a special responsibility that is not inferior, incidental, or secondary concerning the person who acts because the essence of the fight against international impunity is precisely to avoid that the truly responsible actors evade their accountability under the concept of "simple" executor.[19]

Special duties for the observance of the "rules of war"

Special positive duties arise from agents of the State (security forces) in the case of armed conflicts. In effect, recognizing a conflict, whether international or not, paints a legal scenario that goes beyond what is traditionally considered positive legal duties because these should be added to the responsibilities emanating from the law of war from IHL. Consequently, knowing what those particular special

[17] This has been recognized by Colombian case law that sees the focus of danger in the figure of the organized power apparatus, for example, C.S.J., Sala. Casa., January 19, 2011, P.J.: F. A. Castro Caballero, Sentencia de Casación No. 40876.

[18] See in more detail Jacobo Dopico Gómez-Aller, "Posición de garante del compliance officer por infracción del "deber de control": una aproximación tópica," in *El derecho penal económico en la era Compliance*, ed. Luis Alberto Arroyo Zapatero and Adán Nieto Martín (Valencia: Tirant Lo Blanch, 2013): 165 et seq.

[19] See C.C., July 30, 2002, P.J.: M. J. Cepeda Espinosa, Sentencia C-578/02 (Colom.)

duties are is of the utmost importance, especially considering that their fulfillment or non-fulfillment has clear consequences when making criminal legal accusations.

IHL is the branch of public international law that sets out from the recognition of bellicose activity and, therefore, seeks to find a balance between the strategies of war used in international and non-international armed conflicts and humanitarian considerations centered on respect for human dignity. In IHL, the two great international systems that have emerged throughout history have been unified to humanize conflicts: the law of Geneva (IHL) and the law of The Hague (the law of war). Above all, for practical purposes, it is necessary to emphasize that this distinction is analytical and has no legal effect, especially in its application and in establishing responsibilities for its infringement.[20]

On the one hand, the law of The Hague, or the law of war, has as its pivotal element the application of the principle of limitation, which acquires special significance when analyzing methods of war such as bombing, and against specific means of warfare like the projectiles and bombs that can be used in a warlike confrontation. Similarly, this principle has to do with the methods to conceal the actions and intentions, mislead and deceive the enemy (stratagems), such as camouflage, deception, simulating retreat, ambushing, disseminating information to deceive the enemy, simulating operations or false positions, etc. Then, this principle limits the use of combat methods, techniques, and maneuvers in addition to the means used in combat, such as weapons, communications, and the undertaking of hostilities.[21]

On the other hand, the law of Geneva has as its pivotal element the application of the principle of distinction between the civilian population and combatants. It is oriented primarily towards the protection of the victims of armed conflicts. These norms have two purposes: the first is to protect and prohibit the attack on civilians who do not participate in hostilities, protect the people of the opposing side not participating in combat and who do not perform combative acts (crew members of downed aircraft, wounded, shipwrecked, captured, and demobilized individuals), and guarantee the protection of humanitarian personnel (health, civil, religious, and the Red Cross personnel, etc.). The second purpose is to protect, against any attack and war action, the essential goods for the civilian population's survival,

[20] See Alejandro Valencia, *Derecho internacional humanitario. Conceptos básicos. Infracciones en el conflicto armado colombiano* (Bogotá: UN, CIDA, 2013): 37 et seq.

[21] On infringements of IHL in Colombia, see Defensoría del Pueblo and Ministerio del Interior y Justicia, Derecho Internacional Humanitario (Bogotá, 2008): 78 et seq.

the constructions and facilities that contain dangerous elements, and the cultural assets and places of worship.[22]

In Colombia, the Constitutional Court and the Supreme Court of Justice case law has recognized and applied these principles and the international norms of war in armed conflict. It has been recognized that the application and observation of the norms and principles of IHL are a *duty* that must be fulfilled by the parties of non-international armed conflicts (they are part of the guarantor position of the agent of the State); likewise, the authorities of ordinary justice courts, the military criminal justice, and the *transitional justice* must make these norms binding in the Colombian legal system.

Degree of Criminal Participation of Agents of the State

In modern criminal law, the basis model of the guarantor position defines the type of delinquent participation. In contrast to what is usually said and held to be the majority doctrine,[23] in the case of agents of the State who commit crimes in general or are associated with an armed conflict (severe violations of human rights or IHL), it does not seem appropriate to deal with these suppositions as cases of "domain of the facts," for example, through the "domain of the will" within the framework of an organized structure of power. There are not only severe criticisms of criminal law doctrine in this model[24] but also the practical difficulties in establishing the necessary "domain" of the criminal event through a power structure. What relates an agent of the State to a punishable act is not, therefore, a "domain" but the relationship of duty that one has in a specific case for belonging to an institution or being a State representative fulfilling an essential function.[25] Applying the criterion of the

22 On international law as a protector of the civilian population and applying the principle of distinction, see Héctor Olásolo, *The Prohibition of Attacks Directed at Civilians or Civilian Objects and of Disproportionate Attacks as the Core Component of the Principle of Distinction in the Conduct of Hostilities in International Humanitarian Law. Unlawful Attacks in Combat Situations: From the ICTY's Case Law to the Rome Statute* (New York: Martinus Nijhoff Publishers, 2008): 21.

23 Claus Roxin has oriented the majority doctrine's positions through his theory of "organized apparatuses of power." See Claus Roxin, "Straftaten in Rahmen organisatorischer Machtapparate," in *GA* (Hamburg: C.F. Müller, 1963): 193; Claus Roxin, *Strafrecht-AT, Vol. II* (Munich: C.H. Beck, 2003): paragraph 25, C., note to the margin 105 et seq.; Claus Roxin, *Täterschaft und Tatherrschaft* (Berlin: De Gruyter, 2008): 242 et seq.

24 Fundamental to see Günther Jakobs, "El ocaso del dominio del hecho. Una contribución a la normativización de los conceptos jurídicos," trans. Manuel Cancio Meliá, in *Injerencia y dominio del hecho. Dos estudios sobre la parte general del Derecho Penal* (Bogotá: Universidad Externado de Colombia, 2001).

25 See Günther Jakobs, *Derecho Penal Parte General, Fundamentos y Teoría de la Imputación*, eds. Joaquín Cuello Contreras and José Luis Gonzáles de Murillo (Madrid: Marcial Pons, 1991): 1004 et seq.; Perdomo Torres, "El Estado como garante": 239 et seq.

domain does not allow for recognizing the true normative meaning of the conduct because one still thinks about the factual, the empirical, and that which naturally impresses the senses, as is already known. What interests modern criminal law is the normative link of a person to the fact and not the factual link.

The fundamental rule that arises from understanding that someone is an institutional guarantor is that if that person violates their special positive duty, they must be treated as the *author* of the respective behavior, regardless of the causality or the facticity of the conduct. Consequently, this guarantor can be held responsible for the conduct of others who have directly executed what was described. Think of some correctional officers who allow (omission) or help (action) inmates escape. Since each violates their positive duty, the crime committed must be understood as a personal act; each is an author because their actions infringe the duty that emanates from institutional competence.[26] The proposed example reveals that beyond circumscribing the conduct to supposed rules because it is a case of omission or action, the essential point lies in identifying if the actor was a guarantor for the protection and development of an institution and if then in the specific case, it was compulsory to avoid the realization of a danger in a legal result. It deals with assumptions framed within the theory of crimes of duty infringement in the criminal law doctrine, recognized by the case law of the courts in our country,[27] and the consequent rules of authorship.[28] Then, whoever is in charge of the protection of the institutional relationship, that is, the special guarantor, will always be the author, and the person who does not have such a position should be understood as *extraneous*, one who can never be an author and will be a participant in a duty-infringement crime.

[26] See Jakobs, *System der strafrechtlichen Zurechnung*: 85; Günther Jakobs, *Theorie der Beteiligung* (Tübingen: Mohr Siebeck, 2014).

[27] Remember that Roxin proposed the terminology of offenses of duty infringement to complement his theory of the domain of the fact in those cases of authorship for infraction of extra-criminal duties. Then, this category would be revisited by Jakobs and developed within a complete normative system that excluded domain crimes and brought organizational crimes and offenses of duty infringement as new terminology. About this evolution and the rules of authorship in this type of crimes, see Sánchez Vera, *Pflichtdelikt und Beteiligung*; Eduardo Montealegre Lynett and Jorge Fernando Perdomo Torres, *Funcionalismo y normativismo penal* (Bogotá: Universidad Externado de Colombia, 2006): 74 et seq.; Yván Figueroa Ortega, *Delitos de infracción de deber* (Madrid: Dykinson, 2008); on the recognition of the crime of duty infringement in Colombian case law, see Miguel Córdoba Angulo, "La figura del interviniente en el Derecho Penal colombiano," *Revista Derecho Penal y Criminología* 25, no. 75 (2004): 71 et seq.

[28] See Javier Sánchez-Vera, "Delitos contra la administración pública en el Código Penal colombiano," in *El funcionalismo en derecho penal*, coord. Eduardo Montealegre Lynett (Bogotá: Universidad Externado de Colombia, 2003): 463 et seq.

Although the first requirement to start an imputation trial against the agents of the State is, obviously, the existence of the legal obligation, i.e., the position of guarantor in the particular case, it is necessary to examine all the elements of imputation: abiding by the analysis of imputation in the specific case to be then able to determine if the duty of guarantee was infringed. Once the position of guarantor is established, a second element of imputation as transcendent as the first has to be analyzed (and not to be forgotten) to hold the military guarantors responsible: the subject has *created a legally disapproved risk*, the first element of the so-called theory of objective imputation,[29] widely recognized in criminal law doctrine.

The basic principle of this theory, as stated, is that the attribution of personal responsibility for the conduct or an outcome in criminal law depends on the area of competence to which the protection belongs; this is the reach of the position of guarantor *in the specific case*. Once there is certainty about the competence, that is, the duties, it is necessary to determine if the subject *creates a legally disapproved risk*; that is, it must be established if the person has violated the duty in the specific case. Suppose an agent of the State is a member of the national army who does not effectively control the activities of the troops under his command and, as a result, there are dangers and even harmful results for his subordinates and third parties (think of the civilian population), thus infringing his duty. In that case, a legally disapproved risk is created. The creation of legally disapproved risks occurs in the duty-infringement relationship and in the case of members of the armed forces and police deviating from the duties in general amid a non-international armed conflict, as depicted in detail here.

There are at least four doctrinal criteria that serve to determine this imputation judgment, or more precisely, to exclude the creation of legally disapproved risk: (1) the action within the allowed risk; here, the creation of dangers is authorized within the limits that society is tolerating due to the needs of development

[29] Fundamental to see Günther Jakobs, *Strafrecht-AT, Die Grundlagen und die Zurechnungslehre* (Berlin: De Gruyter, 1993): 7/4 et seq., 35 et seq., 56 et seq., 24/13 et seq.; Wolfrang Frisch, *Tatbestandsmäßiges Verhalten und Zurechnung des Erfolgs* (Heidelberg: C.F. Müller, 1988): 9 et seq., 33 et seq.; Claus Roxin, "Gedanken zur Problematik der Zurechnung im Strafrecht," in R. Honig-FS (Göttingen: Schwartz,1970): 133–150; Claus Roxin, *Strafrecht-AT, Vol. I* (Berlin: C.H. Beck, 2006): 11/39 et seq.; Manuel Cancio Meliá, *Finale Handlungslehre und objektive Zurechnung* (GA: F.C. Müller, 1995): 177–191. For a comparison with the social theory of action, Isabel Voßgätter Genannt Niermann, *Die Sozialen Handlungslehren und ihre Beziehung zur Lehre von der objektiven Zurechnung* (Frankfurt am Main: Peter Lang Pub Inc, 2004); Yesdi Reyes Alvarado, *La imputación objetiva* (Bogotá: Temis, 1994); Claudia López Díaz, *Introducción a la imputación objetiva* (Bogotá: Universidad Externado de Colombia, 1996); Manuel Cancio Meliá et al., *Teoría de la imputación objetiva* (Bogotá: Universidad Externado de Colombia, 1998).

and evolution; (2) the principle of trust is an essential criterion for joint work in a society that allows the subject to delegate specific tasks because others are self-responsible individuals who will meet the expectations arising from a specific role; (3) actions at own risk, in which the victims are accused of the conduct resulting from violating their duties of self-protection; (4) the *Regressverbot*, according to which the facilitating of willful or culpable misconduct by a third party, is not attributable to the person who provided it within the permitted risk. These criminal precepts developed in the last decades by the criminal law doctrine,[30] which have also been receiving jurisprudential reception, become suitable mechanisms to determine a breach of duty and how this infraction must be understood when several people take part in an event, including the victim of the crime.

If, after the analysis, it is proven that the subject, in this case, the military agent of the State, has created the legally disapproved risk because he has violated a duty, a "risk relationship" is also required. A "risk relationship" indicates that the same risk created for the subject is specified in the production of the result. For example, if, as a result of military combat, a person is slightly wounded and is transferred in a helicopter that, due to a technical failure, crashes and the person dies, it will be necessary to analyze if the legally disapproved risk created initially, the injury in combat, is the same one that ends up causing the death outcome. In this case, there is no risk relationship since the death was the cause of a risk different from the original one; therefore, such death cannot be objectively attributed to the first agent.

In conclusion, to make the imputation judgment against agents of the State, it is necessary to determine the existence of the position of guarantor, the reach of the positive duty they have, and whether the subject has violated his duty by creating a legally disapproved risk and this has materialized in the typical result. In addition, to complete the typical imputation, it is necessary to consider the subjective part of the act, especially the knowledge of the facts with all the vicissitudes that this issue has in modern national and international criminal law.

[30] See Günther Jakobs. "La imputación objetiva especialmente en las instituciones jurídico-penales del "riesgo permitido", "la prohibición de regreso" y el "principio de confianza"," in *Estudios de Derecho Penal* (Madrid: Civitas, 1997).

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