The governance of complementary global regimes and the pursuit of human security : the interaction between the United Nations and the International Criminal Court

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Part I

The Quest of Complementarity and the Dilemma of Human Security

2 The Legal and Political Frameworks Fostering Human Security

Preliminary remarks

This part explores the quest of *complementarity* trying to fix the margins between statehood, sovereignty and international governance of mass atrocity crimes and the pursuit of human security. It offers an overview of the tools at disposition by the international community in societies in transition from conflict to reconstruction offering reliable models of governance and based on the advocacy of human security. In this chapter the following topics have been comprehensively debated: the legal and political frameworks of governance fostering human security, the discussions around the rule of international law, the function of multilateralism versus unilateral interests, and the risk of opportunistic policy formulations. The last section concludes the assessment provided in the whole chapter about the transition of the concept of security and the paradigms in the making between the conceptualization, the applicability, and the critics of the human security doctrine. In other words, it highlights the formulation of human security systems of complementary character fighting against war and crime and the requirements thereof. The contribution in this debate underscores the needs of democratic governance of humanitarian affairs throughout institutional reforms, strengthening the partnerships and relationships of governance institutions of complementary character with measures of human security.

This chapter clarifies where the emerging regime of international criminal justice comes from, and where it should go within the arrays of the governance of international peace and security and its role in the maintenance and restoration of sustainable peace. The main assumption articulated in this chapter is that the architecture of global governance systems reflecting the world as it existed in 1945, has not kept pace with the fundamental changes taking place in the world community. We face an incredible amount of shortcomings in the governance systems fostering human security at national, regional and international levels. The paradigm shifts include the spread of global threats, the commission of serious crimes of common concern during violent political transitions, and the devastating consequences of *intra*-state armed conflicts. The military interventions for humanitarian reasons and the protection duties of civilians are inconsistent, while the interaction strategies to prevent mass atrocity crimes with timely intervention are not sufficient. The influence of non-state actors involved in armed conflicts has repercussions in the transition of human security and humanitarian intervention in

conflict and post-conflict situations, including the problem of their accountabilities. Therefore, it is required to identify the policy and the normative requirements for an effective governance system centralizing human security, when dealing with *intra*-state and *inter*-state warfare and with the violations of international humanitarian law and human rights law.

This chapter argues that there are some opportunities to progress with human security measures between the emerging regime of international criminal justice and the established regime fostering sustainable peace in conflict and post-conflict situations of the United Nations. It debates the transition of global regulatory frameworks fostering human security, considering the intersection between international politics and laws, including the paradigm shift of global *complementarity* between established global regimes and emerging sub-regimes, the purpose of which is to solve the political impasse crucial for the progress of *global justice* and its architecture of governance. The approach in this chapter is complementary to the broad concept of human security originally articulated by the United Nations Development Programme (UNDP) in its *Human Development Report* delivered two decades ago,[1] and its annual analytical reports which followed next, including the theoretical and empirical findings of NGOs and relevant think tanks, in accordance with the current changes occurring in the international society.[2]

From the valuable assessments performed in the past by legal and political theorists we learn that human security focuses on the protection of individuals, rather than defending the physical and political integrity of States from external military threats, which represents the traditional goal of national security. Ideally, national security and human security should be mutually reinforcing, but in the last hundred years far more people have died as a direct or indirect consequence of the actions of their own governments or rebel forces in internal civil wars, more than have been killed by invading foreign armies during *inter*-state conflicts. Acting in the name of national security we have seen that the governments themselves can pose profound

1 See UNDP Human Development Report 1994, *New Dimensions of Human Security,* accessible at: http://hdr.undp.org/sites/default/files/reports/255/hdr_1994_en_complete_nostats.pdf

2 Important references are the empirical findings of think-tanks and their programming activities such as The Hague Global Justice Institute (IGJ) dealing with the 'judiciary and global justice'; 'international affairs, peace diplomacy and global justice'; 'environment, development and global justice'. Such programming activity is dedicated to the promotion of knowledge of law and justice as the basis of, and in relation, to peace, security and social and economic development, using a comprehensive approach. The analysis of theory and practice and a network organization facilitates cross-fertilization towards global challenges such as failing States and governance systems, resource conflicts, climate change and its multiple consequences, the changing international architecture, the effectiveness of international judicial institutions and the increasing importance of non-state actors. See the mission of The Hague Global Justice Institute (IGJ) accessible at: http://thehagueinstituteforglobaljustice.org/index.php?page=Mission&pid=121

threats to human security. This was the case in Syria, Libya, Iran, Tunisia, Egypt including any other aggressive and criminal regime where the army easily turned against its own populations. In such countries the reforms of the security sectors such as the army, police and the judiciary depend on the outcomes of political transitions and democratic reforms. The same requirement is valid for the States committing the crime of aggression characterizing *inter*-state conflicts. The crime of aggression had been included in the Rome Statute in 1998 while its definition and implementation were deferred to a review conference. The amendments adopted in 2010 define the crime of aggression and provide for the conditions for the exercise of jurisdiction over this crime. The Court may exercise jurisdiction over the crime of aggression once thirty States have ratified the amendments, and subject to a decision to be taken after 1 January 2017 by the States Parties.[3]

The States have the primary responsibility to protect civilians and the ways the international community deals with civilian protection measures, is definitely questionable. The human security policy focuses its attention on the threats stemming from violence to individuals and to collapsed societies where the absence of the rule of law could lead to political, military, social or economic instability and inequality. The emerging regime of international criminal justice falling under the Rome Statute is interpreted as a tool of human security and as such deserves global support. This chapter discusses the limits of such emerging international regime and its transition centralizing human security. It supports the idea of an integrated approach of governance able to offer capacity-building on the ground for the sake of humanitarian protection and human development through reparation measures, rehabilitation programs and social re-integration of the victims of war. Therefore, the interaction between complementary global regimes advocated in this study is based on the concept of *global justice*, respectively its *retributive*, *protective* and *restitutive* aspects. The human security doctrine deserves further consideration by the political actors enforcing complementary global regimes, and this of course, for the several reasons outlined in this chapter.

In order to have a complete overview, this chapter recalls what has been accomplished in the past in the context of multilevel criminal jurisdictions dealing with the serious violations of international law, which received a pluralist approach by primary and secondary laws in the global legal order. The attention also goes to the interaction between pluralist regulatory frameworks respectively dealing with the accountability of the States and of the individuals as in the case of the crime of aggression which is not yet politi-

3 See Handbook *Crimes of Aggression and War Crimes* published by the Liechtenstein Institute on Self-Determination. Part I of the handbook is based on a workshop on the ratification and implementation of the Kampala amendments on the Crime of Aggression that took place at New York University on 25 June 2012. The handbook is accessible at: http://crimeofaggression.info/documents/1/handbook.pdf

cally agreed. This chapter clarifies the lacuna of human security measures between complementary global regimes, including the political impasse of multilateralism between the theories of constitutionalism and pluralism of international legal systems. It contributes to the views of the international legal world moving from the relative and the universal "to build order without imposing it, to accept pluralism without giving up on a common law".[4] The struggle remains: how far is it really possible to measure such transitions?

2.1 International Criminal Justice: The Evolution of Human Security?

Section Outline

The historical overview of the definition of multilevel jurisdictions, including the establishment of judicial institutions enforced by political organs after the scourge of world wars, is important to measure the progress already achieved at global level fighting against the impunity of international crimes. The Court today is a major international institution securing justice for victims when it cannot be delivered at the national level. Investigations in nine country situations concern shocking allegations such as mass murder, rape, torture and the use of child soldiers. The prosecutor is currently conducting preliminary examination in ten situations including Palestine, Afghanistan, Georgia, Guinea, Colombia, Honduras, Korea, Nigeria and Ukraine.[5] The Court however, does not have jurisdiction on individuals responsible in case of aggression during *inter*-state conflicts. Such jurisdictional pillar received postponement during the first review conference of the Rome Statute in Uganda (Kampala) and waits for further consensus and resources in 2017. In order to verify the reasons of such an impasse it is required to look in the past. The main theory promoted in this section is that on the one hand, for an understanding of the effects deriving from the political determinations enforcing international governance institutions, it is required to look at the causes placed in the past by the decision-making. On the other hand, if we want to understand the effects that might appear in the future, it is required to focus on the causes currently laid down by the decision-making. The question is whether the international governance institutions deriving from such political process would be able to simultaneously have an impact on the causes and effects of war and crime. The main concern is if there would be human security measures during humanitarian escalations of *last resort* between the complementary global regimes fostering peace and justice. So said, in which direction evolve the policies of global

4 M. Delmas-Marty, *Ordering Pluralism. A Conceptual Framework for Understanding the Transnational Legal World*, 2009. M. Delmas-Marty, *Les forces imaginantes du droit: Tome 1, Le relatif et l'universel*, 2004.

5 See ICC website » Structure of the Court » Office of the Prosecutor » Policies and Strategies » ICC – Policy Paper on Preliminary Examinations, November 2013.

'humanitarianism', global 'solidarity', collective 'responsibility' and mutual 'accountability'? This section briefly recalls the historical background of multilevel criminal jurisdictions, the UN judicial activity, and the progress of international criminal justice surely requiring further research.

2.1.1 The historical background of multilevel criminal jurisdictions

With regard to the *inter*-state conflicts (intended as international conflicts, or conflicts between States) the world community has sought to prevent war and eliminate aggression for ages. After World War I the efforts to limit international warfare resulted in the establishment of the League of Nations. The Treaty of Versailles of 1919 called for the prosecution of Kaiser Wilhelm II for waging unjust war but efforts to carry out this provision were fruitless since he found refuge in The Netherlands. The Kellogg-Briand Pact of 1928 provided for the formal renunciation of war as an instrument of any national policy.[6] This renunciation became the basis of the London Charter of 8 August 1945, which established in Nuremberg the International Military Tribunal for the prosecution of the major Nazi war criminals, and of the 1946 Charter for the International Military Tribunal for the Far East (IMFTE) establishing a similar war crimes trial in Tokyo.[7] These charters, the indictments and judgments of the tribunals, and the 1947 United Nations resolutions embodying the 'Nuremberg Principles', are among the legal sources for considering aggression a 'crime against peace'.[8]

In 1945, the United Nations Charter in Article 2 (4) and Article 39 prohibited aggression but no definition of the crime was established.[9] No real consensus on the meaning of aggression was reached until the United Nations' definition of aggression was agreed upon on 14 December 1974.[10] The definition states in rather general terms that "aggression is the use of armed force against the sovereignty, territorial integrity, or political independence of another State, or in any manner inconsistent with the Charter of the United Nations". The definition also enumerates, not exhaustively, other specific examples of aggression and sets forth their legal and political consequences.

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6 The Kellogg-Briand Pact served as the legal basis for the creation of the notion of crime against peace. It was for committing this crime that the Nuremberg Tribunal and Tokyo Tribunal sentenced a number of people responsible for starting World War II.

7 For an historical overview of the International Military Tribunal for the Far East (IMTFE), commonly called the Tokyo trial see Y. Totani, *The Tokyo War Crimes Trial. The Pursuit of Justice in the Wake of World War II*, Harvard University Press, 2008. See also N. Boister, R. Cryer, *Documents on the Tokyo International Military Tribunal. Charter, Indictment and Judgements*, Oxford University Press, 2008.

8 UN doc. General Assembly Resolution 177 (1947)

9 For an overview see "International Criminal Law. Defining International Crimes", in *Law Library, American Law and Legal Information, Free Encyclopedia*, accessible at: http://law.jrank.org/pages/1392/International-Criminal-Law-Defining-international-crimes.html

10 UN doc. General Assembly Resolution 3314 (1974)

The definition does not cover acts by non-state actors. The two key military alliances at the time of the definition's adoption, the NATO and the Warsaw Pact, were non-State parties and thus were outside the scope of such legal considerations. Moreover, such definition did not deal with the responsibilities of individuals for acts of aggression but only with the State responsibility. Aggression was widely perceived as an insufficient basis on which to ground individual criminal prosecutions.[11] Those jurisdictional issues have been discussed in multilateral negotiations for decades, with the last event being the review conference of the Rome Statute in Kampala in 2010 which is approached in the next paragraphs. But before looking into the latest outcomes, it is required to recall the UN political role in the advent of international criminal justice.

2.1.2 The UN judicial activity and international criminal justice

Throughout history, the United Nations has adopted, or at least considered the adoption, of a number of variations on the definition of international crimes. In 1948, only a few years after the Nazi Holocaust ended, the General Assembly adopted the text of the Genocide Convention.[12] Among these there are also the resolutions endorsing the standards of the Nuremberg Charter, the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind, and the Statutes of the two *ad hoc* international criminal tribunals established by the Security Council. In the past however, the relations between threats and crimes, *intra*-state and *inter*-state conflicts and individual accountabilities have been resolved in the absence of an established regime of international criminal justice which were only based on *ad hoc* Security Council resolutions. The international criminal tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) were established by the Security Council to punish violations of international law during the Yugoslavia conflict and the Rwanda genocide. The United Nations also administered the domestic criminal justice system of Kosovo. Likewise, Sierra Leone and the United Nations concluded an agreement to establish a Special Court to prosecute both international and domestic crimes committed during the conflict in the country. A similar tribunal for prosecution of Khmer Rouge has been established in Cambodia. The Special Tribunal for Lebanon (STL) was established by an agreement between the United Nations and the Lebanese Republic.[13] The United Nations Security Council, acting under Chapter VII of the Charter of the United Nations, endorsed the agreement on 30 May 2007.[14] The STL marks the first time that the UN-based international criminal court tries a 'terrorist' crime committed against a specific person. According to the

11 L. F. Damrosch, "Enforcing International Law through Non-forcible Measures", *Recueil De Cours/Collected Courses*, Académie de Droit International de La Haye, 1998, at 202.
12 UN doc. General Assembly Resolution 260 (1948)
13 UN doc. Security Council Resolution 1664 (2006)
14 UN doc. Security Council Resolution 1757 (2007)

United Nations it is a "tribunal of an international character based on the highest international standards of criminal justice".[15]

Thus, as discussed above and taking in consideration the analytical contributions of eminent experts in the field of international law such as Arsanjani and Reisman, if we look at the evolution of international criminal justice in the course of history, two types of international criminal tribunals have emerged.[16] The first category exemplified by the tribunals at Nuremberg and Tokyo, may be called *ex post* tribunals. They were established after the acute and violent situations in which the alleged crimes occurred, and had been resolved by military victory and new political settlement after WWII. As a result, the tribunals' judicial activity did not affect international security concerns. Even if some conditions of instability were still present, these were not likely to be dealt with, as the victorious parties patronized the political momentum. The second generations of *ad hoc* tribunals established by the Security Council also has an *ex post* nature and were based on international security considerations settled by the political and executive organ of the United Nations.

Another category of international tribunals may be called *ex ante* tribunals. They are established before an international security problem had been resolved or even manifested itself, or established in the middle of the conflict in which the alleged crimes were taking place. In these circumstances authoritative political entities such as the Security Council and its operations in the field, if any, would have only been initiating the re-establishment of order in these situations, triggering the negotiations with the governments responsible of conflict resolution, or just addressing the threats of peace and security, or better say the severe humanitarian violations, to the appropriate judicial channels, which also require the involvement of human rights treaty-based bodies within the UN system (UNHCHR).[17] In such context the *ex-ante* judicial decisions may in theory influence the political configuration of peace enforcement by the Security Council depending on the willingness of further international engagements, while the Security Council may still suspend prosecutions for the benefit of peace negotiations. It is clear that the interests of justice and the discretion settled in article 53 of the Rome

15 For an overview of the current proliferation and insight of international criminal tribunals see R. Zacklin, 'The Failings of *Ad Hoc* International Tribunals', in *Journal of International Criminal Justice* (2004) 2 (2), at 541.

16 See H. Arsanjani, W. M. Reisman, "The International Criminal Court and the Congo: From Theory to Reality", in L. N. Sadat, M. P. Scharf (eds.) *The Theory and Practice of International Criminal Law. Essays in Honor of M. Cherif Bassiouni,* 2008, at 325.

17 See S/RES/1970 (2011) which provides jurisdiction to the International Criminal Court over the situation in Libya since 15 February 2011. See A/HCR/16/20 (2010), "Combating Impunity and Strengthening Accountability, the Rule of Law and Democratic Society", in the 2010 Annual Report of the United Nations High Commissioner for Human Rights, at 62.

Statute (initiation of an investigation) is part of such *ex-ante* activity of the International Criminal Court which *ratio* is also valid in the referral activity of the Security Council. In the practice, however, the Court is not an *ex-ante* judicial institution. It is a tool of *last resort* and witnesses serious crimes allegedly committed in conflict and post-conflict situations in accordance with the principle of complementarity. Article 53 provides that the Prosecutor may desist from acting either in relation to opening an investigation or in continuing with an investigation that has been opened, if it appears that the decision to desist would be in the interests of justice. The decision of the Prosecutor not to investigate or not to prosecute based on these grounds may be reviewed by the Pre-Trial Chamber on its own initiative, or at the request of the referring State or the Security Council, and, in such a case, the decision of the Prosecutor will only be effective upon confirmation by the Chamber. The text of Article 53 reflects another aspect of the compromise reached during the first conference in Rome.[18]

The Court could be rather seen as an *ex ante* tribunal without police and law enforcement capabilities.[19] In the longstanding *peace v. justice* debate some observers would even see the Court as an *ex ante* tribunal which "may create conflicting pressures on both the domestic tribunals and the actors responsible for resolving the security problem in the country in question. A unique challenge falls on the judiciary and other domestic security sectors such as conventional army and police. Such actors determine whether and how to set priorities among their curial responsibilities and the inevitable political consequences of their actions". Such pragmatic approach of the "law in action" would only be feasible under important conditions.[20] First of all, in respect of the judicial impartiality and independence from the political compromise with criminal domestic regimes; second, with a judicial institution able to monitor multinational law enforcement interventions, holding humanitarian interventions accountable when necessary; and third, through balancing public powers between international executive and judicial authorities towards configurations of mandates on the ground, institutional liaisons and resource sharing. Such idealistic assumptions however, depend on the willingness of the international community to give more credibility to the Court and to its public authority *vis-à-vis* international political bodies such as the Security Council. One example of such reasoning would sim-

18 See C. Gallavin, 'Article 53 of the Rome Statute of the International Criminal Court: In the Interests of Justice', 14 *KCLJ*, 2003, at 179-198. See also C. Gallavin, 'The Security Council & the ICC: Delineating the Scope of Security Council Referrals and Deferrals', 5 *New Zealand Armed Forces Law Review*, 2005, at 19-38.

19 See H. Arsanjani, W. M. Reisman, *supra*.

20 See H. Arsanjani, W. M. Reisman, "The Law in Action of the International Criminal Court", 99 *The American Journal of International Law* 2, 2005, at 385. See also R. Gerber, "Mass Atrocities and the International Community: The Multilateral Framework for Prevention and Response", *The Stanley Foundation Articles,* April 2011, accessible at: http://www.stanleyfoundation.org/articles.cfm?ID=678

ply be that human security waits for reliable mechanisms requiring political configurations of mandates assisting investigations and prosecutions on the ground with protection, relocation and rehabilitation of victims and witnesses. What we currently see, instead, are political organs compromising with warlords the end of violence in the countries in question at the expenses of international criminal justice. These and other issues are extensively dealt with in this study.

2.1.3 A universal or a customized jurisdiction?

A frail accomplishment after post-cold war is the fact that the supremacy of the Security Council monitoring international threats and crimes such as rebuilding societies after conflict; setting *ad hoc* tools of international criminal justice with politicised judicial mandates; rehabilitating the access of justice in post-conflict realities; initiating legal reforms, including domestic institutional empowerment and rule of law sectors, among other things, are currently challenged by the independence of a permanent judicial institution dealing with the most serious breaches of international humanitarian law and human rights. The Rome Statute, however, did not challenge such 'supremacy'. The UN peacekeeping operations should serve with law enforcement operations following the judicial decisions of the Court. Moreover, a key question is to what extent non-state actors would be accountable for acts attempting human rights. The major concern in the current practice is to fill the accountability and responsibility gaps at all levels. If such lacuna is not solved serious risks would attempt the universal project of international criminal justice and its global institutions.

We all agree that the jurisdiction of the Court cannot be defined as universal as yet.[21] As a young institution the Court ought to expand the highest international standards of international criminal justice, representing an example to be followed by any tribunal of international character, while complementing domestic jurisdictions on criminal proceedings. The ideal would be to achieve universality of such international judicial institution dealing with the accountability of individuals in domestic judicial systems. Its presence requires strengthening relations between and within courts and tribunals of States involved in the preservation of international humanitarian law.

21 For an extensive legal analysis of some provisions of the Rome Statute see C. Stahn, M. El Zeidy, H. Olasolo, "The International Criminal Court's Ad Hoc Jurisdiction Revisited", 99 *American Journal of International Law,* 2005, at 421. For an historical overview after the invitation given to the International Law Commission by the United Nations General Assembly to study the 'desirability' and 'possibility' of establishing a judicial organ as "a Criminal Chamber of the International Court of Justice (ICJ)" see Vespasian V. Pella, "Towards and International Criminal Court", 44 *American Journal of International Law*, 1950, at 37. See also UN doc. A/760 (1948); UN doc. A/AC.48/4 (1951).

The presence of the Court represents an historical opportunity. It offers a new direction to the evolution of international relations, international law and international criminal justice. Its impact in devastated domestic realities however, still needs to be verified by social scientists. The Court cannot operate alone. Reconciliation and human security need a re-engagement of higher political priority. The responsibility relies on the actors involved and primarily on the nation-states, including the UN system, international and regional organizations, civil society and other stakeholders. This section promotes further research on the legal responsibilities of global actors and constitutional strategies of universal character according to the UN Charter and the Rome Statute.

2.2 The transition of global regulatory frameworks

Section Outline

In this section the attention goes further to the evolution of the rule of law and the human security expectations in global regulatory frameworks of governance dealing with *intra*- and eventually *inter*-states conflicts. In theory, these frameworks are interdependent and complementary in their nature and reflect the global politics of international responses in mass atrocities. Looking further into the past, and for an understanding of the present, while avoiding speculations in regard to the future, it can be said that the establishment of the International Criminal Court is the result of longstanding negotiations and a legal discourse which took place in the United Nations as a forum for its 193 Member States to express their views, through the General Assembly, the Security Council, the Economic and Social Council and other bodies and committees involved in the preservation and evolution of international law. The International Law Commission presented a draft statute in 1993 which was examined by a committee appointed by the UN General Assembly in 1995. The Rome Statute was adopted on July 17, 1998. The Statute became a binding treaty, and came into force after it received its 60th ratification, which was deposited at a ceremony at United Nations Headquarters on 11 April 2002. As a result of many years of negotiations aimed at establishing a permanent international tribunal to punish individuals who commit genocide and other serious international crimes, the UN General Assembly convened a conference in Rome on the establishment of an International Criminal Court.[22] This section provides an overview of the transition of global regulatory frameworks dealing with *inter*- and *intra*-state conflicts, and the triggering mechanism of jurisdiction deriving from them.

22 UN doc. A/CONF.183/10, 17 July 1998, Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, accessible at: http://www.un.org/icc/index.htm

2.2.1 *The path of universality and integrity: from Rome to Kampala*

After a longstanding diplomatic compromise, the Rome Statute was rapidly adopted by a vote of 120 to 7, with 21 countries abstaining. The seven countries that voted against the treaty were Iraq, Israel, Libya, China, Qatar, the United States, and Yemen. With the rejection of the United States and China, and with Russia abstaining, three permanent members of the UN Security Council are still not parties, while as of today 123 States ratified the Rome Statute.[23] The important elements of such revolutionary international treaty are without any doubt of historical character for modern international legal and political relations, first of all, as a response to the shortcomings of domestic jurisdictions in the fight against the impunity of serious crimes, and second, for the independence of such permanent judicial institution from the political and executive organ of the United Nations. The establishment of the Rome Statute represents the substantive alternative to the practice of the Security Council establishing *ad hoc* tribunals whose judicial mandates are currently under completion. Distant from reaching the *trias politica* or separation of powers in international relations, the Rome Statute represents the evolution of supranational criminal law, humanitarian and human rights law, pacing effectively the arena of international criminal justice mandates. Nevertheless, a new horizon arises for the emerging 'contours' of international criminal justice in the field of international institutional law, international administrative and constitutional law, including the law of international organizations. These pluralist contours require legal tools to counterbalance conflicting laws and the gaps in the preservation of the legal order in the absence of a constitutional strategy.[24]

23 For an overview of the ratification chart by region of the Rome Statute see CICC, *A Universal Court with Global Support*, accessible at: http://iccnow.org/?mod=romeratification See also the ICC States Parties chronological list updated in 2013 and accessible at: http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/states%20parties%20_%20chronological%20list.aspx

24 For an interesting overview of new fields of public international law and the theories of the potential and problems of global administrative law enhancing the accountability of global governance, see N. Krisch and B. Kingsbury, 'Introduction: Global Governance and Administrative Law in the International Legal Order', in *European Journal of International Law*, (2006), Vol. 17 No. 1, 1–13, accessible at: http://www.ejil.org/pdfs/17/1/64.pdf

The first review conference of the Rome Statute in Uganda (Kampala) in 2010 gathered over 2000 delegates of States Parties and non-State Parties such as the US from all corners of the globe. At provisional level, the States Parties discussed the following amendment proposals: the revision of Article 124 of the Rome Statute; the crime of aggression; the inclusion of the use of 'certain' weapons as war crimes in the context of an armed conflict not of an international character, such as the amendments of Article 8. In accordance with the treaty provisions, any future amendment to the Rome Statute requires the support of a two-thirds majority of the States Parties, and an amendment will not enter into force until it has been ratified by seven-eighths of the States Parties. Any amendment to the list of crimes within the jurisdiction of the Court will only apply to those States Parties that have ratified it, with the possibility of an *opt- out* clause by the States not endorsing such amendments.

The international legal order is still characterized by the absence of a *supranational* organization monitoring compliance of universal norms. However, some gaps should be filled according to the high expectations of a world constitution of the international community. With regard to the issue of public authority it would be extremely important also to define the parameters between multilateral approaches of governance and the bilateral engagements as for *non*-members, or only observers within the emerging multilateral regimes of complementary character. This is the case of some permanent members of the Security Council such as the US, China and Russia as well as other States (India, Pakistan, Israel, Iran and Syria). In addition to such policy issues the institutional and constitutional matters of the United Nations and the Rome Statute institutions will be part of the discussions. The Security Council for instance should refrain from the use of the veto in situations of mass atrocity crimes, namely genocide, war crimes, and crimes against humanity as proposed in the policy formulation of the 'Small five' (Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland). Their proposal and policy formulations will need to be discussed in the General Assembly. If such proposal would pass, the civilians in Syria would at least have a better chance to be served by international justice and accountability.

2.2.2 Legalizing aggression from threat to crime

The Statute of the International Criminal Court (ICC) adopted in Rome in 1998, lists aggression as a crime within the jurisdiction of the Court. Negotiations leading to the adoption of the Rome Statute produced consensus on a very narrowly defined core concept of crimes to be applied under the treaty, such as genocide, crimes against humanity and crimes of war. In the first instance, political consensus was not reached on aggression under the Rome Statute negotiations. Although a definition of the crime of aggression has finally been agreed, the jurisdiction of the Court will need more than

that.[25] Resource sharing is fundamental, including appropriate triggering mechanisms between the governance institutions of universal character. It needs also to be noted that during the review conference of the Rome Statute in Kampala the States Parties agreed that no sooner than 2017, the Security Council may refer aggression to the Court for prosecution of aggressive leaders from any nation, regardless of whether it has joined the Court. Alternatively, if a State party or the Court's Prosecutor refers aggression to the Court, then the Prosecutor must see if the Security Council has determined that an act of aggression by the accused nation has occurred.[26]

In the past, the Security Council rarely determined that acts of aggression occurred. It has been much easier for the political and executive organ of the United Nations to determine a threat to or breach of international peace and security. This is one of the reasons why most governments pressured some means for the Court proceedings, in the absence of an explicit Security Council decision on aggression. The compromise reached in Kampala requires that if the Security Council fails to reach any such decision on acts of aggression after six months from any referral, the Court's pre-trial judges can deliberate on the issue. If the chambers authorise the Prosecutor to investigate aggression however, the Security Council can still block the inquiry by adopting a mandatory resolution. Such ultimate decision given to the Security Council was essential to bring the UK and France on board, as permanent members of the UN political body, while also appealing the

25 Although article 5(1) of the Rome Statute, the founding treaty of the International Criminal Court (ICC), included in its jurisdiction the crime of aggression as one of the core crimes, the Court cannot exercise its jurisdiction with regard to this crime until the adoption of a definition and jurisdictional conditions was agreed upon. The negotiations in this regard have stirred considerable debate among States. In 1998 when the Rome Statute was formally adopted, States decided to continue with the longstanding legal debate. In 2002, the subsequent Preparatory Commission concluded its work with a Discussion Paper proposed by the Coordinator of the Working Group on the Crime of Aggression which reflected the status of the negotiations. In September 2002, the Assembly of States Parties (ASP) established a Special Working Group on the Crime of Aggression (SWGCA), open to all States including non-States Parties, to continue discussions on the crime. Since 2003, the SWGCA has met both formally during ASP sessions and informally at Princeton University. A revised Discussion Paper was proposed by the Chairman in January 2007 and new version was issued for the resumed sixth ASP session in June 2008. In February 2009 the Group agreed on a set of proposals on aggression that left only a few questions open, mainly related to the role of the Security Council. Finally the proposal was ready for the review conference in Kampala as described above. For an overview and analysis of such intersection between international law and politics see, S. Barriga, W. Danspeckgruber, C. Wenaweser, *The Princenton Process on the Crime of Aggression*, Liechtenstein Institute on Self-Determination, 2009. See also M. Gillett, "The Anatomy of an International Crime: Aggression at the International Criminal Court", *International Criminal Law Review*, Volume 13, Issue 4, at 829, accessible at: http://booksandjournals.brillonline.com/content/journals/15718123/13/4

26 See ICC-ASP/1/Res.1; ICC-ASP/8/Res.6; ICC-ASP-RC/Res.6, 2010, accessible at: http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf

American observer delegation in Kampala, which exerted influence despite the fact that the United States is not a party to the Rome Statute. Another particular aspect of such compromise is that the nationals of non-States Parties are excluded automatically from the jurisdictional liability of the Court.

Thus, it can be said that the interaction frameworks between institutional premises preserving peace, justice and human security in international conflicts, and the fight against the impunity of serious breaches committed during military aggression still wait to be universally enforced. The jurisdictional regime of the crime of aggression is currently on hold, if we consider the outcome of the first review of the Rome Statute in Kampala.[27] The review conference based the definition of the crime of aggression on the UN General Assembly resolution 3314 (XXIX) of 14 December 1974. In this context, if agreed, to qualify aggression as a crime committed by a political or military leader which, by its character, gravity and scale constituted a manifest violation of the UN Charter. As regards the Court's exercise of jurisdiction, the conference agreed that a situation in which an act of aggression appeared to have occurred could be referred to the Court by the Security Council, acting under Chapter VII of the UN Charter, irrespective as to whether it involved States Parties or non-States Parties. Moreover, while acknowledging the Security Council's role in determining the existence of an act of aggression, the conference agreed to authorize the Prosecutor, in the absence of such determination, to initiate an investigation on his own initiative or upon request from a State Party. In order to do so, however, the Prosecutor would have to obtain prior authorization from the Pre-Trial Division of the Court. Also, under these circumstances, the Court would not have jurisdiction in respect to crimes of aggression committed on the territory of non-States Parties, or by their nationals, or with regard to States Parties that had declared that they did not accept the Court's jurisdiction over the crime of aggression.

27 The 8th session of the Assembly of the States Parties (ASP), which took place on 18-26 November 2009, was foreseen to serve as a filtering mechanism of the issues that were discussed at the Review Conference in Kampala, Uganda (31 May to 11 June 2010). The ASP decided to forward to the Review Conference for its consideration only the proposals for amendments concerning the revision of Article 124 of the Rome Statute, the possible adoption of provisions for the crime of aggression and the first of the proposals put forward by Belgium to extend the jurisdiction of the Court to cover the use of certain weapons in the context of armed conflicts not of an international character. In addition, discussions were held regarding other proposals presented by Belgium, Belize and Trinidad and Tobago, Mexico, the Netherlands and South Africa. None of those proposals gathered sufficient support for their consideration at the upcoming Review Conference. Nevertheless, the ASP agreed to create an ASP Working Group on Amendments that will serve as a mechanism to continue discussions on all of the submitted proposals and any other future proposal toward the next ASP in 2010 and ahead.

The most contentious issue relates once again to the relationship between the Security Council and the Court. In particular, the controversy exists regarding the situations where the Security Council would not yet have determined that a State committed an act of aggression.[28] Some States have expressed the view that under Article 39 of the UN Charter, the Security Council has exclusive competence to determine an act of aggression committed by a particular State. Under this view, the Court would not be able to proceed with a case in the absence of a Security Council determination to declare a State aggressor by specific acts against another State. This was simply the view expressed by the permanent members of the Security Council.[29] Other States have argued that the Security Council has primary, but not exclusive authority to determine an act of aggression, and that the absence of a Security Council determination should not preclude the Court from proceeding with a case. Under the revised 'green light' option, the Security Council could make a decision not to object to the investigation of the crime of aggression instead of making a determination of an act of aggression. Other governments have insisted that since the Security Council may already *refer* a situation to the Court and *defer* an investigation in accordance with article 13 and 16 of the Rome Statute respectively, no additional provision on a prior determination of an act of aggression, or other prior decision would be necessary by the Security Council. Overall, many States have expressed the view that the conditions for the exercise of jurisdiction must reflect a careful balance between the independence of the Court as a judicial body, and the fundamental role of the Security Council in maintaining peace and security under the UN Charter.

The journey to find consensus on such sensitive governance issues appears to be a long one. Only a couple of years ago the States clarified their agreement exclusively on due processes and the way they would proceed on these several issues. The independence of the Court has been promoted by the majority of the States Parties and such view is more than welcome. However, the way such view would be accomplished in the practice is still unclear and remains to be seen. In any case, the prior determination by the Security

28 Article 39 of the UN Charter provides that the Security Council shall determine the existence of any act of aggression and "shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security". The act of aggression is the use of armed force by one State against another State without the justification of self-defence or without authorization by the Security Council.

29 The ideal formula for the crime of aggression expressed by the permanent members of the Security Council has simply been the opt-in jurisdictional procedure left to the discretion of the States. In order to bridge the gap between the permanent members and a considerable number of other States seeking some alternative to an exclusive filter by the Security Council on aggression, other options have been proposed. For an overview of additional proposed options see D. Scheffer, "A Pragmatic Approach to The Crime of Aggression", in R. Bellelli (ed.) *International Criminal Justice: Law and Practice from The Rome Statute to Its Review*, 2010, at 609.

Council, or another UN organ, would not be prejudicial to the Court's own determination on its jurisdictional substance. The Court has to make its determination in accordance with the definition under the Rome Statute and in accordance with the rights of the accused. During the sixth session of the Assembly of the States Parties, the States welcomed the clarification that the jurisdictional triggers of article 13 of the Rome Statute would remain applicable independently of the question of additional preconditions. With regard to other preconditions, the special working group on the crime of aggression (SWGCA) focused in particular on the revised 'green light' option and on the option to enlarge the role of the Pre-Trial Chamber.[30] Nevertheless, both proposals were met with more reluctance than support by the permanent members of the Security Council. Following long negotiations during the Review Conference of the Rome Statute in Kampala (Uganda), the States Parties finally adopted provisions governing the terms of the Court's ability to investigate and prosecute individuals for the crime of aggression.[31] The States Parties to the Rome Statute agreed upon a jurisdictional regime for the crime of aggression, which provides separate procedures depending on whether the situation was referred by the UN Security Council, or whether it came before the Court through a State referral or upon the ICC Prosecutor's initiative. The review conference determined that the activation of jurisdiction is still subject to a positive decision by the Assembly of the States Parties which cannot be taken before 1 January 2017 and one year after the ratification or acceptance of the amendments by 30 member States.[32] The regime of Article 16 of the Rome Statute is once again confirmed, while the provisional change appears in the Article 15 of the Rome Statute.[33]

In conclusion, another element to be emphasized is that the emerging regime of international criminal justice is not able to regulate the cluster of humanitarian interventions and counter terrorism actions by individuals in a position to exercise control, or empowered to direct political-military actions against another State. In the practice, the unilateralism of the national security policy of some States to affirm military supremacy in international relations still takes place at the expense of the citizens of fragile and disintegrated States. In the military operations in Iraq, and later in Afghanistan, the international community witnessed that the national security policy of a couple of States (US and UK) might take the proportions of military coalitions involv-

30 See International Criminal Court, Assembly of the States Parties (ASP), *Report of the Special Working Group on the Crime of Aggression,* ICC-ASP/7/SWGCA/2, 20 February 2009.

31 See ICC Press Release, *Review Conference of the Rome Statute concludes in Kampala,* ICC-ASP-20100612-PR546, accessible at: www.icc-cpi.int

32 For a provisional overview see the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Annex I, ASP/RC/Res.6, 28 June 2010, accessible at: http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf

33 Article 15 *bis*: Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*), Article 15 *ter*: Exercise of jurisdiction over the crime of aggression (Security Council referral).

ing multinational forces causing humanitarian casualties and human rights violations including the risk of a crash of international stability.[34] These breaches of international humanitarian law represent serious violations but do not fall under any supranational jurisdiction.[35] Moreover, such military interventions rely on old mechanisms of conflict management, while reflecting an unlawful concept of international security and a distortion of international law which is still weak vis-à-vis non-state actors.[36]

2.2.3 The triggering mechanisms of jurisdiction

In this study the complementary role of the Rome Statute institutions with the United Nations system receives clarifications, as well as the controversial challenges characterizing their interaction. Such interaction was compromised by the provisions of the Rome Statute setting the initial stage of 'triggering mechanisms' of jurisdiction during *intra*-state armed conflicts. As we have seen, the crime of aggression characterizing *inter*-state conflicts has been extensively delayed for political reasons.[37] Hopefully such jurisdictional mechanisms will receive appropriate re-configurations depending on the evolution of the Court's jurisdiction and the universal ratification of the Rome Statute. In any case, the ways public authorities interact with each other sharing their specific insight in devastating conflicts, deserve discussions for the sake of entire communities. It is important to review some of the initial assessments in the formation of the Court's jurisdiction. Right after the Rome Statute came into force and with regard to the debate on the lacuna of law enforcement in the treaty-based and brand new judicial institution, the *American Society of International Law* clarified its scholarly standing point that what emerged from the diplomatic compromise during the Rome Conference, which shaped the provisional nature of the treaty, was a Court with a 'two-track' system of jurisdiction. Scharf in his '*Results of the Rome Conference for an International Criminal Court'* described that 'track one' would constitute situations referred to the Court by the Security Council. This track would create binding obligations on all States to comply with

34 See P. Shiner, A. Williams, *The Iraq War and International Law*, 2008.

35 Besides, during the investigation by the ICTY and its prosecution strategy, when the NATO forces intervened in the former Yugoslavia, atrocities were allegedly committed by its forces and the resultant investigations by the UN on the allegations were damning. The NATO forces escaped indictment only by a single vote in the UN Security Council. This has functioned to discourage the western powers to be hesitant at including the crime of aggression in the Rome Statute.

36 See P. W. Singer, 'War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law', *Columbia Journal of Transnational Law,* 42:2, Spring 2004, at 521.

37 The crime of aggression is a crime forming part of customary international law, therefore can be prosecuted by any State. The problems it currently faces are purely political manipulations by nations manifesting their political intent to frustrate the ICC. This was the case of the policy orientations by the US, especially during the previous administration under George W. Bush, including the distant positions taken by China and Russia as the permanent members of the UN Security Council.

orders of evidence or surrender of indicted persons under Chapter VII of the UN Charter. Track one would be enforced by Security Council "imposed embargoes, the freezing of assets of leaders and their supporters, and/or by authorizing the use of force". In other words, the possible authorization of military enforcement by the Security Council under the flag of international criminal justice, humanitarian interventions and the duty to protect civilians.

According to Scharf it is indeed the 'track one' that the US favoured during the Rome Statute negotiations. With all respect to this theory, the question is whether such primary 'law enforcement track' falling under Chapter VII of the UN Charter is translated in concrete actions, considering the practice in the case of Sudan, against President Al Bashir, since the International Criminal Court received jurisdiction by the Security Council.[38] With the Court's arrest warrants to the Sudanese leaders, the pressure for an international action grows, but there is no agreement in the Security Council on what this action should be. Due to unilateral economic interests in Sudan, China is even contrary to the isolation of the government in Sudan. While the US is supporting the arrest warrants, the Security Council may give priority to such political standpoints and even freeze the charges against the President of Sudan. Moreover, the negative political reactions became visible from the African Union against the judicial decisions of the Court in the Darfur's case. The credibility of the Court's judicial deliberations is at a crossroad between double standards and politicized positions of nation-states not cooperating with the Court, including a distortion from the Security Council authorizing the use of military force under the flag of the responsibility to protect civilians, which characterizes also the situation and the referral addressed from the Security Council to the Court in Libya.

The 'second track' described by Scharf would constitute situations referred to the Court by individual countries (States Parties), or initiated by the ICC Prosecutor (*proprio motu* powers). This track would have no potential for any law enforcement action, but rather would rely on the good-faith cooperation of the States Parties to the Rome Statute. Thus, it was widely understood according to such theory that for the US "the real power was in the first track". The US however, still demanded protection from the second track of the Court's jurisdiction. As a consequence, the Court is facing serious difficulties regarding the judicial assistance, law enforcement and cooperation in situations unable to end the impunity of gross violations of human rights. An example would be the case in Uganda where peace and justice were not seen as the two sides of the same coin. The peace processes would neutralize and freeze the arrest warrants, including the necessary coopera-

38 UN Doc. S/RES/1593 (2005), Referral to the International Criminal Court of the situation in Darfur (Sudan). For an overview of the lack of support received in Sudan, see ICC-02/05 the situation in Darfur, Sudan, ICC reports to the UNSC, accessible at: http://www.icc-cpi.int/cases/Darfur/s0205/s0205_un.html

tion to enforce the judicial decisions of the Court. In addition to the political rejection and the controversial relation between peace, justice and reconciliation, the investigations of the Court are all characterized by serious security problems, especially reaching and protecting witnesses and victims in the field.[39] Moreover, another security issue refers to the fact that for the ICC staff and the field offices, the assistance of the UN peacekeeping operations is extremely vital but still insufficient. In the DRC, several violations have been committed by the parties involved in the field including peacekeepers, which requires an internal UN justice system dealing with such matters, as the Court does not have jurisdiction over it.

According to Scharf and in order to address the US concerns during the negotiations of the Rome Statute, the following protective mechanisms were incorporated into the Court's Statute pressured by the US: first, the Court's jurisdiction under the second track which only relies on the cooperation of the States, would be based on a concept known as *complementarity* which was defined "as meaning the Court would be a *last resort* tool which comes into play only when domestic authorities are unable or unwilling to prosecute".[40] At the insistence of the US, "the delegates at the Rome Conference added an additional clause to the concept of *complementarity* by providing in Article 18 of the Rome Statute that the Prosecutor has to notify States with a *prosecutive* interest in a case of intention to commence an investigation. If, within one month of notification, such a State informs the Court that it is investigating the matter, the Prosecutor must defer to the domestic investigative activity, unless it can convince the Pre-Trial Chamber that such investigation is unlawful. The decision of the Pre-Trial Chamber is subject to interlocutory appeal to the Appeals Chamber (e.g. the Appeals Chamber deliberation on the situation in Kenya). Article 8 of the Court's Statute specifies that the Court would have jurisdiction only over 'serious' war crimes that represent a 'policy or plan'. Thus, random acts of personnel involved in a foreign peacekeeping operation would not be subject to the Court's jurisdiction.

Article 15 of the Court's Statute monitors complaints addressed to the Prosecutor by requiring the approval of a three-judge pre-trial chamber before the prosecution can launch an investigation, as in the situation addressed by the Prosecutor in Kenya and Ivory Coast after the post-election violence. The decision of the chamber is subject to interlocutory appeal to the Appeals Chamber. Article 16 of the Statute allows the Security Council to affirmatively vote to postpone an investigation or case for up to twelve months, on a renewable basis. "While this does not amount to the individual veto the US had sought, this does give them and the other members of the Security Council a collective control over the Court, if no permanent member 'vetoes'

39 UN doc. Security Council Resolutions 1422/2002 and 1487/2003.

40 M. P. Scharf, 'Results of The Rome Conference for an International Criminal Court', August 1998, *ASIL Insights*, accessible at: http://www.asil.org/insigh23.cfm

the resolution calling for postponement. These measures were considered sufficient for other major powers, including the United Kingdom, France and Russia, which voted in favour of the Rome Statute. But without what would amount to any veto of jurisdiction over US personnel and officials, the US felt bound to vote against the Rome Statute".[41]

Even no experts of international relations and international law are aware of the devastating consequences of such rejection of the Rome Statute under the Bush administration. On the contrary the 'agendas' of the current Obama administration focusing on 'repair', 'resume', 'renew' contain pragmatic new policy elements for international law considering what President Obama has called a "new era of engagement" in his remarks addressed to the UN General Assembly. The Rome Statute institutions however, are still waiting for such global engagements.[42]

2.2.4 The impact and progress of the Review Conference

Regarding the jurisdictional progress of the Court in terms of article 123 of the Rome Statute the review conference in Uganda (Kampala) has so far been the only statutory one. As a result of discussions at the sessions of the Assembly of States Parties (ASP), a number of proposals did not gather sufficient support for their consideration at the review conference, such as terrorism, the use of weapons of mass destruction and other serious threats in the sense of receiving crime definition globally recognized. Nevertheless, the ASP agreed to create a working group on specific amendments, which will serve to continue discussions on the submitted proposals and any other future proposal.[43]

Participation in the conference was open to representatives of States Parties to the Rome Statute, observer States, States not having observer status, representatives designated by intergovernmental organizations and other entities that received a standing invitation from the UN General Assembly, representatives designated by regional intergovernmental organizations or other international bodies invited to the Rome Conference, representatives

41 See M. P. Scharf *supra*.

42 See H. Koh, S. J. Rapp, *The US Engagement with the ICC and the Outcome of the Recently Concluded Review Conference*, Special Briefing to the US Department of States, June 15 2010, accessible at: http://www.state.gov/s/wci/us_releases/remarks/143178.htm

43 The eighth session of the ASP of November 2009 (ICC-ASP/8/20) was foreseen to serve as a filtering mechanism of the issues to be discussed at the Review Conference in Kampala, Uganda (31 May to 11 June 2010). Thus, the ASP decided to forward to the Review Conference for its consideration only the proposals for amendments concerning the revision of Article 124 of the Statute, the possible adoption of provisions for the crime of aggression, and the first of the proposals put forward by Belgium to extend the jurisdiction of the Court to cover the use of certain weapons in the context of armed conflicts not of an international character.

of subsidiary bodies of the Assembly of States Parties (ASP), officials and staff of the Court, officials and staff of the United Nations, non-governmental organizations invited to the Rome Conference, and other persons accredited or invited to attend the conference. The States Parties officials, national judicial and prosecutorial authorities, NGOs and other members of civil society, reported on the status and impact of international criminal justice and the Rome Statute regime.

The initiation of a 'stocktaking' process of the Court's presence in the international legal order and its impact in mass atrocity situations, including the perspective of victims and communities affected by the Court's work on the ground, was proposed as an important topic by numerous States, by the ASP, NGOs and other members of civil society. With regard to the case-law and its jurisprudence, the main task for the Court is to guarantee fair trials, giving back the voice to the victims of crimes with participation and reparation programs. The review conference included assessments to consider the holistic success and impact of the Rome Statute to date, with a particular focus on the following areas: a) the impact on victims and affected communities; b) the principle of complementarity; c) the status of cooperation; and d) the dilemma of peace and justice.[44]

Political and legal challenges on the role of complementary global regimes complementing domestic governance institutions for the fight against the impunity of international crimes are important preconditions for decision-making. Only time will prove if such 'systemic' assessments during the review conference in Kampala will raise the standards of policy making and strategy building, fostering peace, justice and security altogether. The role of parliamentarians and the legislative implementation at national level remains the key. At international level measuring the effectiveness of such a 'system' of governance should not preclude the basic requirement to harmonize the treaty law in the Rome Statute and the UN Charter, strengthening the political consensus on structural and substantial reforms. These are considered essential topics before any other future 'systemic' assessment would take place.

An important aspect that limits the current progress of the emerging regime of international criminal justice, is the distance taken by political standpoints on global threats in the way of being defined as crimes falling under international law. Some proposals on terrorism have been put on the table of the negotiations and addressed to the political premises of the Assembly of the States Parties but there seem to be an impasse in the decision making about

44 ICC RC/WGOA/1/Rev.2, RC/WGOA/2, RC/ST/V/INF.1, RC/ST/V/INF.2, Review Conference of the Rome Statute, Kampala, Uganda, 31 May – 11 June 2010. For an overview of the official documents see: http://www.icc-cpi.int/Menus/ASP/ReviewConference/Review+Conference.htm

the international regime under which such global threat would fall. In general, the current exercise of the powers of the Security Council relating to the maintenance of international peace and security can directly affect individual rights. This is in particular true for targeted sanctions. In this case, the respect due to human rights requires that the affected individuals enjoy certain procedural safeguards, including an effective remedy against a listing decision. The Security Council Committee established pursuant to paragraph 6 of resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities (hereafter referred to as the "Al-Qaida and Taliban Sanctions Committee") oversees the implementation by States of the three sanctions measures (freeze of assets, travel ban and arms embargo) imposed by the Security Council on individuals and entities associated with the Taliban and the Al-Qaida organization.

It needs to be noted that the 1267 Sanctions Committee maintains a Consolidated List of individuals and entities subject to the sanctions measures in the context of counterterrorism. By Resolutions 1267 (1999), 1333 (2000), 1390 (2002), as reiterated in resolutions 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006) and 1822 (2008), the Security Council has obliged all States to: freeze without delay the funds and other financial assets or economic resources, including funds derived from property owned or controlled directly or indirectly; prevent the entry into or the transit through their territories; prevent the direct or indirect supply, sale, or transfer of arms and related material, including military and paramilitary equipment, technical advice, assistance or training related to military activities, with regard to the individuals, groups, undertakings and entities placed on the Consolidated List. In accordance with paragraph 13 of resolution 1822 (2008), the Al-Qaida/Taliban Sanctions Committee makes accessible a narrative summary of reasons for the listing for individuals, groups, undertakings and entities included in the Consolidated List.[45] After the terrorist attacks of 9/11 the last decade has been characterized by an approach against terrorism which created serious issues for human rights law including serious violations of humanitarian principles.[46] Real consensus is still required in the fight against terrorism including its definition as international crime. Unfortunately, the advent of the first review of the Rome Statute did not progress on terrorism and we will discuss later some of the political reasons behind such an impasse.

45 For an overview of the narrative summaries of reasons for listing, see http://www.un.org/sc/committees/1267/narrative.shtml See also M. Bothe, "Security Council's targeted sanctions against presumed terrorists: The need to comply with human rights standards" 6(3) *Journal of International Criminal Justice* (2008), at 541-555. See also I. Cameron, 'UN Targeted Sanctions, Legal Safeguards and the ECHR', 2006 *Nordic Journal of International Law* 72, 1 at 56. See C. Warbrick, 'The European Response to Terrorism in an Age of Human Rights', (2004) 15 EJIL, at 989. See also J. Farrall, K. Rubenstein (eds), *Sanctions, accountability and governance in a globalised world,* 2009.

46 See the US *National Strategy for Counterterrorism,* White House, June 2011, accessible at: http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf

2.3 The Normative and Policy Orientations

Section Outline

The previous section addressed the lacuna of human security measures between legal and political frameworks preserving international order, peace and security and fundamental individual rights. It pointed out the role of the emerging regime of international criminal justice in multiple situations of war and crime; the jurisdictional nature deriving from previous *ad hoc* models based on double standards; the rule of law as a principle of governance in extremely violent political transitions, aggressive domestic regimes and political élites far from preserving human security. It examined the transition of global regulatory frameworks and the intersection between policy and law about international interventions in *intra-* and *inter*-state conflicts. It demonstrated the limits of complementary global regimes dealing with international threats and crimes and their democratic governance. This section debates the missing priorities of normative and policy orientations securing individuals in times of turmoil and violations of international law. It examines the concept of human security in international law and world politics serving the quest of peace and justice. First of all, it needs to be verified whether civilian protection measures would ever be applied to victims and witnesses of genocide, war crimes, ethnic cleansing and crimes against humanity, during both security operations and judicial activities, when at least the international community decides to intervene with *last resort* investigations and prosecutions of States parties and/or not parties to the Rome Statute. This is only one of the reasons why the complementary role of the Rome Statute regime to the United Nations system deserve clarification in order to define the governance of justice during humanitarian interventions in 'failed' States. Moreover, it is also important to understand the possible evolution of the Court's jurisdiction and its public authority once the judicial outcomes have been released. In other words, the ways *complementary* global regimes would translate in practice reliable measures of *protective* justice towards the proceedings of security systems, law enforcement and sustainable order, including capacity-building of domestic governance systems dealing with *retributive* and *restitutive* justice. This section discusses the missing priorities in the governance of peace, justice and security. It offers some observations about the dilemma of human security in international law and global politics and the importance of regimes of complementary nature governing sustainable peace towards justice and accountability and possible capacity-building.

2.3.1 The missing priorities

The analysis of empirical data shows that the major constraint detected in the governance of peace and justice is the lacuna of human security measures. Human security depends on an understanding of preventive measures capable of preventing international threats and crimes, and on the

willingness of the actors involved to apply those measures, especially by the States themselves and their political will to follow such measures, but also by international governance institutions in accordance with their roles to provide applicable models to be followed by domestic governance structures, including regional and international realities. The problem of 'stateless'' territories, their sensitive statehood issues, and the conflicts and violations deriving from them, are still left out of any support by global governance systems. These systems are still correctly defined as state-centered, even if lately the harm suffered by the individuals in conflict zones characterized by severe human rights violations requires regulatory frameworks of governance. In this study the governance model proposed is based on the principle that the proper referent for security should be the individual rather than the State. Human security holds that a people-centred view of security is necessary for national, regional and international stability. It advocates that more efforts and resources need to be invested in an accurate knowledge of early warning, identifying the fragility of the situation and the risks associated with it, in order to anticipate a possible attempt to peace and serious violations of international humanitarian law. Unfortunately, such an approach did not materialize in the practice and methods applied in the referrals of the Security Council to the Court in the Sudan and Libya, while still keeping the Court far from ending the impunity of the mass atrocity crimes committed in Syria, Palestine, Iraq, Afghanistan and other country-situations where jurisdiction, support and cooperation are required.

The establishment of an international judicial institution, advocated for decennia, dealing with individual perpetrators outside the UN premises, while fighting against the impunity of serious crimes internationally recognized, represents a revolutionary development for the promotion of global values, such as integrity and universality. However, the creation of a reliable architecture and mechanisms fostering peace, justice and security is characterized by important challenges which are related to the absence of separation of powers between legislative, judicial and executive international mandates and by the negative repercussions on the creation of a state-building apparatus applicable in 'failed' States for the sake of human security. The lack of political support of the judicial decisions of the Court in the Sudan, Uganda and the Democratic Republic of Congo (DRC), for instance, show that the comprehensive efforts of the United Nations to stop conflicts and atrocities visible in peace negotiations, peace enforcement operations, and escalations of humanitarian disasters are not taking part in support of the regime of international criminal justice. Besides, in the debate on the normative provisions that led to the adoption of Article 16 of the Rome Statute relating to the possible tensions or disconnection between peace and justice and their governance, including real-life experience to govern international humanitarian escalations, were indeed underestimated. The lacuna of human security measures still persists when preventive diplomacy would fail, while the links between justice, human development and sustainable

peace are weak and inconsistent in the majority of the conflict and post-conflict situations assessed in this study.

2.3.2 *Human security and international law*

The questions addressed in this section relate to the lack of protection measures of civilians during *intra*-state conflicts. The Court is expected to receive appropriate consideration in the configuration of peace enforcement mandates including the findings of inquiry commissions of the UN Human Rights Council. It is essential to focus on the ways the policy of the responsibility to protect (RtoP), and the fight against domestic criminal regimes would centralize fundamental individual rights and the universality of human rights principles when dealing with escalations of mass atrocity crimes. The preventive efforts of armed conflicts wait for concrete accomplishments of global governance. It needs to be noted that in accordance with the principle of proportionality, the incidental and unintended harm caused to civilians, or civilian property, must be proportionate and not excessive in relation to the concrete and direct military advantage anticipated by an attack on a military objective. Under international humanitarian law (IHL) and the Rome Statute indeed, the death of civilians during an armed conflict, no matter how grave and regrettable might be, does not in itself constitute a war crime. International humanitarian law and the Rome Statute permit belligerents to carry out proportionate attacks against military objectives, even when it is known that some civilian deaths or injuries will occur.[47] With the war in Iraq some important features of international law have been compromised. Unfortunately, the establishment of the Rome Statute institutions would not signify the solution of longstanding issues in the realm of compliance of international law. If some of its branches received consistent jurisprudence in the criminality domain, including the fact that international law is no longer solely concerned with relations between sovereign States, there is much less progress about possible alternatives that could further preserve the international legal order by the foundational and systemic changes occurring in the world society.

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47 Article 52 of the Additional Protocol I to the Geneva Conventions provides a widely-accepted definition of military objective: "In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage", see L. Moreno-Ocampo, OTP letter to senders re Iraq, 9 February 2006, page 4-5, footnote 11, accessible at: http://www2.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf
See also H. E. Shamash, "How Much is Too Much? An Examination of the Principle of Jus in Bello Proportionality", in Israel Defense Forces Law Review, Vol. 2, 2005-2006, accessible at http://ssrn.com/abstract=908369

2.3.3 Human security and world politics

Another problem is that the 'responsibility to protect' (RtoP) 'norm' does not have as yet a firm legal character but is left to the fluctuations of global politics. The Protection of Civilians (POC) and the Responsibility to Protect (RtoP or R2P) for instance, are distinct but very closely linked from a theoretical perspective. The POC has its roots in universal principles of international humanitarian law (IHL) as well as human rights and refugee law. The POC constitutes the full range of activities that intergovernmental organizations, States, international NGOs, and individuals can pursue to advance the legal and physical protection of civilians, particularly in the context of armed conflicts. This notion of protection can be understood to include: physical protection from immediate harm; satisfaction of the needs essential for the sustenance of life, and freedom to exercise fundamental human rights. The RtoP calls on national authorities, regional organizations and global institutions to cooperate in the protection of civilians from genocide, war crimes, ethnic cleansing and crimes against humanity. Much work needs to be done to identify the scope of civilian protection, the measures needed to protect civilians and the best practices applicable. The RtoP is a framework for realizing the POC in the most egregious cases, such as the prevention of, and the protection from mass atrocity crimes. The whole POC agenda is substantially wider than that one covered by the RtoP, and aspects of the preventive components of the RtoP extend beyond the POC. So said, what kind of interrelation can be found between the two, and how this would be applied by complementary global regimes? How did the RtoP work in situations of war and crime such as in the DRC, in the Sudan and in Libya, whereas the humanitarian assistance on the ground was constantly compromised by the military operations deployed in the field and by the lack of cooperation by criminal regimes?

Unfortunately, apart from providing some definitions of volatile international policies, the operational relationship between the POC and the RtoP remains unclear. More work is needed to understand what protection activities contribute to preventing the escalation, or constitute an effective response to the commission of mass atrocity crimes, and hence, how and where the two concept are symbiotic. In the Horn of Africa for instance, there is clearly a drought but the reason why thousands of people are leaving their homes in search of food is also because a violent insurgency in Somalia, along with the forced recruitment of youths, which is making things worse. Much of southern and central Somalia is controlled by *al Shabaab* Islamist militants linked to al Qaeda who imposed a ban on food aid in 2010.[48]

48 See Abdisaid M. Ali, *The Al-Shabaab Al-Mujahidiin: A profile of the first Somali terrorist organisation,* Institut für Strategie Politik Sicherheits und Wirtschaftsberatung (ISPSW), Berlin, Germany, June 2008, accessible at: http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?id=55851

These *al Shabaab* militants have since maintained the embargo on the World Food Program (WFP), calling the world food aid program a 'spy agency'. *Al Shabaab* accused the United Nations of invasion and determined not to allow humanitarian agencies with 'hidden agendas' to return on the ground. Part of the problem according to reliable analytical reports is that much of the fundings for WFP and some other humanitarian aid agencies come from the United States, opening them to charges of controversial objectives which again relate to security policy and its anti-terrorism agenda, much more than humanitarian assistance to the population starving to death.[49] Furthermore, it needs to be noted that with East Africa facing its worst drought in 60 years affecting more than 11 million people, the United Nations has declared a famine in the region for the first time in a generation. The overcrowded refugee camps in Kenya and Ethiopia are receiving some 3,000 new refugees every day, as families flee from famine-stricken and war-torn areas. The situation of East of Africa is characterized by the slow response of Western governments, local governments to terrorist groups blocking access, terrorist and bandit attacks, including anti-terrorism laws that restrict who the aid groups can deal with, not to mention the massive scale of the current humanitarian crisis. The unfortunate information is that in the Sudan as well both the POC and the RtoP agendas have constantly failed, and are still in the hands of controversial international political engagements which are compromising the stability in the country, and with the criminal and violent leaderships, undermining the credibility of the international judicial outcomes falling under the Rome Statute. So said and avoiding speculations, the substantial progress in the normative and policy frameworks centralizing individuals in international affairs, and the governance institutions dealing with them, needs to be verified. In fact, the involvement of the Court in mass atrocity crimes in the African continent could be interpreted as the hope of having a deterrent effect of the serious violations of individual rights committed in several countries, and which hopefully would take full ownership of their fight against the regime of impunity of international crimes of common concern.

Since the early 1990s the African Great Lakes Region, politically and geographically defined as the Democratic Republic of Congo (DRC), Burundi, Rwanda, Uganda and Tanzania, has been convulsed by genocide, civil wars, *inter*-state conflict and flawed democratic transitions. The conflicts of the last decade across this region must be understood in the context of ethnic and religious conflict, the struggle of State formation and the role of natural resources originating such conflicts. Three factors have been identi-

49 See B. Malone, 'Horn of Africa aid caravan too late, again', *Somalia on msnbc.com*, 26 July 2011, accessible at: http://msnbc.msn.com/id/43900689/ns/world_news-africa/ For an insight into the struggle against terrorism in the Horn of Africa, in the situations in Djibouti, Eritrea, Ethiopia, Kenya, Somalia, Sudan, and Yemen, see R. I. Rotberg, *Battling terrorism in the Horn of Africa*, Brookings Institution Press, 2005.

fied as key contributors to conflict and mass atrocities in the region: ethnicity, absence of domestic systems of governance and exploitation of natural resources (pillage). Peace-building strategies and post-conflict recovery have increasingly sought to address both political and economic issues, incorporating the national, regional and the international dimensions. The empirical results regarding African countries point out that in the majority of these situations, conflicts returned to be the reality after a very short break through from war to peace. This is the reason why the governance of complementary global regimes requires attention. Such governance represents the opportunity to maximize both actions and results fostering peace, justice and security. However, it requires to be challenged in the right direction with a strong political *road map*.

2.4 The paradigm shift of global 'complementarity'

Section Outline

The political determination to establish an independent, permanent, universal, International Criminal Court in 'relationship' with the United Nations system, "with jurisdiction over the most serious crimes of concern to the international community as a whole", was settled in the preamble of the Rome Statute. The preamble of the treaty recognizes the link between peace and justice, stating that "grave crimes threaten the peace, security, and well-being of the world" and affirming that States Parties are "determined to put an end to the impunity for the perpetrators of these crimes and thus, contribute to the prevention of such crimes". Considering the practice of the last decade, the pursuit of peace and justice in conflict and post-conflict societies presents some controversial challenges. Several problems occur in the coordination of efforts of independent political and judicial mandates, particularly between the configuration strategies of international peacemakers and peacekeepers, and the interests of victims and witnesses of international crimes on relocation, protection and reparation in the context of human security.

Even if peace and justice complement each other in the long term, in the short term tensions have arisen between efforts to secure peace, and efforts to ensure accountability of international crimes. In theory, the principle of the interdependence between peace, justice and security at global level should focus on strengthening relationships and partnerships between complementary international mandates, such as the Rome Statute institutions and the United Nations system, particularly considering the main characteristic of the emerging regime of international criminal justice, based on cooperation networks at domestic, regional and global levels. In practice, the interdependence between peace, justice and security is compromised by the obstacles on balancing powers at international level. In my view this is particularly true looking at the interaction between political, executive and judicial mandates and the 'governance' that derives from such compromise.

At structural level, none of the Rome Statute institutions is formally part of the United Nations system, however their mandates are complementary. Such global governance institutions are involved respectively on international threats, peace and crime control, but their partnership is not sufficiently defined, while the Court's jurisdiction is limited to the most serious crimes of international concern. The legal relationship between the Court and the United Nations is governed by the relationship agreement.[50] Any amendment of such agreement shall be approved by the UN General Assembly and by the Assembly of States Parties (ASP) in accordance with article 2 of the Rome Statute.[51] Several basic principles, such as discretion and confidentiality, preside over the cooperation between the Court and the United Nations, which is also based on specific arrangements regulating such poor interaction in the field missions.

2.4.1 The challenges in global regimes

Since the Court's establishment several States Parties referred to the Court their inability to investigate and prosecute serious crimes on their own (e.g. Democratic Republic of Congo, Uganda, Central African Republic, Ivory Coast and Mali), while preliminary assessments are performed by the Court to verify whether investigations should be opened in Afghanistan, Colombia, Palestine, Guinea, Georgia, Honduras, Nigeria, Democratic Republic of Korea and Ukraine. A preliminary assessment is the first phase of the Court's Prosecutor activities. It is a phase during which the office of the Prosecutor first examines the jurisdiction of the Court, whether crimes falling under the ICC jurisdiction may have been, or are committed in a given situation.[52] If the conditions are met, whether genuine investigations and prosecutions are being carried out by the competent authorities in relation to these crimes and, as a third step, whether the possible opening of an investigation by the Prosecutor would not go against the inter-

50 As reported in the addendum to the note of the Secretary-General, UN doc. A/58/874/Add. 1, the draft relationship agreement was approved by the Assembly of States Parties to the Rome Statute on 7 September 2004 at The Hague. The Netherlands recommended the adoption of the draft resolution by the General Assembly without a vote, thereby approving the draft relationship agreement between the UN and the ICC. Because the several concerns about the ICC, the United States rejected the consensus on the draft resolution. See UN doc. General Assembly, A/58/PV.95, 13 September 2004, Agenda item 154, at 5.

51 UN Doc. A/RES/58/79, UN doc. A/58/874 (2004).

52 Office of the Prosecutor, *Draft Policy Paper on Preliminary Examinations*, 2010, accessible at: http://www.icccpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/Draft+Policy+Paper+on+Preliminary+Examinations.htm

ests of justice.[53] During this phase, and in accordance with Article 15 of the Rome Statute, the Office of the Prosecutor proactively evaluates all information on alleged crimes from multiple sources, including communications from individuals, non-governmental organizations and other parties concerned. The triggering of a preliminary examination does not imply that an investigation will be opened. The extensive literature existent since the first phase of existence of the Court on such policy orientations, which fall under the normative framework of the Rome Statute, is the result of a longstanding scholarly debate on issues such as the selection of situations and admissibility, the complementarity and the impact on affected communities, including public outreach and witnesses and victims' rights.

2.4.2 The challenges in policy and law

It should be clear at this stage that this study explores practical steps in furthering the international rule of law as a principle of governance. It offers an analysis of the challenges characterizing the emerging regime of international criminal justice arguing on the imperfect interaction between the International Criminal Court and the United Nations, particularly during the operations on the ground fostering human security. The rule of law as a principle of governance centralizing human rights and justice is extensively argued by scholars and practitioners, while international governance institutions struggle with the preservation of such fundamental principle according to their respective mandates. The supranational lacuna characterizing the international legal order is not resolved by the presence of institutions of universal character. A legal framework regulating such interactions does not contain a defined strategy or *road map* and it is considered very poor. Political deadlocks slow down the transition of humanitarian interventions, use of force, protection duties of civilians, reconciliation and reconstruction, which should create the premises of *global justice*. Appropriate interaction strategies between independent and complementary mandates for the sake of individuals are an opportunity to preserve further the rule of law. After all, such public authorities operate in accordance with the constitution of the international community and need democratic 'triggering mechanisms' monitoring serious international threats and crimes. The precondition of appropriate triggering mechanisms however, depends on real consensus in balancing powers between such complementary global entities. In other words, the intersection between international law and global politics by the research community is further required.

53 Office of the Prosecutor, *Policy Paper on the Interests of Justice*, 2007, accessible at: http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf

The domestic jurisdiction of any sovereign State includes the right to define and punish crimes. Every State decides for itself, according to its legal traditions and within the limits of international law.[54] International law does not determine which point of view is to be preferred between monism and dualism. International law only requires that its rules are respected, and that States are free to decide on the manner in which they want to respect these rules and make them binding on their citizens. In theory, the supremacy of international law is a rule in both dualist and monist legal systems, while in practice if a treaty is accepted for purely political reasons, and States do not intend to fully translate it into national law, or to take a monist view on international law, then the implementation of the treaty is very uncertain. The impasse of a treaty depends indeed on the combination of several factors. The institutions deriving from such treaties need to be proactive in preventing whatever impasse. The institutional design established by the treaties may limit the level of uncertainty, firstly proposing a model of harmonization between the international legal systems of the world, and secondly enhancing definitions of crimes of serious common concern, offering assistance in the implementation of national legislations. The theory applicable in this doctrinal context is balancing public powers to maximize results. The precondition is a good delimitation of competences, working methods and good relationships between complementary actors especially on the ground. The policy of cooperation between such independent, and most importantly complementary institutions, is extremely important and needs to be visible in their respective legislations. It is still argued by many policy observers that the extent of such cooperation preserving peace, justice and security is treated as matters of common concerns. In my view, only towards an accurate interaction between complementary global regimes it would be possible to maximize the results with the use of minimal resources. Such interaction depends of course on a defined strategy settled by the decision-making enforcing global governance institutions towards democratic reforms, which are still pending. The political convergence on such issues does not receive

54 For an overview of the debate regarding the substantive criminal matters, international cooperation and implementing solutions of the Rome Statute, R. S. K. Lee, *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation, and Criminal Law*, (2005), at 215. This is a comparative study focusing on the legislative methods and techniques used in 12 countries to give effect to the ICC, which covers both common law and civil law countries: Argentina; Brazil; South Africa; The Netherlands; Liechtenstein; France; Sweden; Germany; Norway; Italy; Canada; and the UK. The practice of each State forms a chapter focusing on constitutional, sovereign, and criminal issues. Two additional chapters discuss such issues now facing Japan and Mexico. The contributors focus on real issues encountered and methods and techniques actually employed with the purpose of serving as a practical guide to those countries still looking for methods to give effect to the Rome Statute. In each case the authors explain why certain legislative approaches were used and why others were not selected. The authors are all experts with years of experience in the field; most of them participated in preparing the relevant domestic laws and in the making process of the Rome Statute.

any progress, if we consider the positions of the permanent members of the Security Council in regard to the situation in Syria.

2.5 The Political Impasse of Multilateralism

Section Outline

The analysis of the legislative history of the United Nations and the Rome Statute institutions during the first decade of their existence shows that there have been delays for the International Criminal Court to enter into a substantive relationship with the United Nations. In addition to such delays the relationship between the United Nations and the African Union (AU) failed to design a *road map* for the peace process in the Sudan. The Darfur's peace talks by the UN, which called on all parties to cease hostilities and prepare for forthcoming negotiations, did not work. As a result, the humanitarian disaster in the whole Sudanese region considerably increased. The Court would then receive the first referral from the UN Security Council as massive humanitarian escalation of last resort, where serious crimes falling under its jurisdiction had been committed.[55] Right after the opening of an independent investigation in Darfur the Court's officials declared that such an investigation "will require sustained cooperation from national and international authorities. It will form part of a collective effort, complementing African Union and other initiatives to end the violence in Darfur and to promote justice".[56] The Court however, remained completely isolated. Not any political and diplomatic support was ever provided by the Security Council, by the Assembly of the States Parties and by the other relevant organs in order to re-shape the relations between the Court and the several members of the African Union which, as States Parties to the Rome Statute, took severe distance from the judicial institution. In this collapse of cooperation, the discrepancy of law enforcement and the lack of engagement in such humanitarian escalations became visible very soon. The Court would not receive any support right after the extension of its jurisdiction to a non-State party by the UN Security Council in Darfur. Its judicial outcomes did not receive any follow up. The cooperation between the Security Council and the Court shows the lacuna of political and diplomatic support and the complete absence of law enforcement engagements. The consensus in the

55 UN doc. S/RES/1593 (2005).

56 See Report of the former Prosecutor of the International Criminal Court Luis Moreno-Ocampo to the Security Council Pursuant to UNSCR 1593 (2005), 29/06/2005 accessible at: http://www.icc-cpi.int/nr/exeres/2386f5cb-b2a5-45dc-b66f-17e762f77b1f.htm On 25 May, 2010, Pre-Trial Chamber I of the International Criminal Court (ICC) ordered the ICC Registrar to transmit the decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan in the case of *the Prosecutor v. Ahmad Muhammad Harun (Ahmad Harun) and Ali Muhammad Ali Abd-Al Rahman (Ali Kushayb)*, in order for the Security Council to take any action it may deem appropriate. See ICC-02/05-01-07 accessible at http://www.icc-cpi.int/iccdocs/doc/doc868180.pdf

UN political organs resulted to be weak. The unilateral interests of China with regard to Sudan and also the abstention of the US characterized the vote of the Resolution 1593 (2005). Even referring the situation to the Court in light of the findings of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur, the so-called Cassese Commission, the collective efforts have been neglected compromising further the authority of the international judicial institution. The same controversial political trends characterized the involvement in the situation in Libya and the inaction with regard to Syria.

2.5.1 Engaging in relationships and partnerships?

This section argues not exclusively on the relationship between the Security Council and the Court but refers to deep-rooted systemic issues still waiting for political convergence and democratic solutions. The actual overlaps obviously point out the absence of the separation of powers in international relations and the failure of democratic reform of the political and executive organ of the UN empowering the voice of less represented States. In the case of the African States and their obligations falling under the Rome Statute including the controversial position of the African Union (AU), the political solution would be to avoid with every means the distance between the AU Peace and Security Council and the UN Security Council. In accordance with the UN Charter the regional dimension is extremely important. In my view, such dimension should receive a specific role in any systemic change of democratic governance. The interaction between the Security Council and the Court is characterized by the inexistence of law enforcement solutions between executive and judicial, and by the absence of a supranational judicial organization which should monitor the accountability regime at global level. The 'triggering mechanisms' regulating humanitarian escalations of last resort need attention.

In the presidential statement issued by the Security Council on the rule of law, the Council notes that "the fight against the impunity for the most serious crimes of international concern has been strengthened through the work of the International Criminal Court" and "it intends to continue to fight impunity and uphold accountability with appropriate means…".[57] The question is at which extent there is genuine political determination to establish global 'partnerships' between such complementary global mandates dealing with humanitarian escalations of last resort in conflict and post-conflict societies. So said, which is the extent decision-makers are committed to build up a credible international state-building apparatus, assisting 'failed' States and societies in transition from mass atrocities to rehabilitation? What kind of strategy or *road map* will characterize such 'system' of interventions in mass

57 UN doc. SC/9965, 29 June 2010, accessible at: http://un.org/News/Press/docs/2010/sc9965.doc.htm

atrocity escalations? How such interventions would comply with the standards of legality in international law? Furthermore, the interaction between the Court, the Security Council and the General Assembly involves clusters of assistance at legal, political and operational levels. Issues such as law enforcement of judicial decisions, protection of witnesses and victims, security of field offices on the ground, security of personnel and threat assessments of country-specific situations, including resource sharing, seem to remain under discussion in the years to come.[58] The first step currently dealt with, involves logistics, communication channels and information exchange, while such 'relationship-building' is currently in the 'work in progress' phase on legal assistance, institutional liaison and cooperation. This study merely clarifies where the Court comes from and how far it can go in the absence of the necessary conditions implementing its public judicial authority.

2.5.2 International governance institutions and the rule of law

The extensive literature on the disintegration of the nation-states in modern society points out that one unequivocal aspect of globalization is that any of the problems afflicting the world today compromise domestic, regional and international stability at the same extent. Poverty, armed conflicts and violations of international humanitarian law are some of the problems originating the dilemma of human security. These global problems are increasingly transnational in nature, and cannot be dealt only at the national level, or by "state to state" negotiations. The comprehensive approach of this study considers the symptoms of the current shifts in the international order, including the necessity of political decision-making to find concrete remedies of democratic global governance of humanitarian affairs. Whilst today with the use of modern technology the outcome of international criminal judicial proceedings in a fair trial against a 'war lord', has at some point the chance to circulate around the planet providing the signal of fairness, truth and deterrence, the impact of globalization on the breakdown of the nation-states in war-torn societies are the main causes of serious humanitarian violations, including instability and serious attempts to peace and security.[59]

58 For the debate see M.H. Arsanjani, W.M. Reisman, "The Law in Action of the International Criminal Court", *The American Journal of International Law*, Vol. 99, No. 2 (April 2005), at 399.

59 For some useful research findings on the impact of globalization on the nation-states, including the role and evolution of universal organizations in democratic governance processes in the last decade, see G. Bertucci, A. Alberti, 'Globalization and its impact on the State: The role of the State in domestic and international governance' in *World Public Sector Report: Globalization and the State,* ST/ESA/PAD/SER.26, 2001, United Nations, Department of Economic and Social Affairs, at 29, accessible at: http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN012761.pdf

Globalization pressures on democratic global governance of international threats and crimes requiring the implementation of the rule of law and *global justice*. Such motivations have indeed forced "international governance institutions to redefine their role of universal provider as one that encompasses the roles of catalyst, enabler, gatekeeper, consensus builder, mediator and negotiator".[60] The view of globalization is a "process of essentially increasing intense interconnectedness, interactions, interdependence, and integration across borders, State and communities, local, national, global, and in different spheres of human life. This process is leading to the emergence of one world, a *global society*. Consequently, it is often reduced to a process reducing the power and the importance of nation-state, increasing the idea of a global world ruled by global rules and global organizations. The point that divides scholars, involved in theories about globalization, is indeed if globalization announces the death of the modern nation-state.[61] The evident disintegration of the nation-states in conflict and post-conflict situations, or so defined in the policy circles 'failed' States, causes a crisis of the governance institutions and public powers at domestic level in the majority of such situations. Such breakdowns at national level challenge the tools of democratic governance at international level for the preservation of security and their competence to rehabilitate law and order complementing such complex domestic realities. This thesis does not discuss such globalization theories. They have been extensively dealt by relevant literature but emphasizes however, the required process of democratization of global governance institutions fostering peace, justice and security towards further definition of their complementary roles and responsibilities one another.[62]

The rule of law is one of the most important components of public democratic governance at the same extent of political processes. The basic principles of the rule of law are found in the authority of the judiciary, human rights, freedom of information, civil society participation and human development. The preservation of the rule of law at domestic and international levels relates to processes of democratization and maintenance of human rights, extending issues of mutual concern towards multilateral approaches. States and non-States parties of international governance institutions need to comply with norms universally recognized, while being flexible and open to democratic reforms. International governance institutions, which share complementary universal mandates, have to be prepared to assist domestic realities with all their means, especially in extreme conflict and post-conflict situations identifying the right choice of international intervention on each

60 See A. Bertucci, *supra*.

61 See A. M. Slaughter, *A New World Order: Government Networks and the Disaggregated State*, (2004). For the debate see also K. Choudhary, 'Globalisation, Modernity and Nation-building', in K. Choudhary (ed.), *Globalisation Governance Reforms and Development in India*, (2007), at 523.

62 See also K. H. Ladeur, *Public Governance in the Age of Globalization*, (2004).

case, while being able to interact and serve other complementary actors on the ground. For the fight against the impunity of serious breaches of human rights, even non-member States should prepare themselves to such a process of democratization, but is this the case considering the position taken by the permanent members of the Security Council?

The question is whether international governance institutions give yet momentum to a universal system in respect of international humanitarian law and human rights, and thus "contributing to freedom, security, justice and the rule of law, as well as to the prevention of armed conflicts, the preservation of peace and the strengthening of international security, including the advancement of post-conflict peace-building and reconciliation…".[63] The number of international regimes, as a form of governance coordinating behavior among countries around an issue, has increased dramatically since WWII, and today international regimes cover almost all aspects of international relations that might require coordination among countries and other international actors, from security issues (such as weapons non-proliferation, conflict management or collective security), human rights (international criminal justice, humanitarian assistance), development, environment, information and communication, just to name a few. The emerging regime of international criminal justice has its fundaments to fight against the impunity gap worldwide. It offers deterrence, reconciliation and jurisprudence on victims' rights. The argument is that such regime cannot function in isolation from peace and security, but should be part of it for the sake of human security and *global justice*.[64]

2.5.3 International humanitarian policies, norms and principles

Since its establishment, the role of the United Nations institutional design is confronted with the main challenges occurring in conflict and post-conflict societies and the necessary adjustments required by the international features fostering peace, justice and security. As Kofi Annan stressed in the Millennium Report addressed to the UN institutions and Members States, "a new understanding of the concept of security is evolving. Once synonymous with the defence of territory from external attack, the requirements of security have to embrace the protection of communities and individuals from internal violence".[65] The former Secretary-General in his important report underlined that "while the post-cold war multilateral system made

63 Resolution ICC-ASP/9/Res.3, Strengthening the International Criminal Court and the Assembly of States Parties.

64 For an overview of the legal struggle creating the premises of an emerging world system of justice in which individual rights will be enshrined in laws secured by both States and the world community see G. Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, (2002).

65 UN Doc. A/54/2000, Fifty-fourth session Agenda item 49 (b), The Millennium Assembly of the United Nations, Report of the UN Secretary-General, Kofi Annan.

it possible for the new globalization to emerge and flourish, globalization, in turn, has progressively rendered its institutional designs antiquated".[66] While democratic institutional reforms seem to receive a political impasse and peace operations are in danger of systemic failure, the achievement of the UN's 2005 World Summit was the adoption of the 'responsibility to protect' principle.[67] That year, the UN General Assembly voted unanimously in favour of a major new concept of international protection duties of civilians. The responsibility to protect norm represents a major paradigm shift for the protection of victims of international crimes worldwide. But does this mean that the emerging regime of international criminal justice would receive a specific place in such global policy formulation?

Despite the fact that during the UN World Summit outcome in 2005 the heads of State and government unanimously affirmed that "each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity", the parties explicitly referred to the duty to protect civilians in conflict and post-conflict situations, stating that "when a State manifestly fails in its protection responsibilities, and peaceful means are inadequate, the international community must take stronger measures including Chapter VII measures under the UN Charter, including but not limited to the collective use of force authorized by the Security Council".[68] Such duty did not provide sufficient elements, either at strategic, normative levels, or a comprehensive review of existing United Nations capacities to prevent or halt genocide, war crimes, ethnic cleansing and crimes against humanity. There is still the need to develop strategies, standards, processes, tools and practices to implement the ways such responsibility can best encourage States to live up to their duty to protect their populations, and discourage States or groups of States from misusing the responsibility to protect for inappropriate purposes, as a dangerous version of military humanitarian intervention. In accordance with the rule of law, as the basic principle of governance such duty does not provide any additional basis for the use of force under international law. On the contrary, it reinforces the prohibition of the use of force, and the limited exceptions

66 K. Annan, *We the peoples: the role of the United Nations in the twenty-first century*, 2000, at 11, accessible at: http://www.unmillenniumproject.org/documents/wethepeople.pdf

67 For an overview of the UN peace operations debate see, A. J. Bellamy, P. Williams (eds.), *Peace Operations and Global Order,* 2005. See B. Jones, R. Gowan, and J. Sherman, "Building on Brahimi Peacekeeping in an era of Strategic Uncertainty", *NYU Centre for International Cooperation*, April 2009, accessible at: http://www.alnap.org/resource/11243 See UN doc. A/63/677, Report of the Secretary-General, "Implementing the Responsibility to Protect", 12 January 2009. See also A.J. Bellamy, "The Responsibility to Protect and the problem of military intervention", in *International Affairs*, Volume 84, Issue 4, July 2008, at 615–639.

68 Paragraphs 138-139 of the 2005 UN World Summit Outcome Document.

to that prohibition set out in the UN Charter in the case of self-defence, or authorisation by the Security Council.[69]

Right before the adoption of the norm of the 'responsibility to protect' there have been some new trends in the establishment of treaty-based international public authorities which are complementary to the holistic duty of the UN, namely, the establishment of an independent international judiciary dealing with individual criminal responsibility and based on the principles of universality and integrity. In other words, a legal framework that might serve as a deterrent of war and mass atrocity crimes, infringements of the Geneva Conventions, its protocols, and serious violations of humanitarian and human rights law. Such framework received the setting up of the International Criminal Court by the Rome Statute outside the institutional system of the United Nations. Just more than a decade ago, the Rome Statute paved the way for the establishment of a Court capable of prosecuting individuals allegedly responsible for serious breaches of international humanitarian law (IHL) and with jurisdiction over crimes internationally recognized.

Human rights and international criminal justice advocates have emphasised the importance of such emerging regime to help achieve justice for all, by filling a gap in the international legal system by dealing with individual responsibility as an enforcement mechanism of the rule of law. The *ratio* behind is to end the impunity of serious crimes by establishing the principle of individual criminal accountability for all who commit crimes against international law as a cornerstone of international criminal law; to help end conflicts, since violence often leads to further violence, by providing the deterrent that at least some perpetrators of war crimes or genocide may be brought to justice; to remedy the deficiencies of *ad hoc* tribunals, which immediately raise the questions of 'selective justice', by establishing a Court that can operate in a more consistent way and regardless of the time and place in which atrocities occurred; to take over when national criminal justice institutions are unwilling or unable to act in times of violent conflict, when institutions collapse or national judicial systems lack of the political will to pursue their own perpetrators; to deter future war criminals by establishing more clearly that mass atrocities will not go unpunished any longer.

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69 The traditional legal issues that advocates of the 'responsibility to protect' must confront are similar to those concerning whether there currently exists an international legal right of humanitarian intervention in the absence of a Security Council authorization. For a general review of the various perspectives within the legal debate useful previous references include A. Boyle, "Kosovo: House of Commons Foreign Affairs Committee 4th Report, June 2000", *International and Comparative Law Quarterly* (2000) Vol. 49, at 876; L. Henkin, "Editorial Comments: NATO's Kosovo Intervention Kosovo and the Law of 'Humanitarian Intervention", *American Journal of International Law* (1999), Vol. 93, at 824; C. Greenwood, "International Law and the NATO Intervention in Kosovo", *International and Comparative Law Quarterly* (2000), Vol. 49, at 927; S. Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law*, 2001.

2.5.4 Conclusions

In conclusion, some commentators of the outcomes of the Review Conference of the Rome Statute in Kampala would argue "whether the Court will ever be truly universal in its ability to protect individuals from the worst forms of abuse" in conflict zones, without the support of the Security Council. For these analysts "the Court, like any international mechanism intended to promote human rights, faces the impossible task of acting morally in a political world characterized by power inequalities, domination and violence. Because the Court lacks of an independent law enforcement capacity, it must often accommodate itself to political powers instead of challenging it".[70] Hopefully, democratic interaction strategies between complementary global regimes will neutralize such extreme assumptions or speculations. Only through initiating an appropriate interaction strategy there will be a real chance of more public authority for the Court not only vis-à-vis the States, but also between the Court and the UN. In any case the Court as an *ex-ante* tribunal is only one aspect of the features in the governance of justice falling under the jurisdiction of the Rome Statute, while the parallel activity of the Security Council promoting *ex post* mixed courts and tribunals on crimes falling outside the Rome Statute is still active, although the historical *ad hoc* tribunals are in the completion phase of their activities (ICTY, ICTR).

The fact that a political outline characterizing the *ex-ante* international security situations in a specific country will impact both the Security Council and the International Criminal Court, the configuration of their mandates in the field operations need to be based on a specific strategy of interactions, including the implementation of legal responsibilities of cooperation. It has been argued that just as the international military intervention in modern warfare has been destructive in fighting an enemy, so also can the use or better say the abuse, of laws dealing with perceived or an actual political enemy in the name of humanitarianism. It has further been argued that the conduct of the Security Council so far has worked to legitimize these fears from States and within their regional political realities. Many countries therefore, fear that the Court could be used by powerful nations to intimidate weaker opponents. This is the reason why the emerging regime of international criminal justice will need a specific role within the arrays of peace and security maintenance, including the States and regional entities which have been marginalized even if the peace and security concerns regard closely their own territories and their own domestic jurisdictions.

70 S. Al-Bulushi, A. Branch, *In Search of Justice: The ICC and Power Politics*, 2010, at 4, accessible at: www.almasryalyoum.com

The civilian protection duties need to be associated to the emergencies of relocation and protection of witnesses and victims. With the advent of the Rome Statute it is also important to verify in the long term the impact on affected communities by the new features offering participation, reparation and rehabilitation, in other words the mechanisms implementing the rights of the victims. The examples that are of main interest for us are those that witnessed courts and tribunals operating in the absence of powers of law enforcement and in the majority of the situations, even against the executive power, as in the case of the UN *ad hoc* tribunals. As many observers have emphasized, "although international laws and tribunals are devoid of enforcing powers, they still serve a decisive function in forcing major players to assume more virtuous behaviour".[71] In agreement with such doctrinal approach, further clarification of the assessment performed in this chapter follows in the next section.

2.6 The paradigms in the making of human security

Section Outline

This section reflects on the human security doctrine and its paradigms in the making between peace-building, civilian protection duties and the links of cooperation with investigations and prosecutions of serious international crimes. It concludes the assessment of the sensitive transitions in the legal and political world order of the post-cold war era and the adjustments required by complementary global tools. It examines some of the national, regional and international approaches governing international threats and crimes and the concept, application and the critics of the human security doctrine. In this chapter the limits encountered by legal and political frameworks centralizing human security have been extensively discussed. In conclusion this section supports the idea of an integrated approach of governance offering capacity-building on the ground for the sake of human security and human development. After all, the interactions between complementary global regimes advocated in this study endorse the main aspects of global justice, respectively its *retributive*, *protective* and *restitutive* aspects. A greater and amplified *complementarity* between global regimes fostering human security would be beneficial for their own evolution. It would unlock any political impasse of multilateral tools of global governance, including the universal aspirations dealing with peace, justice and security in comprehensive and effective manners. This section demonstrates that for an international architecture of governance fostering peace and justice, the human security measures applicable in conflict and post-conflict situations require an integrated approach of governance.

71 See D. Archibugi, 'The Rule of Law and Democracy', in *European Journal of International Relations*, 2004, Vol. 10(3), at 462.

The global humanitarian policy formulation and the transition of governance systems concern the evolution of security at domestic, regional and global levels. Security is a concept in transition. The word security itself comes from the Latin etymology *securus*, which literally means 'free from care'. Its concept remains volatile if we consider the several approaches in the chronological formulation of humanitarian policy and law, including the treaties and conventions deriving from them. There are valid reasons to formulate appropriately the different aspects of the concept of security and the interrelation between human security, domestic security and international security. What we have seen in the course of history is that at international level the concept of security centred mainly on the issues of war and peace between States, or *inter*-state conflicts. In particular, it focused on the question of the nature of conflict and the use of military force. Today, the *intra*-state failure in the governance of domestic security sectors (army, police and judiciary), their inexistence in several undeveloped countries, and their political transitions are central for the governance of international conflicts and humanitarian crimes. Such failure in domestic security perturbs the minimal requirements of human security and requires both national and international responsibilities which go beyond State sovereignty. This is a good reason to advocate for reliable governance systems centralizing individuals, challenging behaviours in trafficking weapons, avoiding the militarization of corrupted regimes and the mentality of armed groups using child soldiers, which are constantly violating the basic requirements of the rule of law and fundamental individual rights. There are no doubts of the global responsibilities in such governance which wait for further accountabilities of non-state actors.

The *inter*-state insecurities are also in transition. Although there is today a definition of the crime of aggression, as the traditional component of regional and international security, its governance is still in a sort of political deadlock waiting for consensus. The important theoretical and unifying aspect, valid either for domestic, international or regional human security approaches, is to neutralize the risks of militarization in the policy formulation for each of them. In such context, it is fundamental to provide assessments of the governance of complementary global regimes reacting to a governance crisis in 'fragile' or so-called 'failed' States responding to threats and crimes on individuals. The question is whether complementary global regimes adjust their roles in the current transition of international security with an appropriate interaction strategy between them. In other words, it is important to verify whether there is a common search of human security measures towards their complementary and universal nature. The legislation of the last decade by the political organs (e.g. by the UN institutions and the Assembly of States Parties to the Rome Statute) shows a lacuna of civilian protection measures on the ground while serious crimes are committed. Once the selection of situations would bring complementary international mandates on the same ground of war and crime, they should allocate

protection measures at least of the groups of individuals selected as victims and witnesses. Such complementary mandates should work together for the protection, relocation and rehabilitation of individuals affected by war and crime. Furthermore, the *inter*-state insecurities require the extension of multilateral action against international crimes.

2.6.1 National, regional and international approaches

The policy formulation regarding international threats and crimes is an important paradigm in the making. It remains to be seen how it evolves in global governance systems of complementary character. If on one side it can be affirmed that since the terrorist attacks on 9/11 the international community *a)* deepened the legal framework that provides grounds for going after terrorists; *b)* increased the obligations of the UN Member States to undertake concrete efforts to fight against terrorism; and *c)* launched a framework of actions to overcome the financing to terrorist organizations;[72] on the other side, there are still divisions on the multilateral governance of such international threat including the legal problems to define terrorism as a recognized international crime. After 9/11 the US, for instance, focused on some improvements after the failure of communication and intelligence between the expensive apparatus of internal security in the country, while its public authorities currently struggle on rebuilding approachable security policies in the international sphere, which have been reluctant to human security, if we evaluate the devastating effects of the security policy of the 'global war against terror', and its impact incurred and reflected at global scale.

With regard to the fight against al Qaeda, the US, under the first Obama administration, opposed the use of the words 'global war on terror' to describe much of George Bush's hazardous national security policy and embracing the White House's legalistic approach to terrorism, defining instead the conflict an 'overseas contingency'. Before taking office for the first presidential round Obama clarified to the audience of voters his intention to revise the prevailing policy on terrorism. Obama made clear he would seek 'to use the language more precisely and to bring actions in line with intentions'. But this did not mean the end of the global war on terror.

72 See the UNSC approach in the resolution on 'Threats to international peace and security caused by terrorist acts' which criminalize terrorist activities, UN doc. S/RES/1373 (2001). Including over 16 UN conventions on terrorism and the UNSC resolution on the 'Non-proliferation of weapons of mass destruction' which also constitute a threat to international peace and security and in which the Security Council "*decides that* all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery…", see UN doc. S/RES/1540 (2004) accessible at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/328/43/PDF/N0432843.pdf?OpenElement

He only rephrased using the term war 'against a far-reaching network of violence and hatred'. Hopefully, the slogan of such global 'war' would not only change in the language used. Within hours of taking office, the new president ordered the closure of the Guantánamo detention facility which still waits to be dismantled, and in the following days he outlawed detainee torture and re-established the binding force of the Geneva Conventions on the US. The new president also went on Arab television to begin reversing the perception that the US is engaged in a conflict against all Muslims or Islam, and announced that the US has 'a stake in the well-being of the Muslim world'. The new president declared, too, that his administration would refrain from using the familiar Bush phrase 'global war on terror', but maintained that it 'is very important to recognize that the US has a battle or a war against some terrorist organizations'. Obama's words and actions aimed to puncture the inflated drama that has characterized international relations' scholarship and literature on peace and security studies. Rather than 'a battle to the death between the forces of good and evil' as expressed by his predecessor, the war was to become 'a human-sized conflict between States pledged to act in accordance with agreed rules of warfare and a reasonably well-defined adversary'.[73]

Such new approach however, would currently lack of concrete actions taking in considerations international governance institutions able to take the lead on such global security issues, influencing the deterrence of targets by the adversary at global scale, namely the UN and the Rome Statute institutions. The multilateral perspective of such actions is still not measurable. The UN premises for instance, are a constant target worldwide of attacks in the last couple of decades. Instead, according to former US Secretary of Defense Robert Gates 'president Obama has made it clear that the situation in Afghanistan should be a top overseas military priority. The ideology the US face was incubated there when Afghanistan became a 'failed' State, and the extremists have largely returned their attention to that region in the wake of their reversals in Iraq. As we have seen from attacks across the globe, on 9/11 and afterwards, the danger reaches far beyond the borders of Afghanistan or Pakistan'. The consequence being NATO's main role in Afghanistan, pressuring again its allies through its UN-mandated International Security Assistance Force (ISAF) which for some analysts became

73 See the President Obama's Speech, *A New Beginning*, Cairo University, Egypt, June 4 2009, accessible at: http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-Cairo-University-6-04-09 See also L. van den Herik, N. Schrijver (eds.), *Counter-terrorism Strategies in a Fragmented International Legal Order. Meeting the Challenges*, CUP, 2013.

a protectorate of the corrupted Afghan State.[74] So said, if we try to measure the accomplishments of importing democracy in the region, delusion would be the right word.

The situation of terrorist recruitment training in Yemen, the situation in Afghanistan and the struggle for other countries in the region not to become a new refuge for Al-Qaeda (as the jihadists' franchise in the impoverished Arabian peninsula which urge new attacks against Western targets), is a matter of mutual concern and needs an international approach, with a detailed jurisdiction, intelligence and resources. As Galtung asserts, on the necessity of policy change needed on terrorism, in his article *"To End Terrorism, End State Terrorism"*, he explains that "Hitler's success can be explained by the humiliating 1919 Versailles treaty, which called Germany alone responsible for WWI and imposed huge reparations for 50 years. Of course, nothing can justify what Hitler did. Understanding is not forgiving. But without understanding, we are condemned to repeat history".[75] In the Middle East civilians are expressing on their own the readiness and the courage for a democratic change, against the autocracy and dictatorship of lasting criminal regimes. They need solidarity and support during and after such difficult political transitions. In other words, they will deserve to raise their voice in domestic governance. But are we really able and prepared to provide tools and assistance to raise their domestic governance? Or weapons and military arsenals would remain the only exchange and option?

After the multiplicity of terrorist attacks in western societies, Galtung addressed important issues for policy makers in the US which are still on the table considering the failure of current national security and intelligence in the US to prevent such attacks. Galtung clarifies that "there are serious flaws

74 For an overview of the US military strategies in the region, see R. Gates, 'Submitted Statement to the Senate Armed Services Committee' January 27, 2009, accessible at: http://armed-services.senate.gov/statemnt/2009/January/Gates%2001-27-09.pdf For an extensive political analysis challenging the US policy on terrorism since Clinton's administration, later Bush and currently Obama, and the quest of the global war on terror as a military strategy, see A. Zalman, J. Clarke, 'The Global War on Terror: A Narrative in Need of a Rewrite', 2009, 2 *Ethics & International Affairs* Vol. 23, accessible at: http://www.cceia.org/resources/journal/23_2/essays/002#_footnote16 For an analysis of the statements of President's Obama released to the media and his communication strategy adjusting policy wordings, see L. C. Baldor, 'Obama: US Choosing Words Carefully in Terror War', *Associated Press*, 2009, February 3, accessible at: http://abcnews.go.com/Politics/wireStory?id=6798802 For scholars' views considering the war on terror as a symptom of current shifts in the international order shaped by globalization, rather than as a consequence of political decision-making, see P. Bobbitt, *Terror and Consent: The Wars of the Twenty-First Century*, (2008). For an early historical perspectives analyzing the roots of the resentments that dominate the Islamic world today and that are increasingly being expressed in acts of terrorism, see B. Lewis, *The Crisis of Islam: Holy War and Unholy Terror*, (2004).

75 See J. Galtung, D. Fisher, To End Terrorism, End State Terrorism, in Transcend Research Institute, 2002, accessible at: http://www.transcend.org/tri/

in foreign policy formulations, however well intended. We create enemies through our insensitivity to the basic needs of the peoples around the world, including their religious sensitivities. Suggesting democratic policy steps to the US, Galtung clearly highlights to "withdraw the military bases from Saudi Arabia; recognize Palestine as a State; enter into dialogue with Iraq to identify solvable conflicts; resolve the tensions with Iran; pull out militarily and economically from Afghanistan; stop the military interventions and reconcile with the victims". With such resolutions Galtung clarifies that the same day such actions would be taken by the decision-makers "1.3 billion Muslims would embrace America; and the few terrorists left would have no water in which to swim. It would take a speech-writer of half an hour, and ten minutes to deliver it; as opposed to, say $60 billion for the Afghanistan operation. This is not easy for the national security policy, says Galtung, "but the benefits would be immeasurable".[76] While this may be somewhat considered as a demagogical assessment, it clearly suggests that the solution must be shown by multilateral actions in contrast with unilateral interests and national security approaches, which have resulted to be inappropriate in the policy formulations and resulted in devastating consequences at national, regional and international levels.

2.6.2 *The governance of international threats and crimes*

In theory, the role of international criminal justice has also the potential to play an important role in the realm of terrorism and organized crime. For such governance the policy making of the permanent members of the Security Council does not seem to be appealing, however, the interaction between threats and crimes can surely serve for the maintenance of peace and security globally under important conditions of multilateral governance. In addition to the legal, political and jurisdictional obstacles in the definition of urgent threats, waiting to be internationally recognized as serious crimes, such as terrorism, the international community will need to take concrete strategic steps preserving democratic governance towards an institutional design of global interactions between complementary mandates, which will

76 With a very pragmatic approach in his peace study work, Galtung underlines that the State system is yielding to regionalization and globalization. State foreign policies can no longer be based on (dominant) nation interests only, but have to be aligned with regional and nature-human-global interests towards action for peace, education and training for peace, dissemination of knowledge for peace, based on research which goes beyond empirical and critical studies of past and present, into constructive studies of the future, focusing on problems of peace studies proposing concrete actions. For suggestions to policy maker on terrorism see J. Galtung, D. Fisher, *To End Terrorism, End State Terrorism,* in Transcend Research Institute, 2002, accessible at: http://www.transcend.org/tri/ For the debate on globalization policy issues see J. Galtung, B. Gosovic, A. Khosla, A. Zammit, 'The Millennium Development Goals: Missing Goals and Mistaken Policies' in *MDGs: A Costly Diversion from the Road to Sustainable Development,* 2008, 20 at 37, accessible at: http://www.transcend.org/tri/downloads/the_mill.pdf

need to share intelligence, resources and best practices in their respective fields of expertise, which are without any doubt complementary. In 2010, the States Parties to the Rome Statute institutions met for the possible adoption of some provisions in the Rome Statute defining the crime of aggression and reviewed the transitional provision in Article 124 of the Rome Statute. A proposal has been tabled by the Belgian delegation regarding the addition of the use of specific weapons to the definition of War Crimes in Article 8. A proposal offered by the Netherlands, in accordance with 'Resolution E' regarding the adoption of the crime of terrorism as a distinct crime under the Rome Statute, has been addressed to the Assembly of the States Parties to the Rome Statute. Trinidad and Tobago has put forward a proposal on the crime of international drug trafficking for inclusion in Article 5, which concern also proposals received regarding terrorism.[77] For such global threats in the way of being defined as international crimes the jurisdiction of the Court has not been considered by the Assembly of the State Parties to the Rome Statute, and the discussions are on-going. This is the sign that the political organs are well aware of the gaps in such governance. After all, without political convergence, systemic change, and a reliable structure of cooperation, the current architecture would not be ready to deal with any extension of the Court's jurisdiction. As previously discussed, the same view is also applicable to the crime of aggression, including terrorism and the use of weapons of mass destruction.

The priority would be first to challenge the approach of policy making on such sensitive issues. Nobody knows how long this process will take. Since the beginning of the new century persistent terrorist activities (9/11 in the US, 2004 in Madrid and attacks in some other parts of the world) forced the UN General Assembly to maintain its focus on the ways to eliminate the scourge of international terrorism, stressing the need of a multilateral approach for the suppression of such crimes. Over the past decade, terrorism has been a global challenge underscoring the imperative of effective multilateralism. The literature and the views of scholars also highlight the weaknesses of multilateralism in its current form. The so-called 'war on terror' needs a different approach. In my view, even the word "war" has been indeed inappropriate since the beginning of such policy formulation.[78]

77 See the reports of the Review Conference in Kampala, 11/02/2011: RC/11, annex IV, Report of the Working Group on other amendments; RC/WGOA/1/Rev.2, Draft resolution amending article 8 of the Rome Statute; RC/WGOA/2, Draft resolution on article 124 of the Rome Statute, accessible at: http://www.icc-cpi.int/en_menus/asp/review-conference/Pages/review%20conference.aspx#officialdoc

78 For valid contributions on such debate see H. Duffy, "Harmony or Conflict? The interplay between human rights and humanitarian law in the fight against terrorism", in L. van den Herik, N. Schrijver (eds.), *Counter-terrorism Strategies in a Fragmented International Legal Order. Meeting the Challenges*, CUP, 2013.

The concept of 'effective multilateralism' emerged as the basic doctrinal foundation of the EU deliberations in the past decade. Since 2003, it has also been the basis for the EU's external relations, with the aim of expressing the global need for effective international institutions and decisive international action. In order to offer an updated version of the implementation necessary by governments of the legislative instruments listed in the Declaration on terrorism of the European Council of 25 March 2004, and subsequent major instruments identified by the United Nations, the EU Counter-Terrorism Coordinator, Gilles de Kerchove addressed a couple of years ago to the European Council, the document in the context of an EU Action Plan on combating Terrorism. The first version of the EU Action Plan to Combat Terrorism is contained in 7233/1/07 REV 1. This report is a response to the European Council's request to the EU Counter-Terrorism Coordinator for a report every six months on the implementation of the Action Plan to combat terrorism adopted in June 2004. In 2005, the EU decision-makers established a high level political dialogue on counter-terrorism, between the European Council, the Parliament and the Commission, meeting once per EU Presidency to ensure inter-institutional governance on these sensitive security threats. The main strategic commitment of the EU is based on the political determination "to combat terrorism globally, while respecting human rights, and make Europe safer, allowing its citizens to live in an area of freedom, security and justice". The strategic elements characterizing the EU policy are "prevent, protect, pursue, and respond".[79] Although such policy developments as global threat, it is still not possible to refer to terrorism as a crime under the Rome Statute and international law. It remains to be seen whether such policy formulations at European level would help. Limited as it is at regional scale. Multilateralism is in any case the key and complementary regimes have a specific call, which requires further efforts in order to reach the global dimensions.

2.6.3 The conceptualization of human security

The short outline of the challenges characterizing complementary global regimes deserves some reflections on the principles from which they derive. There seem to be the shared view that the human security doctrine points out both the causes and the long-term implications of conflicts instead of simply reacting to problems, as the traditional international security approach is often accused of doing. The preventive efforts should focus on reducing, and hopefully eliminating, the need of (military) intervention altogether,

79 For a detailed overview of the EU Counter-Terrorism Strategy established since 2005, see 14469/4/05 REV 4, accessible at: http://register.consilium.eu.int/pdf/en/05/st14/st14469-re04.en05.pdf For an updated overview of concrete actions to be fulfilled by EU delegations at legal and policy level on the implementation of the Strategy and Action Plan to Combat Terrorism, see last Report 9715/1/09 REV 1 accessible at: http://register.consilium.europa.eu/pdf/en/09/st09/st09715-re01.en09.pdf

while an investment in rehabilitation or rebuilding should ensure that past conflicts do not increase future violence acting on the causes of such conflicts. We look at the gaps between the theory and the practice of such governance approach. The first responsibility to apply human security parameters bears on the domestic jurisdictions themselves, and only at a secondary stage an international community concern, which still struggles with the basic measures applicable *when*, *where* and *how* to intervene. Such international concern became visible during the escalations of severe humanitarian crisis characterized by mass atrocity crimes and after the failure to act in a timely and decisive manner, holding the promise which the States made to each other of 'never again' with regard to genocide and other mass atrocity crimes.

The human security theories influencing the agenda in the new century conclude that such concept of security stands for a 'paradigm in the making' as exemplified by the main organizations established around such policy orientations, as for instance the Rome Statute institutions.[80] For the first time with a multilateral treaty international governance institutions received provisions centralizing *restitutive* justice for the victims of mass atrocity crimes. In fact, human security ensures that a better knowledge of the rapidly evolving large-scale threats has respectively a major impact on individuals and communities, and also strengthening mobilization of the wide array of actors actually involved in participative policy formulation in the various fields of the rule of law and democratic self-determination. So said, what characterizes concretely the emerging paradigm of human security in the governance of complementary global regimes fostering peace and justice? The question is whether the knowledge, advocacy and policy formulation of human security have been translated in governance systems for the sake of individuals in situations of war and crime. Otherwise, what else do we need?[81]

80 The concept of human security, which emerged in the 1994 *UNDP Development Report*, is on its way to changing the practice and institutions of global governance. The underlying issues of human security, a focus on the individual, the waning of State sovereignty and the rise of new actors, the shift in our understanding of security, the need and risks of humanitarian intervention, the reform of the Security Council, the conduct of complex peace missions, and the adequate reaction to new threats, pose a challenge to international law. As a value-based and people-centered approach to security, human security will contribute to normative changes in the international legal order. For an overview of this approach see G. Oberleitner, 'Human Security: A Challenge to International Law?' In *Global Governance: A Review of Multilateralism and International Organizations*, Apr.-June 2005, Vol. 11, No. 2, at 185-203.

81 See M. Goucha and C. Maresia, *What Agenda for Human Security in the Twenty-first Century?* Published by UNESCO, second edition, 2005. See also O. Richmond, 'Human Security, the Rule of Law, and NGOs: Potentials and Problems for Humanitarian Intervention' in *Human Rights Review*, Vol. 2, No. 4 (July–September 2001).

2.6.4 The applicability of human security

We have seen that the human security conceptual framework embraces the transition from past restrictive notions of security tending to identify it solely with defensive, aggressive or retributive behaviours, to a much more comprehensive multidimensional concept based on the respect for all human rights and democratic principles. It contributes to sustainable development and especially to the eradication of extreme poverty, which is a denial of all human rights. It reinforces the prevention at the root of different forms of violence, discrimination, conflict and internal strife mainly on civilian populations in all regions of the world and without exception. It provides a unifying theme for multilateral action to the benefit of the populations most affected by interrelated political, social and economic insecurities in the context of global solidarity. This revolutionary unifying concept stands for strategic approaches adopting an interdisciplinary intersection between development goals, including a domestic, regional and global humanitarian approach and the empowerment of civil society. For the UN Secretary-General Dag Hammarskjöld, the United Nations had a primary responsibility to do everything within its means to protect successive generations from the ravages of war. In his final Annual Report to the General Assembly, Dag Hammarskjöld argued that this objective was to be progressively achieved via the international community's realization of four fundamental principles, namely: *(i)* equal political rights, both in terms of sovereign equality and individual respect for human rights and fundamental freedoms; *(ii)* equal economic opportunities, thereby promoting higher standards of living through the creation of conditions conducive to development and economic and social advancement; *(iii)* a firm rule of law framework underlying the actions and activities of the international community; and finally *(iv)* the prohibition of the use of force contrary to the common interest of the international community.[82] A strategy based on human security anticipates and prioritizes international threats, focusing on the preventive actions of the actors needed, or involved on the ground, for the preservation of law and order.[83]

82 For an overview of this legacy, see Kofi Annan, *Dag Hammarskjöld and the 21st Century*, Uppsala, 6 September 2001, accessible at: http://www.un.org/Depts/dhl/dag/legacy.htm

83 In examining the development of international law, it becomes apparent that the goals of international law are not distinct from those of human security. The principles underlying human security have been latent in international law and are evolving with increasing dynamism to encompass many of the basic principles of human security. For an overview see H. Owada, 'Human Security and International Law', *United Nations Audiovisual Library of International Law*, 2011, accessible at: http://untreaty.un.org/cod/avl/faculty/Owada.html See also H. Owada, "Human Security and International Law", in U. Fastenrathat et al (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*, 2011, 505.

The question is whether nation-states and global actors are prepared and equipped to follow some of the recommendations formulated in the field of legal and political sciences, creating governance systems based on the human security doctrine.

The centralization of decision-making of international humanitarian intervention exclusively in the domain of the Security Council risks undermining the human security expectations to intervene in situations of mass atrocity crimes. In order to maximize the multidimensional character of human security a strategy of interactions between complementary global actors is fundamental. An example would be whether the protection measures of civilians in conflict zones are currently taken care of, or the establishment of other treaties and international governance institutions are required. Moreover, are victims and witnesses of serious humanitarian violations falling under such protection measures? In order to respond to such issues the interaction of complementary global regimes on the ground in the last decade is extensively analysed. In situations of war and crime only a deep understanding of the causes may have an impact on the effects. The emerging paradigm is to challenge the traditional notion of national security by arguing that the proper referent for security should be the individual rather than the State. Human security holds that a people-centred view of security is necessary for national, regional and global stability. The United Nations and the Rome Statute institutions are based on such view of security which is supposed to centralize fundamental individual rights. The question is whether their contribution to the 'paradigm in the making' of human security is really measurable according to the current interaction between them, including their necessary reforms still waiting to be fulfilled.

In the struggle of shaping a consistent policy at global level harmonizing human security measures in conflict and post-conflict societies with development programs, the former UN Secretary-General and current Chair of the Advisory Board of the Coalition for the International Criminal Court (CICC) Kofi Annan, in his report *Larger Freedom*, clarified that "the protection and promotion of the universal values of the rule of law, human rights and democracy are ends in themselves. They are essential for a world of justice, opportunity and stability. No security agenda and no drive for development will be successful, unless they are based on the sure foundation of respect for human dignity".[84] In the African Great Lakes Region, in Central African Republic, Kenya, Ivory Coast, cross-related programs for justice, institutional building, reconciliation and victims rehabilitation should be able to anticipate and complement the model proposed by the United Nations Development Program (UNDP), its strategic plan on the rule of law, and domestic access to justice, falling within the areas of both democratic

84 Report of the Secretary-General A/59/2005, *In Larger Freedom: Towards Development, Security and Human Rights for All*, 2005.

governance, crisis prevention and recovery in societies in transition. The policy shaped through the last decades over 'failed' States is to destabilize criminal and corrupted regimes with militarized peace enforcements before development programs and security sector reforms (army, police and justice systems) would take place. Such policy trends deserve attention.

2.6.5 The critics to the human security doctrine

The critics of the human security concept argue that its vagueness undermines its effectiveness;[85] that it has become little more than a vehicle for activists wishing to promote humanitarian causes, that it does not help the research community to understand what security means; or help decision makers to formulate good policies.[86] This chapter critically questioned the progress of complementary global regimes fostering the centralization of individuals in situations of war and crime. In other words, it offered an assessment of international regimes fostering peace, justice and security and their complementary role to be seen on the ground in conflict and post-conflict situations. International security relies on political processes and in the long term the tools at disposition by the international community have to create the premises of *global justice* focusing on reconciliation and reconstruction. In one word: sustainability. These tools should focus, in particular, on the transition of societies from conflict and crime, to stability and order. The current resolutions of the UN Security Council contain targeted sanctions against identified groups of individuals responsible of serious crimes, including the responsibility of the actors on the ground to protect civilians. The UN Security Council, emphasizing 'all necessary measures'in certain specific country-situations, also relies on the referrals to the emerging regime of international criminal justice. The question is whether in such context, the counterbalance of centralizing specific human security measures of protection, relocation and rehabilitation of individuals in conflict zones is part of a strategy of interaction between complementary global regimes and whether peace diplomacy would not neutralize judicial decisions. In one simple word: the truth as recognition of the human suffering of individuals.

This chapter concludes anticipating the importance of the requirement of an integrated approach of governance which is dealt in the next one more extensively. The search of a model of governance of peace and justice as tools of human security deserve attention by the decision-making. With particular regard to the justice responses at domestic level, research findings are extremely necessary to address appropriate methodologies of external interventions, firstly measuring the societal impact of international criminal

85 See R. Paris, 'Human Security. Paradigm Shift or Hot Air?' in *International Security*, Vol. 26, No. 2, 2001.

86 For a comprehensive analysis of all definitions, critiques and counter-critiques, see S. Tadjbakhsh, A. M. Chenoy, *Human Security. Concept and implications*, 2007.

proceedings in domestic jurisdictions on a case by case basis, and secondly influencing the institutional capacity-building and the rule of law in such difficult conflict and post-conflict situations. Only the use of such knowledge, fostering local adaptation of governance institutions in shifting criminal and dictatorial regimes, would ultimately allow these countries to profit of development and cooperation programs. The scholars promoting such an idea in the context of the politics of transitions would prioritize: the political pressure on governments reluctant to prosecute perpetrators; the assistance required in building legal frameworks and training legal officials; the support provided for investigations, including forensic analysis and security sector reform; and at last but not least, creating trust in the justice system among the local population. With regard to further research required in the field of the human security sectors, the impact of international governance institutions on communities and individuals also needs empirical assessments. The approach on lessons-learned studies based on the experience of other international and hybrid criminal courts of relevance to the International Criminal Court, may only be useful in some areas and might result partly to be insufficient, considering that the Court's challenges "are and will remain unique".[87]

87 For an overview of the US foreign policy orientations provided by the Council on Foreign Relations, see D. Kaye, *Justice Beyond The Hague. Supporting the Prosecution of International Crimes in National Courts,* Council on Foreign Relations Press, June 2011. This report provides important insights into the strengths and limitations of current international justice mechanisms. It makes a clear case for increasing support to national legal systems and outlines a variety of ways that the US government can improve and coordinate its aid with others. While there will always be a place for international courts in countries that cannot or will not prosecute perpetrators themselves, this Council Special Report argues that domestic systems can and should play a more meaningful role, the report is accessible at: http://www.cfr.org/international-criminal-courts-and-tribunals/justice-beyond-hague/p25119?co=C009603 See also G. Boas, G. Oosthuizen, 'Suggestions for Future Lessons-Learned Studies: The Experience of Other International and Hybrid Criminal Courts of Relevance to the International Criminal Court', January 2010, *International Criminal Law Services*, at 1, accessible at: www.icisfoundation.org