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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3 The Governance of Peace and Justice as Tools of Human Security

Preliminary remarks

The previous chapter wanted to shed some light on the transition of global regulatory frameworks fostering human security. It clarified the construction, meaning and subject matter of global regimes of legal and political nature dealing with international threats and crimes. It offered some background information of the emerging regime of international criminal justice and the foundation of its jurisdiction. It examined the normative and policy orientations of human security based on both the rule of international law and world politics. It focused on the paradigm shift of complementarity between global regimes and the interpretation of its meanings. It attempted to clarify the challenges and opportunities and the expectations of human security from different perspectives and views. It indicated that in order to progress with the architecture of governance fostering human security in conflict and post-conflict situations multilateral engagements are absolutely required. The multilateral perspective should expand further the principle of complementarity between statehood, sovereignty and the tools of international governance in accordance with the constitutions of the world community. This chapter examines the governance of peace and justice as tools of human security. It wants to stimulate further progress in accordance with the expectations of human security and the policy formulations required at domestic, regional and international levels responding to mass atrocity crimes. It underscores the prospects and the lasting debate of peace, justice and security, the unresolved governance issues, and the requirement of an integrated approach of governance of peace and justice.

This chapter explores the lasting debate between peace and justice and the unresolved governance issues between peace operations, law enforcement and civilian protection duties. It argues about the importance of interactions between complementary global regimes and underscores the preventive strategy of mass atrocity crimes required at global level. It recalls the background of the emerging regime of international criminal justice after decades of political efforts to reach consensus for the ratification of an international treaty, which would finally regulate the jurisdiction of a permanent criminal tribunal. As previously clarified, the Court was established with the scope to generate further jurisprudence after the judicial activity of the *ad hoc* UN tribunals, and among other purposes such as the preservation of the rule of law and human rights. Its potential to become a global tool of human secu-

rity depends, however, on many factors. Some of them have already been debated in the previous chapter. This chapter recalls the necessity to find an integrated model of governance that would have sustainable results on the ground in conflict and post-conflict situations. Such model of governance requires appropriate reforms, capacity-building and a greater complementarity. The governance model proposed would centralize the rights of individuals, including their protection, safety and security in situations of war and crime. All actors involved in such policy formulations (States, international and regional organizations and civil society) have to take complete ownership of their responsibilities towards individuals. In this way the evolution of international law preserving the fundamental rights of individuals in situation of war and crime would absolutely progress.

3.1 Renewed responsibilities to respond to Mass Atrocity Crimes?

Section outline

This section points out some of the issues characterizing the intersection between legal and political regimes of complementary nature based on cooperation, and the practice of delivering justice in conflict and post-conflict societies devastated by mass atrocity crimes. It underscores further the importance of an integrated approach of governance fostering peace, justice and security in conflict and post-conflict situations realizing the *protective, retributive* and *restitutive* principles of *global justice.* In the last years, the unresolved tensions between peace and justice resulted in a long and open debate between scholars, practitioners, representatives of governments and civil society, including officials of international organizations. It needs to be noted that an analytical framework to properly understand the positive and negative effects of accountability during or after conflicts combined with peace processes and peace negotiations is weak and somewhat unreliable. The debate over whether pursuing international criminal justice is helpful or harmful to peace processes during political violence has become a *mantra* in the realms of international relations and international law.[1] The lessons learned from the interaction between peace and justice in conflict and post-conflict societies indicate that the occurrence of short term methods to secure peace, incorporating individuals with records of past abuses into local governments, caused negative long-term effects on affected communities by war and crime. The analysis of the UN missions and the activities in the

1 See L. Arbour, *Doctrines Derailed?: Internationalism's Uncertain Future*, Global Briefing 2013 opening speech from the International Crisis Group's President & CEO Louise Arbour, accessible at: http://www.crisisgroup.org/en/publication-type/speeches/2013/arbour-doctrines-derailed-internationalism-s-uncertain-future.aspx See also M. Kersten, "The ICC and its impact: more known unknowns", *Open Democracy*, 5 November 2014, accessible at: https://www.opendemocracy.net/openglobalrights/mark-kersten/icc-and-its-impact-more-known-unknowns

field operations confirm this unfortunate trend in several situations such as in the Sudan and in the DRC. In extreme conflict situations the amnesties on the table of peace negotiations produced a dangerous message that abuses would be tolerated encouraging more violence. The clusters of peace and justice, including the issues of victims, cooperation and complementarity, have been debated during the stocktaking exercise of international criminal justice during the Review Conference of the Rome Statute in Kampala. Such debates concluded that in conflict and post-conflict situations "the negative consequences that had been predicted would occur on peace processes from pursuing international criminal justice, had fortunately not materialized".[2] Thus, are there renewed responsibilities responding to mass atrocity crimes in sustainable ways? Are we finally able to respond internationally to the political violence against civilians in conflict and post-conflict situations?

3.1.1 The ongoing debate

The complementary nature of legal and political regimes, and the way they interact for the sake of human security in conflict and post-conflict situations is extremely important. In particular, the controversial relations between global politics and the rule of international law deserve discussions between the responsibility to protect civilians and the fight against the impunity of mass atrocity crimes. In other words, the idea of an architecture governing international relations towards a comprehensive international strategy establishing the primacy of the law, while using it as a fundamental tool of global governance, is the paradigm shift deserving attention. This study proves that the political expectations centralising individuals in global matters require first of all the clarification about the use of justice involving the lives of civilians in situations of war and crime, and those legal frameworks prioritizing the rule of law and the universality of their provisions, challenging the criticism of what Koskenniemi defined in *The Politics of International Law* "the corruption of the rule of law either in the narrow chauvinism of diplomats, or the speculative utopias of an academic elite".[3] In 1848 Lacordaire rightly noted that "between the strong and the weak, between the rich and the poor, between master and servant, it is freedom that oppresses and the law that sets free".[4] Arbour would emphasise that "the purpose of law in a free and democratic society is to liberate, not to restrain. It is to create a safe and just environment in which human conduct is regulated, and power is constrained so that maximum freedom and safety is attained by all".[5]

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2 Review Conference of the Rome Statute. Stocktaking of International Criminal Justice: *Peace and Justice*. Draft Moderator's Summary: Introduction by Kenneth Roth. RC/ST/PJ/1, 7 June 2010.

3 See M. Koskenniemi, 'The Politics of International Law', in 4 *EJIL*, 1990.

4 See H. Lacordaire, *Conférence s de Notre-Dame de Paris*, éd. Sagnier et Bray, 1848, at 246.

5 See L. Arbour, *supra*. See L. Arbour, 'The Rule of Law', in *The New York Time*, 26 September 2012.

When observing the dynamics characterizing the formulation of international regimes it is clear that the political process comes before the supremacy of legal frameworks dealing with international disputes and international humanitarian affairs. The *protective*, *retributive* and *restitutive* aspects of *global justice* require some important decisions to be taken by the relevant decision-makers, considering the political convergence of expectations projected in contemporary governance systems. According to the principle of *complementarity* and the policy of the responsibility to protect civilians recalled in several UN fora, the Court will monitor national judicial proceedings, offering assistance as appropriate on the ground to end the impunity regime of international crimes. The simple question is *how*? The hope is that many States as soon as possible would become parties to such a system. The accession to the Rome Statute would mean for the nation-state a concrete option to protect its citizens from the danger of authoritarianism of its own leadership or criminal regime. At global level, in the field of international criminal law there will finally be a permanent standard and a reference institution in the context of the proliferation of international tribunals. However, there seem to be little chances to centralize the *trias politica* balancing the legislative, executive and judicial powers in the international order. The Court's presence, after all, does not solve the absence of the *trias politica* in international relations including the killings by dictators to retain their power such as in the Sudan, Syria and Lybia, just to name a few situations. Besides, the African Union is taking serious political distance from the Court. The risk is that some of the African States would neglect their legal obligations as States Parties to the Rome Statute expressing the wish to withdraw their memberships.[6] From a legal perspective and ignoring political standpoints the Court will have to continue its fight against the impunity and go ahead with its judicial proceedings. This section recalls the responsibilities of cooperation between the States, regional and international organizations.

Obviously with regard to the collective security and global threats there will be plenty of limits in defining the legal link between the State and the individual responsibility. This must be the ambition of the UN-ASP political and institutional interactions. The Court's responsibility is to ensure the quality of criminal justice, to be a well-understood and well-supported institution and to become an outstanding model of public administration.

6 The African Union (AU) has accused the ICC of singling out Africans for prosecution and has previously called for the Court to drop the Kenya cases. Kenyatta and Ruto, as well as Joshua Arap Sang, face crimes against humanity charges for their alleged roles in planning ethnic violence after disputed 2007 elections in Kenya. The violence between their respective Kikuyu and Kalenjin communities left at least 1,100 dead and more than 600,000 homeless. See *AU to discuss ICC trials of Kenyan leaders,* Aljazeera, 20 September 2013, accessible at: http://www.aljazeera.com/news/africa/2013/09/20139209543865471.html

The question is if the Court's jurisdiction is able to end the impunity regime of international crimes. Like the *ad hoc* tribunals for Yugoslavia and Rwanda, the ICC is not essentially set up to deal with international conflicts, but rather to provide and administer "international justice" to internal conflicts, in countries too weak to perform justice. The difference with the *ad hoc* tribunals is that the ICC is institutionally independent from the Security Council and power politics. But is this assumption true considering the provisions of the Rome Statute such as Article 13 and 16 and the power of the Security Council to defer investigation or prosecution? Besides, are the States willing to find consensus on the reform of the UN Charter applying a constitutional approach, or pluralism would continue as the liberal ideology applicable to international normative frameworks?[7]

3.1.2 The rule of law advocates

In this study the views of the rule of law advocates are absolutely welcome. Some important aspects determining the evolution of international law are the policy formulation and law-making process of its institutions, and their capacity-building to interact with each other to maximize the results, and further preserving the concept of international society. In regime theory international governance institutions are by definition instances of international cooperation with legal personality which derive from international treaties. Their enforcement depends on the political process supporting particular sets of ideas and values expressed in political convergence of expectations, legal provisions and normative frameworks. Their rules of cooperation may create governance functions which might result not appealing by a particular policy, political interest and further formulation of laws.[8] This is the case of the cooperation regime of not binding character settled between the United Nations and the emerging regime of the Rome Statute.

7 For an extensive contribution and analysis of the legal requirements of the United Nations and the future of the Charter see, N. Schrijver, "Applying, Interpreting and *de facto* Modifying the Charter", *The Future of the Charter of the United Nations,* (2006) Max Planck Yearbook of United Nations Law, at 13. See also N. Schrijver 'et al', *The United Nations of the Future. Globalisation with a Human Face*, (2006), at 304. For an overview of the discussion on the constitutional character of the UN Charter and the legal consequences arising from that characterization, see B. Fassbender, *The United Nations Charter as the Constitution of the International Community*, (2009).

8 See E. C. Luck and M. W. Doyle (eds.), *International Law and Organization: Closing the Compliance Gap*, 2004.

The current paradigm shift is at which extent the interaction between the United Nations and the Rome Statute system is important for the governance of peace, justice and human security. This interaction represents a responsibility of both the nation-state and the international community to implement constitutional standards for a universal jurisdiction protecting fundamental individual rights. The view expressed in this study is that the complementary character of such regimes represents the key for further progress: *a)* in the regime of human rights (rehabilitation, reconstruction and victim rights, including humanitarian and socio-economic issues,); *b)* in the regime of international peace and security maintenance and restoration, or better say supporting the main purposes and tools at disposition for humanitarian interventions in conflict and post-conflict societies (civilian protection duties, including conflict prevention and peace enforcement, peace-making, peace-keeping and peace-building); and *c)* in the emerging regime of international criminal justice (jurisdictional matters and the reference of the jurisprudence, harmonization of domestic judicial channels with appropriate assistance to national implementation of laws, and for the preservation of fundamental individual rights). The rule of law has a fundamental task defining the complementary character of international regimes. However, the practice displays the difficulties in keeping the compliance of legal frameworks based on cooperation.

3.1.3 The gaps of the globalist approach

The examination of the theory and the practice of international regimes points out the sensitive gaps of complementary governance based on international cooperation. The disintegration of the nation-states contains the idea that the international community could do something about the issues listed above preserving law and order at global level. This study simply underscores the politics of international criminal justice in the context of maintaining peace and security which governance indicates serious gaps of human security measures, among other serious problems of legal, institutional and political nature. It debates the challenges, obstacles and concerns in the governance of complementary global regimes based on cooperation by the relevant stakeholders. The case studies argue about the potential to maximize the results on the ground by using the limited 'arrangements and agreements' between international governance institutions without challenging the primary law. What is simply argued is the absence of a political *road map* to govern peace, justice and security at global scale. In the preamble of the Rome Statute, its members, or so-called States Parties, expressed their political determination to establish an independent permanent International Criminal Court in relationship with the United Nations system. The purposes and principles of the Charter of the United Nations were reaffirmed once again in the Rome Statute over national sovereignty, territorial integrity and the use of force, as crystallized in the UN Charter since the end of WWII. Today, situations in which one or more crimes appear to have been commit-

ted can be referred to the International Criminal Court by the Security Council, acting under Chapter VII of the UN Charter, by a State Party to the Rome Statute, or by the Court itself, under specific conditions.

This section points out, among other problems, the unresolved governance issues of mass atrocity crimes considering the lasting debate between peace and justice, respectively, between the political determinations and the legal frameworks fostering peace, justice and security at domestic, regional and global levels. In the complex scenario of international relations, the rule of international law as a principle of governance is undergoing a substantial impasse between the *constitutionalist* and the *pluralist* different theoretical approaches of the international legal order. Between a centralized normative framework able to assume the existence of a constitution of the world community, and the liberal view of the pluralistic approach of complementing global mandates, able to respond to the challenges of the time. In other words, the assumption that the rule of law, conceived at domestic level, would be also applicable in the organization of the international society depends by the relationship and partnership between complementary global mandates. As Delmas-Marty correctly points out "we must therefore go beyond models to find a flexible relationship between law and politics that will make the future European and world orders at least sustainable, if not entirely stable".[9] I would say that in order to accomplish such important goal we need a clear *road map* alongside the uncertain future of internationalism and its doctrines.[10]

3.1.4 The practice of delivering justice

The concern is that the idealistic prospects to establish an appropriate architecture, dealing with the causes and the effects of mass atrocity crimes, in accordance with the challenges of the time, is for many an unrealistic vision, while for others this requires consensus and political convergence about institutional reforms and systemic changes. The humanitarian escalation of *last resort* in the conflict in the Sudan, including the following inaction after the judicial outcomes of the Court by the executive and political organs of the United Nations and by the Sudanese authorities, indicate ample discrepancy in the politics of international criminal justice and its governance. Moreover, the compromised provisions of the Rome Statute between the Security Council and the Court, which give the priority to peace processes on investigations and prosecutions, also produced sensitive consequences in the effort to destabilize the criminal and still active regime of the LRA in Uganda, or the leadership of the Sudanese government responsible of mass

9 See M. Delmas-Marty, "Models of Transformation: in the Land of Orderly Clouds", in *Ordering Pluralism,* 2009 at 164.

10 See L. Arbour *supra* .

atrocity crimes. Among other natural resources Uganda has oil, and the unilateral action by the US to send a few military advisers to fight against the LRA in 2011, has been heavily criticised as the typical resource addiction of the US, characterizing the interests of the global economy, instead of acting under the flag of humanitarian solidarity. The appropriate action should be pressuring the Ugandan government to enforce the arrest warrants against the LRA rebels. The Ugandan government has a specific responsibility fighting against the impunity of international crimes, and if military action would be authorized, it should come from the multilateral premises in accordance with the rule of international law. The US should promote multilateral action against the LRA and become a member of the Rome Statute system. Until that moment, the risks of unilateral interests in Africa would always receive as many critics as possible, including the unfortunate reaction of China and Russia in regard to the situation in Syria, and their interests to keep the Syrian regime in place. In summary of these arguments, the criteria for humanitarian intervention in the wake of regime change in Libya, and the on-going humanitarian crisis in Syria, including the law enforcement capacity of the Court's involvement and its judicial decisions in the DRC, Central African Republic, Kenya, and Ivory Coast, including the new investigative situations of the Court, need an integrated approach of governance.

It is a decade that the international judicial institution is operational, however, no solution has been found in the law enforcement dilemma of its judicial decisions. In regard to the situation in the Sudan on 1 March 2012, Pre-Trial Chamber I issued a warrant of arrest against Mr. Abdel Raheem Muhammad Hussein ("Hussein") for 41 counts of crimes against humanity and war crimes allegedly committed in the context of the situation in Darfur (Sudan). Mr Hussein is currently Minister of National Defence of the Sudanese Government and former Minister of the Interior and former Sudanese President's Special Representative in Darfur. In the situations where criminal domestic regimes and their leaders still in power would use the civilians as hostages, the criteria to guarantee civilian protection measures are not defined by governance systems based on international cooperation. The three aspects of *global justice*, namely, the *protective*, *retributive* and *restitutive* aspects are not satisfactorily fulfilled by complementary global regimes. The links between humanitarian intervention, law enforcement and reconstruction in conflict and post-conflict situations wait to find a place in complementary governance systems. Unfortunately, even with the advent of the Rome Statute system a preventive strategy of mass atrocity crimes is still required. The current challenges, obstacles and concerns, including the debate deriving from them, require appropriate attention by the decision-making in the short, middle and long terms. Let us proceed further with the analysis of this sensitive debate and the prospects of peace and justice.

3.2 The Prospects of Peace and Justice

Section outline
This section examines the quest of civilian protection and some of the challenges, obstacles and concerns in the governance of peace and justice. It advocates for further progress of the rule of international law to regulate the complementarity character of global regimes fighting against war and crime and intervening in situations of political violence against civilians. The maintenance of international peace, justice and security after the cold war indicates that the international community became soon powerless to the new international threats and massive crimes spreading at local, regional and global scale. In these conflicts the civilian population is targeted more than ever before. Dictatorship and despotism cause instability, disrupt economic activity, and reduce opportunities for civilians. In many countries, bad governance, authoritarian regimes, opportunistic political élites and the availability of weapons have led to weak States and their domestic governance structures to undermine fundamental individual rights. Corruption, abuse of power, weak institutions and the lack of accountability corrode States from within and contribute to regional insecurity. *Intra*-state conflict not only destroys infrastructure but also encourages further criminal behaviours making governance activities impossible. A number of decolonized regions, like the African Great Lakes, became soon caught in a downward spiral of conflict and serious violations of international humanitarian law. The rhetoric, however, that the Court would be against the African continent is groundless and this section demonstrates some of the reasons why.

3.2.1 The quest of civilian protection

Soon after the cold war a renewal of ethnic conflicts in Africa resumed into a state of anarchy and political violence in many countries. In addition, international terrorism and proliferation of weapons of mass destruction remain important threats to peace and security among nations worldwide, including the transition of Arab politics and the risk that autocratic regimes could hijack pro-democracy movements, as it happened in Iran in 1979, in Libya or currently in Syria. Looking back to the historic transition which occurred in Iran at the end of the 1970s, the uprising against the *shah* was led by pro-democracy youths who took the streets. In the end the regime created a closed and an autocratic society. Across the Middle East the common phenomenon is that authoritarian regimes try to stop unprecedented peaceful protests with brutality and unacceptable violence. These countries struggle between liberation and enormous bloodshed, including the protesters' ability to reach the eyes of the world, not really able to determine the outcomes of difficult political processes, which are all characterized by the potential of authoritarian regimes. The approach by the international community in these situations characterized by serious humanitarian escalations is extensively examined by scholars in the field of international law and interna-

tional relations. They are supposed to work hand in hand in order to advise policy makers about feasible solutions in the short, middle and long term.

If it could be said that the transition of the Arab region has similarity with the events occurred in Eastern Europe in 1989 following the decline of the Soviet bloc, the situation in the Arab region is characterized by other concerns.[11] However, it is not possible to predict what happens next. What is well known is that the authoritarian regimes in these countries kept control giving rewards to supporters and punishing opponents, military and police power, redirecting hostility toward targets in the West and other means. The majority of these countries are not States Parties to the Rome Statute. This means that the Court could receive jurisdiction by the Security Council as it happened for the situation in Libya. The Court, however, has a limited place in the preservation of peace and security as shown by the challenges also debated in the next paragraph.

For many observers the sponsor of the doctrine of the Muslim Brotherhood could intensify revolutionary Islamist terrorism and also attacks on the West. Despite the existence of the risks in such political transitions, people in the Arab world have expressed their democratic wishes with courage and determination. There are new opportunities to combine democracy and Islam but also threats of conflicts of *intra*-state nature. In Egypt for instance, the power given to the army and police in the transition after Mubarak's regime, requires political balancing between religion, Islam and the formation of the State. In this uncertain context the question is whether complementary global regimes and the political forces empowering them will focus on a prevention strategy of mass atrocity crimes by fighting against serious violations of human rights. These countries will need support in their transitions giving the priority to the security sector reforms (army, police and judiciary). There are moments in history in which the impossible becomes unavoidable to challenge political violence. The changes occurring in the Middle East were unimaginable to nearly everyone like the dissolution of the Soviet Union just before its fall. But the power of people movements has a logic and timeline on its own. In the Middle East, the hopes of its people are interrelated with those of the world. In moments like these, it is inspiring to know that global solidarity, in hope and in action, can play a small part in such difficult political transitions. The international community is called upon deeper responsibilities if we also consider the political, economic and social disintegration

11 The pressure of the international community to probe human rights violations is growing, see N. Pillay, High Commissioner of Human Rights, *Egypt: Change system that bred rights abuses*, 1 February 2011, accessible at: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10695&LangID=E See also for an extensive statement addressed to the government, *UN High Commissioner for Human Rights urges Government restraint and respect for human rights in Egypt*, 28 January 2011, accessible at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10688&LangID=E

of regional organizations and their unity of intents based on the policy of global solidarity.

3.2.2 Challenges

Right at the beginning of the new century the world's first permanent international tribunal became a reality. Its establishment will be preserved in some form as an historical record of global proportions for the sake of civilians in conflict and post-conflict societies. The Court has jurisdiction over the most responsible individuals accused of committing serious international crimes. This is to some extent considered by social scientists as the result of the 'failure', 'collapse' or 'disintegration' of the nation-states unable to protect civilians namely their own citizens, while for human rights activists the governance of justice is responding to a crisis in international democracy and to the unilateral security policy of some nation-states neglecting human rights. Others would refer to the national security and criminal policies applied in the last decade in many countries. Namely the classic, liberal 'rule of law' concept as a tool for regulating globalization and security threats in modern information societies. This type of criminal law "parades legislatively in the guise of security law, intervention and occupation law, and, most recently, in the development of a special criminal law solely applicable to the 'enemy'. Such unilateral approach goes hand in hand with a dismantling of human rights, first gradually, but now with increasing rapidity, which frequently occurs in the name of human rights".[12] There are no doubts that the emerging international criminal justice and the Rome Statute regime neutralize such unilateral approaches for the sake of the preservation of human rights standards in international criminal proceedings. The question is whether such emerging regime is governed as sub-regime complementing the United Nations system preserving human rights, and if both would create an architecture fostering peace, justice and security applicable on a case-by-case basis in situations of war and crime with early warning and prevention strategies including law enforcement.

The way justice is governed is an important matter for all of us. The purpose of the governance of justice is to reach affected communities unable to see justice on the ground, to be the judiciary evidence that the dignity of life has been violated, influencing the change in disintegrated nation-states, where the civilians do not have any right left, and even no fundamental right for their own life. The aim of the governance of justice is to repair the harm caused on civilians. They could finally see justice prevail in their communities despite the inability or unwillingness of their own State. For the first

12 For an overview of the debate on the erosion of the human rights protection see, J. Arnold, "Protection of Human Rights by Means of Criminal Law: On the Relationship between Criminal Law and Politics" in W. Kaleck. M. Ratner, T. Singelnstein (eds.), *International Prosecution of Human Rights Crimes*, (2007), 3 at 12.

time in history victims will be recognized in the judicial proceedings according to the Rome Statute of the International Criminal Court, however the obstacles these reparation programs are facing are also a matter of mutual concern (insufficient funds, victims threatened and withdrawing and considerable delays in the prosecution of perpetrators). The first decisions of the ICC demonstrate that child applicants for victim status are confronted with particular difficulties: children struggle with the proof of their identity and age; uncertainties exist about their ability to submit an application for participation on their own behalf among other issues.[13]

In accordance with the challenges approached in this study and from a pragmatic approach, as Richard Goldstone notes, "international law cannot exist in isolation from the political factors operating in the sphere of international relations".[14] This is the reason of the multidisciplinary approach required in this field to prove that there is a substantial evolution of public international law which has evolved in use and importance vastly over the twentieth century, due mainly to the increase of human rights violations in armed conflict. New threats in modern society allow the laws and customs of war, or the law of armed conflict to regulate the conduct and responsibilities of belligerent leaders, referring to individuals engaged in warfare, in relation to each other, and against protected witnesses, usually meaning civilians. The Rome Statute reflects the positive evolution of international (criminal) law and the humanitarian policy in case a State is unable or unwilling to do otherwise centralizing victim rights. The problem for the Court is that it does not receive sufficient support in the collective responsibility to protect victims and witnesses.[15] The implementation of such responsibility depends on several factors. In the current architecture of the governance of peace, justice and security the creation of a new institution responsible for the protection of victims and witnesses is recommended to the decision-making responsible of such lacuna.

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13 For an overview, see C. Ferstman, M. Goetz and A. Stephens, *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making*, (2009). See also C. Chamberlain Bolaños, *Children and the International Criminal Court : analysis of the Rome Statute through a children's rights perspective*, Leiden University, Series of the E.M. Meijers Institute (2014).

14 See R. Goldstone, "International Criminal Court and Ad Hoc Tribunals", *The Oxford Handbook on the United Nations*, in T. Weiss, S. Daws (eds.), (2007), 463 at 474. See also R. Goldstone, A. Smith, *International Judicial Institutions: The Architecture of International Criminal Justice at Home and Abroad*, (2008).

15 On the debate between security and human rights and the features of international law protecting civilians, see O. A. Hathaway, 'Looking Ahead: Can Treaties Make a Difference?' 2002 111, *The Yale Law Journal* 8, at 1935. Three months before Kenya's deputy president is due to go on trial at the International Criminal Court several victims of violence that followed a disputed election in late 2007 have pulled out of the proceedings, see T. Maliti, "Dozens of victims write to ask to withdraw from trial, says victim's lawyer", *ICC Kenya Monitor*, Open Society Justice Initiative, 13 September 2013, accessible at: http://www.icckenya.org/

3.2.3 Obstacles

The problem is that the principle of inter-dependence between peace, justice and security, characterizing complementary global regimes is not applied in the practice. The decisions of the Court have been undermined in many fronts in Darfur,[16] in the DRC and in Uganda.[17] The Court urges an appropriate governance strategy with the United Nations in conflict and post-conflict societies. In Uganda for instance, the political orientation of the Security Council diluted the judicial decisions of the Court. Uganda served a two-year term in the Security Council just a few years ago. According to the diplomatic channels of the country representatives in the Security Council, Uganda had to be the most prominent voice of Africa, as the Security Council focused on several African issues, including *a)* violence in the DRC, Central African Republic, chaos in Kenya and the absence of State in Somalia; *b)* the war in the Sudanese region of Darfur; and *c)* the worsening violence on Uganda's own doorstep in the eastern DRC. The position of the government of Uganda was to bring closer international attention on African conflicts, which might warrant the Security Council to approve international intervention, safeguarding the international security dimension of international relations in other African countries more than on the Ugandan territory. On the other hand, the expectation to have the Court dealing with the last resort escalations of humanitarian crises, as it happened in Darfur, is characterized by the political uncertainties in the current transitional phase of law and order. The African States, under the premises of the newly established African Union, pressure the decision-making process regarding peace and justice, the governance of threats and crimes, the monitoring deferral activity of criminal proceedings giving priority to the role of the Security Council in peace processes and negotiations, thus neutralizing the truth and the judicial outcomes of the Court. In other words, the regime established under Article 16 of the Rome Statute is at a crossroad. In the situation in Darfur, the Security Council should guarantee an increased force on the ground to protect civilians, stabilize the deteriorating security situation, and follow up on the arrest warrants of the Court according to the reports received by

16 Following the referral from the United Nations Security Council on 31 March 2005, the Prosecutor received the document archive of the International Commission of Inquiry on Darfur. In addition, the Office requested information from a variety of sources, leading to the collection of thousands of documents. The Office also interviewed over 50 independent experts. After thorough analysis concluded that the requirements for initiating an investigation were satisfied. See ICC-OTP-0606-104 accessible at: http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/

17 In December 2003 the President Yoweri Museveni of Uganda took the decision to refer the situation concerning the Lord's Resistance Army to the Prosecutor of the International Criminal Court. The Prosecutor determined that there was a sufficient basis to start planning for the first investigation of the International Criminal Court. See the case ICC-02/04-01/05 accessible at: http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/uganda

the Court on the Sudanese cases against the leaders of the country.[18] In the past, international criminal justice has been managed by the Security Council with selective enforcement and this still remains a problem, as it did the "victor's justice" of post-WWII.

At normative level, Cryer points out that one solution would have been having the Rome Statute ratified as part of the UN Charter. Alternatively the Security Council might impose duties upon all member States.[19] The point is whether the States are ready to compromise such a universal codification regulating the public authority of humanitarian violations and law enforcement capacity, while combining the accountability of measures of humanitarian intervention.[20] A pragmatic approach underscores the fact that for an implementation of the governance of justice, structural and normative adjustments are necessary. Such adjustments would create the background of crime control at global scale allowing progress of the treaty law on terrorism, fraud and corruption, trafficking of drugs and weapons and other 'globalized' crimes. This step however is far to be reached if we look at the features of the governance of justice and the struggle between ownership, independence and public authority between political, executive and judicial international mandates. The promotion of a 'systemic change' is necessary for an empowerment of the Court in the peace and security regime, with the purpose of balancing powers in the international legal and political order. This issue is very delicate considering the negative impact of the Court's arrest warrants on several members of the African Union and the Arab League. The Security Council has a specific responsibility with regard to these very sensitive political issues before escalating situations to the Court, or freezing them using Article 16 of the Rome Statute. Even with a serious lack of resources received by the Security Council, the Court delivered its judicial decisions remaining detached from political compromises.

18 See ICC-CPI-20091009-MA49, *The Prosecutor v. Bahr Idriss Abu Garda*, Case ICC-02/05-01/07 Pre-Trial phase, The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") accessible at: http://www.icc-cpi.int/cases/Darfur/c0205.html See, ICC-02/05-01/09, tthe warrant of arrest for Al Bashir lists seven counts on the basis of his individual criminal responsibility under Article 25(3)(a) of the Rome Statute as an indirect (co) perpetrator including: five counts of *crimes against humanity:* murder, Article 7(1)(a); extermination, Article 7(1)(b); forcible transfer Article 7(1)(d); torture Article 7(1)(f); and rape Article 7(1)(g); two counts of *war crimes*: intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities -Article 8(2)(e)(i); and pillaging – Article 8(2)(e)(v) accessible at: http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/Related+Cases/ICC02050109/ See also Sixth Report of the Prosecutor of the International Criminal Court, to the UN Security Council pursuant to UNSC 1593 (2005) accessible at: http://www.icc-cpi.int/otp/otp_events/RP_20071205.html

19 See R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Regime*, (2005), at 237.

20 See N. D. White, Empowering Peace Operations to Protect Civilians: Form over Substance? (September) 13 Jo*urnal of International Peacekeeping* (2009) 3-4, at 327.

However, the Court needs a more structured support by the UN institutions, *a)* especially under the General Assembly which should consider the governance of justice as a matter of mutual concern mandatory for all States; *b)* by the Security Council and possibly by the UN judicial channel before the UN political organs; *c)* by the International Court of Justice which would be the most appropriate dealing with disputes between States and the UN Charter obligations.

In the long term, the promotion of a 'systemic change' of governance would have a positive impact on the project of universal jurisdiction, making the Rome Statute institutions, especially its political organ (the Assembly of the States Parties), able to monitor aggression, terrorism, drug trafficking and other crimes in the Court's jurisdiction. Considering the obstacles in the regulation of humanitarian escalations, it is however not feasible to see the Court's jurisdiction implemented, if such obstacles in the governance of justice are not solved. There are still several limits in the governance of justice dealing with both humanitarian crises and collective security in the absence of a supranational organization and separation of legislative, executive and judicial powers in the international legal order. The escalation of humanitarian disasters in times of war under the premises of the maintenance of peace and security, and the judicial outcomes of serious human rights breaches do not receive appropriate follow up. The risk of such discrepancies is compromising the future of international criminal justice.[21] Moreover, the current status of the governance of international criminal justice reflects the reality characterizing the project of universal jurisdiction between theory and practice. The emerging practice of a permanent International Criminal Court dealing with the accountability of individuals responsible of serious crimes is still too weak, comparing its jurisdiction with the international humanitarian crises occurring in Africa, Middle East and other regions. The *intra*-state African conflicts are all characterized by severe violations and abuses of human rights and by old models of conflict management. These conflicts destabilize peace and security, as also shown by the Security Council resolution on Darfur, where protections duties of civilians under the R2P norm did not work. Another challenge deriving from such humanitarian escalations is that the Court's jurisprudence will need to keep alive the rights of the victims.

21 For research contributions, in the area of international crime, law, and criminal justice which considers the globalization of international criminal justice see, M. Deflem, 'Review of Governing Through Globalized Crime: Futures for International Criminal Justice', 2009 38 *Contemporary Sociology*, at 153.

3.2.4 Matters of international mutual concern

The jurisprudence of the Court will need to confirm the contribution of the Rome Statute to the rule of international law and the fulfilment of obligations by the States Parties on matters of international mutual concern. The Rome Statute represents a carefully drawn compromise between two ideas: countries should be first of all responsible for administering their état de droit within their territory, and respect the assumption that holding people accountable for the most serious crimes under international law is ultimately an international, but firstly a domestic concern.[22] The Court is intended to complement national justice systems, not to replace them, as the Preparatory Ad Hoc Committee for the Court and the ILC discussions made clear.[23] From an historical perspective, the Rome Statute became operational while the struggle of the international community determined concrete and fair reforms of the United Nations, specifically: over the use of force, after decades of Security Council resolutions about security,[24] peace operations, humanitarian intervention and about the institutional struggle of the General Assembly to receive an empowered role for the protection of human rights and collective security.[25] The United Nations reform, specifically the enlargement of the Security Council, has been an issue under discussion in the General Assembly for a long time. The issue of reform also figured prominently in the Assembly's debate in the last decade, but consensus is far to be reached. The discussions, however, contributed to improving the transparency of the Council's work and also clarified its role by developing policies and doctrines for the prevention of conflicts, managing increasingly complex crises, identifying the needs of peacekeeping and peacebuilding, and dealing with new threats such as the fight against terrorism. Many observers would believe that the political impasse in international relations currently manifesting under the UN premises, would receive a new input through the Rome Statute. The question is whether the empowerment of the Court's mandate really becomes a matter of international mutual concern, or it remains in the hands of just a few stakeholders. The responsibility to protect civilians between peace enforcement and the protection measures of victims and witnesses among other governance issues still require solutions.

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22 For an extensive overview on the problems related to implementing legislation and cooperation on the Court in domestic regimes, see C. Stahn, "The International Criminal Court and the Shortcomings of Domestic Legislation: Introductory Note", (2007) LJIL 20, at 165. For a legal analysis of the Court's relationship with domestic jurisdiction see C. Stahn and G. Sluiter, *The Emerging Practice of the International Criminal Court* (2009), 208 at 400.

23 For the discussion within the ILC see Report on the work of its forty-seventh session, 2 May – 21 July 1995, GA, official records, fiftieth session, supplement No 10 (A/50/10), par. 47.

24 For reference reports and materials on the UN reform see the web portal accessible at: http://www.un.org/reform/peace_security.shtml

25 See *Certain Expenses Case*, ICJ Reports (1961) at 166. See also UN doc. A/RES/377(V) A (1950), the "Uniting for Peace" resolution.

In the Resolutions ICC-ASP/6/Res.2 and ICC-ASP/11/Res.8, *Strengthening the International Criminal Court and the Assembly of States Parties*, the Assembly of States Parties declared:

> "*Mindful* that each individual State has the responsibility to protect its population from genocide, war crimes, and crimes against humanity, that the conscience of humanity continues to be deeply shocked by unimaginable atrocities in various parts of the world, and that the need to prevent the most serious crimes of concern to the international community, and to put an end to the impunity of the perpetrators of such crimes, is now widely acknowledged; *Convinced* that the International Criminal Court is an essential means of promoting respect for international humanitarian law and human rights, 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 and the advancement of post-conflict peace-building and reconciliation with a view to achieving sustainable peace, in accordance with the purposes and principles of the Charter of the United Nations; *Convinced* also that there can be no lasting peace without justice and that peace and justice are thus complementary requirements; *Convinced* further that justice and the fight against impunity are, and must remain, indivisible and that in this regard universal adherence to the Rome Statute of the International Criminal Court is essential […]

This resolution points out the importance to strengthen the Rome Statute system and refers to the following important factors: a) the Rome Statute and the relation with other multilateral organisations; b) institution-building; c) cooperation and implementation; d) the role of the Assembly of States Parties. The Annex I and II deal respectively with the "Recommendations on the Plan of Action for achieving universality and full implementation of the Rome Statute of the International Criminal Court" including the "Recommendations on international cooperation". In delivering the Court's annual report to the UN in 2014, ICC President Song acknowledged the fundamental partnership that exists between the UN and the ICC, as both organizations are "based on the ideals of peace, security and respect for human rights, and the realisation that these goals can only be attained through the rule of law and international cooperation". He called upon all States to join the ICC, stressing that "the values of the Rome Statute reflect global solidarity and commitment to peace, security and international law".[26]

3.2.5 The unresolved governance issues

The previous observations referred to the United Nations and the Court's role in the governance of international criminal justice since the Court's establishment, considering the referrals received by multiple States from the volatile and strategically important region for its natural resources: the African Great Lakes Region, including the first referrals from the Security Council (Sudan and Libya and the missing referral of the situation in

26 See Judge Sang-Hyun Song, *Annual Report to the United Nations General Assembly*, 30 October 2014, accessible at: http://www.icc-cpi.int/iccdocs/presidency/UNGA-PS-30-10-2014-Eng.pdf

Syria).[27] In general, the exchange of expertise, study and working groups to keep international complementary mandates alive would promote their relationship as expected in the Preamble of the treaty establishing the Court, which is complementary to the UN Charter. The purpose of this analysis is to improve the ways the UN, together with the Court's judicial mandate, would influence the contemporary international legal order on the creation of a capacity-building apparatus applicable in conflict and post-conflict situations. The international governance of justice is based on compliance of treaty obligations and accountability of serious breaches of human rights; nevertheless, there are still gaps of law enforcement capabilities, protection duties of civilians including victims and witnesses, and the rehabilitation of communities affected by war and crimes. The ideal would be that when mass atrocity crimes would be referred to the Court under the premises for the preservation, restoration and maintenance of international peace and security, the Court would receive binding support and cooperation by complementary stakeholders such as the UN institutions.

In order to offer sustainable peace in fragile States, while fighting against the impunity of serious international crimes, preserving and restoring order requires reforms of the army, police and judicial systems. Such efforts respond to the challenges of domestic security sectors. The consolidation of the rule of law at domestic and international levels is among the priorities of the United Nations. In the emerging regime of international criminal justice the States empower mechanisms to put an end to the impunity of serious crimes which also requires compliance and accountability through national implementation of legislations. In peace operations mandates for instance, the Security Council increasingly included the improvement of security institutions and legal systems in fragile States. The wide range of institutional reforms proposed in the UN brought as limited result a new approach in the configuration of the Security Council mandates unifying peacekeeping and the rule of law. The only institutional restructuring process occurred in the last decade concerns the unification of peacekeeping entities (DPKO) and the Office of the Rule of Law and Security Institutions (OROLSI) with the scope to provide an integrated and forward-looking approach to the UN post-conflict assistance. The Office of the Rule of Law and Security Institutions (OROLSI) brings together the following entities of the Department of Peacekeeping Operations (DPKO): the Police Division (PD), the Disarmament, Demobilization, and Reintegration Section

27 The term Great Lake African Region is likewise somewhat loose. It is used in a narrow sense for the area lying between northern Lake Tanganyika, western Lake Victoria, and lakes Kivu, Edward and Albert. This comprises Burundi, Rwanda, north-eastern Democratic Republic of Congo, Uganda and north-western Kenya and Tanzania. It is used in a wider sense to extend to all of Kenya and Tanzania, but not usually as far south as Zambia, Malawi and Mozambique nor as far north as Ethiopia, though these four countries border one of the Great Lakes. See www.wikipedia.com

(DDR), the UN Mine Action Service (UNMAS), the Security Sector Reform Unit (SSR) and the Criminal Law and Judicial Advisory Service (CLJAS).[28]

As Arbour points out the "rule of law institutions are important and the development agenda has long neglected them even under the heading of governance. In most conflict-prone areas we spend, for example, more money and political capital on elections and support for the executive than on the establishment of a competent, professional and independent judiciary. This is true from Afghanistan, the DRC and Somalia to Guatemala, Sri Lanka and the Central Asian republics: weak or corroded judicial systems are both a product of crisis and a sign of crises to come".[29] With regard to the rule of law discourse in peace and capacity-building operations and as a tool of governance, Hughes and Hunt would emphasize that "although the rule of law is now widely recognized as indispensable to effective peace operations, its delineation remains elusive. Researchers contest its substance, while those most responsible for its implementation, as for instance the United Nations promulgate only abstract notions needed to disseminate detailed decisions. At its worst, this means that competing reform activities undermine each other, making long term success less likely". The questions addressed by scholars are about the deficiencies in how the rule of law is conceived between States and non-states actors.[30] Either at conceptual or operational levels there should be space for more engagement in the configuration of peace operations offering assistance and resources to complementary international mandates.

When addressing to the Rome Statute Conference to create a permanent Court, Benjamin B. Ferencz resumed his speech with the following remarks: "human rights must prevail over human wrongs. International law must prevail over international crime".[31]

3.3 Peace and Justice: The Lasting Debate

Section outline

The lasting debate in the international political circles on peace and justice has an important function for the promotion of the broad concept of *global justice.* It is important to emphasize that such concept would shed some light on the dichotomy between peace and justice in devastated societies by war and crime. This standpoint clarifies the position taken in world politics by some nation-states, regional and inter-governmental orga-

28 For an overview of such internal governance structure in the UN Peacekeeping operations see: http://www.un.org/en/peacekeeping/orolsi.shtml

29 See L. Arbour, *supra*.

30 See B. Hughes, C. Hunt, "The Rule of Law in Peace and Capacity Building Operations: Moving beyond a Conventional State-Centred Imagination", 2009 (September) 13 *Journal of International Peacekeeping*, 3-4, at 267.

31 B. Ferencz, former Nürnberg prosecutor at Pace Peace Center, June 16, 1998, accessible at: http://www.un.org/icc/speeches/616ppc.htm

nizations on the formulation of the humanitarian policy, human rights and international law. So said, are international governance institutions able to handle peace and justice as the two faces of the same coin?

The tensions between peace and justice have long been debated. Both legal theory and policy must be refined for practical application in situations emerging from violent conflict or political repression. Some formative research addresses these dilemmas through an overview of the legal obligations and the implications of the coming into force of the International Criminal Court on the following issues: *a)* as a deterrent tool of judicial and legal nature influencing law and order at domestic level; *b)* for a holistic approach including sustainable peace and development; and *c)* throughout 'hard' case studies regarding the tensions between peace and justice in conflict and post-conflict situations. This section offers some direction on the way forward to build a future on peace and justice between accountability versus conflict stabilization, international responses based on peace sustainability expanding further the concept of *global justice*.

3.3.1 The centralization of individuals in global affairs

In the past, the topic of peace and justice would have been approached exclusively as peace *versus* justice, instead of being considered as interdependent and complementary factors. Despite the new trend in approaching the peace and justice debate there still are, however, real tensions and issues that need to be addressed. The important policy element of human security as sustainable catalyst of domestic stability in conflict and post-conflict situations waits to be implemented. International humanitarian escalations between political, executive and judicial mandates, characterized by severe humanitarian atrocities need an appropriate configuration of law enforcement mandates centralizing civilian protection and victims' rights. The question is whether such idealistic approach would be feasible in conflict situations fulfilling the expectations of *global justice,* which purpose is to centralize individual rights in global matters. Between the sensitive priorities in conflict and post-conflict situations the interactions of complementary public authorities present specific responsibilities. International governance institutions need to keep abreast of appropriate communication channels and focal points, including institutional liaisons. The question is whether such level of interaction is sufficient, or much more would be required in order to maximize the results on the ground. For many observers, the solutions need to be found in the political forces empowering complementary global regimes and such an approach is absolutely right.

3.3.2 *Accountability vs. conflict stabilization?*

In the wake of intervention in serious *intra*-state conflict spreading at larger scale, as the situations in the African Great Lakes Region, controversial debates often arise between those who advocate for 'justice' through domestic or international prosecutions, and those who prioritize 'peace' and argue that efforts to provide criminal accountability may impair or undermine the fragile post-conflict settlement. This debate became more evident regarding Uganda, where peace negotiations between the Lord's Resistance Army (LRA) and the Ugandan government took place while the International Criminal Court had indicated the senior rebel leadership responsible for the crimes. The sequence of peace and justice and the interaction between the Security Council and the judicial institution resulted to be quite controversial for several reasons.[32] This situation was referred by the Ugandan government to the Court in January 2004. The Office of the Prosecutor (OTP) opened its investigation in July 2004. Five arrest warrants had been issued against top leaders of the Lords Resistance Army (LRA): Joseph Kony, Vincent Otti (allegedly killed in 2007 on order of Kony), Okot Odhiambo, Raska Lukwiya (killed on 12 August 2006, whose arrest warrant has been withdrawn), and Dominic Ongwen. These four arrest warrants are outstanding.[33] Over the last two years reliable sources confirm that the LRA killed more than 1,250, abducted more than 2,000 and displaced close to 300,000 in the DRC alone. In addition, there have been substantial numbers of killings and abductions by the LRA in both the South of Sudan and in the Central African Republic. Thus, accountability is required, but how does accountability work between domestic, regional and international structures of governance?

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32 Uganda has twice previously been chosen for a Security Council seat, in 1966 and 1981. Some critics sought unsuccessfully to block the country's return to the prestigious position in the UNSC with a two year mandate until 2010. The US reporter Georgianne Nienaber noted that Uganda has been accused of wanton human-rights violations and resource plundering in the eastern part of the DRC. Her posting was headlined: "Uganda does not deserve seat on UN Security Council; it's time to pay attention." Nienaber's commentary cited remarks by a leader of the US-based advocacy group Friends of the Congo who described Uganda as "certainly an agent of the US wreaking havoc on the African continent, particularly in Congo." See G. Nienaber, "Uganda does not deserve seat on UN Security Council. It's time to pay attention", *The Huffington Post*, 1 October 2008, accessible at: http://www.huffingtonpost.com/georgianne-nienaber/uganda-does-not-deserve-s_b_130853.html

33 For an overview of the situation in Uganda see W. Burke-White, "Reconciling Peace and Justice: The International Criminal Court in Uganda" 2007 (July). Paper presented at the annual meeting of the The Law and Society Association, TBA, Berlin, Germany, accessible at: http://www.allacademic.com/meta/p182030_index.html See also the report of the Office of the Prosecutor, "Investigations and Prosecutions", 2009 (Weekly Numbers) published by the office in the *OTP Weekly Briefing*, issue 6, accessible at: http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Weekly+Briefings/

3.3.3 The international responses

While the maintenance of peace, justice and security in conflict and post-conflict societies has been challenged drastically since the end of the bipolar world order, old models of conflict management and military features of civilian protection duties might undermine the safeguard of human rights, if not appropriately governed. The evolution of the human security policy at domestic and global scale, the legal mechanisms to centralize individual rights, and the interaction of universal mandates fostering peace and justice in conflict and post-conflict situations, play a central role in defining objectives, setting standards and monitoring compliance of States and non-States actors. These interdependent factors of governance can be evaluated by measuring their impact on devastated communities with the use of empirical data according to each situation where international governance institutions are involved. The ideal would be to have appropriate configurations between peace operations and direct protection mechanisms of witnesses and victims of international crimes, while enforcing judicial arrest warrants of warlords at large. After all, the legislative chronology of the Security Council indicates that humanitarian violations have to be handled as threats to peace and security in accordance with the UN Charter requiring measures under Chapter VI and Chapter VII.[34] Despite the new orientations in humanitarian policy and the legal frameworks applicable in armed conflicts on violations of international humanitarian law, the international responses include on the one hand the risk of enforcement practices moved by strategic and political interests of military coalitions. On the other hand, a communitarian-oriented approach is based towards building a community of *global justice* rehabilitating societies unable or unwilling to do it themselves. The simple question between these different approaches is: *how to proceed?*

The concern is whether communitarian approaches are currently applied in the practice in the field operations. The failure of the African Mission in Sudan (AMIS) on the protection of civilians in Darfur is one of the examples of the emerging controversy of the responsibility to protect (R2P). Scholars as Barber argue that while the existence of the responsibility to protect has been widely endorsed in the Sudan, there has been relatively inadequate attention paid to its content. The treaty on the founding of the African Union stipulates that the Union has the right to intervene on humanitarian grounds

34 For an overview of the different approaches between prevention and response to mass atrocity crimes see D. Kuwali, 'Old Crimes New Paradigms: Preventing Mass Atrocity Crimes' in R. I. Rotberg (ed.), *Mass Atrocity Crimes. Preventing Future Outrages,* 2010, at 25. See S. Sewall, 'From Prevention to Response: Using Military Force to Oppose Mass Atrocities', in R. I. Rotberg (ed.), *Mass Atrocity Crimes. Preventing Future Outrages,* 2010, at 159. See also G. Evans, 'During the Crisis: The Responsibility to React', in G. Evans (ed.), *The Responsibility To Protect. Ending Mass Atrocity Crimes Once and For All*, 2008, at 105.

in a member States that 'gravely and massively violates human rights'.[35] In the context of the AMIS intervention in Darfur it is important to clarify the question of "what the responsibility to protect actually entails: for peace-support operations, for the States that send them, and most importantly, for the civilian population that expects to be protected by the soldiers sent to protect them". Because the responsibility to protect, as described by the International Commission on State Sovereignty (ICISS) and endorsed by the UN Secretary General, by the General Assembly and by the Security Council, says little as to positive obligations such as might require peace support operations to actively protect civilians, solutions are expected refining such legal framework. It is suggested by Barber, emphasizing the peacekeeping failure in Darfur, "that it is in the law of occupation that we come closest to finding a legal responsibility to protect, more than other features of international law".[36] This important standpoint found in the literature considers whether there are obligations that can be drawn from international human rights or international humanitarian law that may assist in locating a substantive content for the responsibility to protect. Some scholarship would emphasize the gaps in monitoring humanitarian interventions under the flag of the responsibility to protect in armed conflicts, including the fact that there are any legal parameters of jurisdiction in case of violations and abuses. In fact, the emerging regime of international criminal justice did not receive any place in the configuration of such mandates, neither can use such civilian protection forces, nor monitoring or indicting them in case of serious human rights breaches. Peacekeepers have been simply left out from the 'independent' judicial regime of the Rome Statute. Thus, how does the global fight against impunity works and evolves, and which are the issues on the table waiting for solutions by the decision-makers?

3.3.4 The concept of global justice

A couple of years ago, 60 years after the famous judgement of the International Military Tribunal at Nuremberg, a distinguished gathering in the same courtroom launched a conference entitled *Building a Future on Peace and Justice* addressing the causes of sensitive issues. The outcome was a political document called the *Nuremberg Declaration on Peace and Justice* which was addressed to the United Nations General Assembly in 2008 (A/62/885). The promoters believed that such document may be useful to the United Nations,

35 See article 4 (h) of the founding treaty of the African Union (2000) on the right of the AU to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity. See also A. A. Yusuf, 'The right of intervention by the AU: A paradigm shift in regional enforcement action?', *African Yearbook of International Law,* vol. 11 (2003), pp. 3-21.

36 See R. Barber, "Reflections on the Peacekeeping Failure in Darfur: Is There Any Substance to the Responsibility to Protect?" (2009) 13 *Journal of International Peacekeeping* 33, at 294. See also G. Evans, *The Responsibility to Protect. Ending Mass Atrocity Crimes Once and For All*, 2008.

its members, including those involved at the local, national and international levels in all phases of conflict transformation, including mediation, post-conflict peace-building, development, and the promotion of transitional justice and the rule of law, and thus, being able to influence the future practice of making and building "just and lasting peace". Although this is not a legal document, it contains definitions, principles and recommendations on issues of peace, justice and impunity, and making peace and dealing with the past, as well as promoting development. In this document 'peace' is understood as meaning sustainable peace. Sustainable peace goes beyond the signing of an agreement. Sustainable peace requires a long-term approach that addresses the structural causes of conflict, and promotes sustainable development, rule of law and governance, including the respect for human rights, making the recurrence of violent conflict less likely. The cessation of hostilities, restoration of public security and meeting basic needs are urgent and legitimate expectations of people who have been traumatized by armed conflict, 'Justice' in such debates is understood as meaning "accountability and fairness in the protection of rights, and the prevention and redress of wrongs". Justice must be administered by institutions and mechanisms that enjoy legitimacy, comply with the rule of law, and are consistent with international human rights standards. Moreover, justice combines elements of criminal justice, truth-seeking, reparations and institutional reform, as well as the fair distribution of, and access to, public goods, and equity within society at large.[37] The next sessions of this chapter debate the prospects of justice governance; the interaction between complementary legal and political regimes; and the preventive strategy required of mass atrocity crimes.

3.4 The Governance of Peace and Justice

Section outline

There are no doubts that the governance of peace and justice as tools of human security requires further political efforts to maximize the results of complementary global regimes involved in conflict and post-conflict situations. The rule of law and multilateralism, including the policy formulations regarding collective responsibility, global solidarity and mutual accountability require further evolution. This section explores the prospects of the governance of peace and justice considering the different views to preserve the international legal and political order. In addition to the principle of complementarity with domestic jurisdictions international criminal justice has been associated to the maintenance of peace and security and its enforcement tools. Its governance requires specific responsibilities, political determina-

37 See K. Ambos; J. Large; M. Wierda (eds.), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development The Nuremberg Declaration on Peace and Justice,* (2009). See also C. Bassiouni, D. Rottenberg, "Facing Atrocity: The Importance of Guiding Principles on Post-Conflict Justice", in *The Chicago Principles on Post-Conflict Justice*, 2008 at 9.

tions and legal frameworks defining measures of humanitarian protection in conflict and post-conflict situations. The young regime of international criminal justice can only be effective if all actors are committed to contribute to the universal goal of ending the impunity of serious crimes. The cooperation frameworks offering sustainable peace in conflict and post-conflict situations is now complemented by the regime of justice. Such regime seems to be customized by dealing with a defined category of serious humanitarian breaches, while it is nearly paralyzed about further jurisdictional progress. These doctrinal assumptions derive from a middle ground between the *pluralist* and *solidarist* (or *constitutionalist*) international relations theories and foreign policy principles of States members and non-members of both organizations (the UN and the Rome Statute institutions), which are explored in this section. Let us proceed per steps exploring the governance of justice in world politics between the maintenance of international peace and security, and the preservation of the rule of law and human rights. In other words, the diplomatic compromise resumed in the legal provisions which characterize the nature of the Rome Statute based on *soft-law* of cooperation with the UN system.

3.4.1 Governance of justice and world politics

The emerging regime of justice provides the moral basis for very different types of international responses on humanitarian grounds. At doctrinal level international 'solidarism', or 'monism' in legal theory, is a political and legal process in which sovereignty is transferred from domestic governance institutions to be held by an independent and 'supranational' jurisdiction. Legally, the 'solidarist' approach stands on the assumption that "the more closely international law approximates to national law, the more the individual has the chance to become the direct bearer of legal rights and duties".[38] International pluralism, or 'dualism' in legal theory, refers to public power held to remain at the disposal of a government authority after the enumeration or delegation of specified powers to other public authorities or multilevel jurisdictions. Such trends in world politics divided the approach of the nation-states on the Rome Statute and its provisional codification. The 'solidarist' approaches of the EU members, for instance, became visible in the establishment, assistance and support to the Rome Statute institutions, as well as towards their relation with some members of the African Union (AU), in particular the African, Caribbean and Pacific States (ACP) and some members of the Arab League.[39] Linklater and Suganami argued on defined

38 See G. Schwarzenberger and E. D. Brown, *A Manual of International Law*, 1976, at 65.

39 EU Member States support the International Criminal Law Network's annual conference on the ICC and Arab States. In 2007 this was supported by the United Kingdom, Germany and Ireland. In 2006 by the United Kingdom, Belgium and Ireland. In 2005 it was supported by Denmark, Germany and Ireland (together with other non-EU States). Further information is available at www.icln.net see also General Secretariat of the EU, Council Consilium, *The EU and the ICC*, February 2008, accessible at: http://www.consilium.europa.eu/uedocs/cmsUpload/ICC_internet08.pdf

humanitarian responsibilities for minimizing harm to the members of vulnerable societies. Subject to UN approval such 'solidarist' States can exercise a collective right of humanitarian intervention when gross violations of human rights occur. In their views the solidarists would have a *prima facie* duty to avoid complicity in human rights violations in other societies. The basic assumption of the 'solidarist' approach is that the 'pluralist' commitment to sovereignty and sovereign immunity should be replaced by the notion of personal responsibility and accountability for infringements of the laws of war. For the 'pluralists' the breaches of the laws of war should be punishable in both domestic and international courts. The assumption of this foreign policy is that the sovereignty of States is conditional on compliance with international law and human rights, and that States have responsibility as custodian of human rights everywhere.[40]

In theory, there are no doubts of the relationship between global solidarity and universality of the humanitarian policy of the 'solidarist' group. The critics to the majority of the EU members as States Parties of the Rome Statute, however, refer to the delay in implementing national legislations including their *soft* political approach taken during the Review Conference in Kampala on the peace and justice debate, and all the sensitive governance issues deriving from it, which are still waiting for pragmatic solutions. Moreover, the EU encourages the group of ACP to be part of the regime of international criminal justice and implementation of human rights through the clause settled in the cooperation agreement for development and trade relations, the EU-ACP (or so-called *Cotonou Agreement*).[41] These clauses inserted in 2005 on the occasion of the first revision of the agreement regulate the steps towards ratifying and implementing the Rome Statute and related instruments. Other novel provisions of the revised *Cotonou Agreement* include rein-

40 See A. Linklater, H. Suganami, *The English School of International Relations*, 2006. For discussions on how these principles were debated and/or ignored within different States (US, UK and France) and international institutions (Security Council) in relation to Darfur see D. R. Black, P. D. Williams, *The International Politics of Mass Atrocities: The Case of Darfur*, 2010, at 5. See also R. Jackson, *Solidarism or Pluralism? Political Ideas of the American Union and the European Union*, McGill University-Université de Montreal Research Group in International Security (REGIS), October 10, 2008, accessible at: http://www.cepsi.umontreal.ca/uploads/gersi_chronicles.file/WP28RobertJackson.pdf

41 The Cotonou Agreement entered into force in 2003 and was subsequently revised in 2005 and 2010. It innovates with obligations to ensure prosecution of the most serious crimes at the national level and through global cooperation. Additionally, article 11.6 of the Agreement includes a clear-cut provision that obliges States parties to: "(a) share experience on the adoption of legal adjustments required to allow for the ratification and implementation of the Rome Statute of the International Criminal Court and (b) fight against international crime in accordance with international law, giving due regard to the Rome Statute. The parties shall seek to take steps towards ratifying and implementing the Rome Statute and related instruments". The consolidated version of the second revision in 2010 is accessible at: http://ec.europa.eu/europeaid/where/acp/overview/cotonou-agreement/index_en.htm

forcing political dialogue and rendering the provisions on good governance, human rights, democratic principles and the rule of law, more constructive and operational.[42] The governance of justice depends on the different and controversial political positions between support and rejection, either by some permanent members of the Security Council, or by the African Union and the Arab League, including the political distance of the Asian continent. The important assumption in this study is that the democratization processes and reforms in the international system delayed for too long, and thus, the consequences deriving from such a delay deserve further debate in order to reach the political convergence of expectations required. The political convergence found at global level should be able to influence and interact with the regional and domestic realities offering autonomy and capacity-building, overcoming in some ways, the current crisis of governance systems at all levels fostering peace, justice and security.

3.4.2 Governance of justice and peace and security

Through the findings of this study there should be awareness of the main challenges arising in the governance of international criminal justice as a tool of peace and security. The absence of police and law enforcement after supranational judicial decisions of the International Criminal Court is only one example of such governance controversy. The United Nations established the first generation of special international criminal tribunals in Yugoslavia, Rwanda and Sierra Leone to prosecute those responsible for mass atrocity crimes which mandates are under completion. Judicial convictions of political and military leaders were meant to bring justice to victims and to deter others from committing such crimes in the future. These special or *ad hoc* tribunals established by the political and executive organ of the United Nations gave jurisprudential impetus to the formation of an independent International Criminal Court, as a judicial institution making individuals accountable of serious crimes outside the political realm or 'selective justice' of the Security Council, which nevertheless, remains still active in the establishment of a second generation of mixed courts or tribunals, while tasking peacekeeping with comprehensive mandates in conflict and post-conflict situations characterized by serious humanitarian violations. Such multidimensional activity on the ground by the Security Council in peace enforcement mandates excludes any assistance to the judicial decisions of the Court. In some cases, as in the DRC, the unpreparedness of troops on the ground

42 See document of the European Commission (EU-ACP), Second Revision of the *Cotonou Agreement*, Agreed Consolidated Text, 11 March 2010. Regarding the organization of the negotiations, three thematic negotiation groups were set up: i) political dimension, institutional issues and sector specific policies; ii) economic cooperation, regional integration and trade; iii) development and finance cooperation, accessible at: http://ec.europa.eu/development/icenter/repository/second_revision_cotonou_agreement_20100311.pdf

represented a serious risk aggravating serious violations of human rights, after obtaining weak and unreliable commitments during peace processes and negotiations with domestic criminal regimes.

The occurrence of public international authorities involved in investigations and prosecutions of the most responsible perpetrators of serious crimes internationally recognized is not new, as well as the shortcomings of domestic jurisdictions dealing effectively with such crimes in different legal and institutional systems of the world. The past failure of the international community to prevent, halt and punish genocides, war crimes, ethnic cleansing and crimes against humanity, currently stands for global regimes based on international cooperation, which can be seen as setting responsibilities at domestic, regional and international levels. International cooperation, including the harmonization or integration of international complementary mandates working for peace and justice in conflict and post-conflict environments, are sensitive issues waiting to be explored by theoretical and empirical research in the field of public international law. Further research is necessary, revealing the extent and the nature of the problem of dispersing international responsibilities of States and international organizations as a result of international cooperation. One of the struggles for international law is that when the responsibility for policies is shared among several actors, the responsibility of every individual actor is likely to diminish proportionately. Legal accountabilities and responsibilities are further expected in the current process of legal and political theorizations.

3.4.3 Governance of justice and human rights

According to recent judicial proceedings occurring in Dutch courts about the role of the UN peacekeeping force in Srebrenica, whose mandate was to prevent mass atrocities, the immunity of the United Nations seems to prevail.[43] In determining whether the immunity of the United Nations was in conflict with other rights under international law, the Dutch District Court addressed the standards set out in the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the Genocide Convention. The domestic court in The Netherlands concluded that its inquiry into the possible conflict between the absolute immunity of the UN and other standards of international law did not lead to an exception to the immunity, and determined that it was therefore not competent to hear the case, which could ultimately end up before the European Court of Human Rights. The exclusion of the UN to appear in national courts restricts the

43 Court of Appeal The Hague, Case Number District Court: 07-2973, *Mothers of Srebrenica et al. v. State of the Netherlands and United Nations*, Judgement of 30 March 2010. Supreme Court of The Netherlands, Final appeal judgment, LJN: BW1999; ILDC 1760 (NL 2012), 12 April 2012. For the analysis of the judgement see, R. van Alebeek, *Oxford Reports on International Law in Domestic Courts*, ILDC 1760 (NL 2012), 1 May 2012.

right of access to domestic courts. It is clear that the responsibility of the UN needs to be refined, before any changes are likely to occur in national courts on the UN immunity. In fact, as the Dutch Court of Appeals stated correctly, the UN is the international organization with the most far-reaching powers, but with the recent rulings national courts would have no jurisdiction even to hear civilian cases brought against the UN. According to the claim of the representative of the Dutch Foundation Mothers of Srebrenica, "human rights should prevail as it is the ultimate objective of human rights to provide protection against the strong powers of public authorities. If the UN is the only organization in the world that stands above the law, human rights lose their fundamental function. How credible is the UN as the foremost human rights organization if the organization itself severely disregards these fundamental rights?"[44] In this study such sensitive issue arises with regard to the UN peace operations and the role of justice, emphasizing the necessity to redefine the accountability of peacekeeping forces in the UN, while revisiting the regime of immunities which seems to be only at its initial stage and only dealt internally in the organization.

3.4.4 The rule of law and international cooperation

The nature of modern warfare is in constant transition, while conflicts are increasingly interrelated, involving non-state actors and including the deliberate targeting of civilians. This has led some observers to question the relevance, or at the least the applicability of international humanitarian law (IHL) while others would see the challenge to have those legal frameworks respected and put into practice by all actors dealing with modern warfare. Others would refer to a sort of 'new law' which undermines the binding character of legal frameworks based on cooperation. In international law, however, the responsibility to hold individuals accountable of serious crimes lies with the States as well as with the international community as a whole. If appropriate consideration is not given to the challenges of the time with appropriate reform, the concept of legal responsibilities of international governance institutions would remain volatile. Another important aspect characterizing such debates is that the rule of law would be considered as the main drive of global governance systems. This is contested by the fact that the rule of law relies on political principles when dealing with mass atrocity crimes such as fighting against the impunity of international crimes.

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44 For discussion see A. Hagedorn, "UN-immunity disregards fundamental human rights: A decision by the Court of Appeals at The Hague in the case of the Mothers of Srebrenica", *The Hague Justice Portal*, 2010, accessible at: http://www.haguejusticeportal.net/eCache/DEF/11/659.html See B.E. Brockman-Hawe, "Questioning the UN's Immunity in the Dutch Courts: Unresolved Issues in the Mothers of Srebrenica Litigation", 10 *Washington University Global Studies Law Review* 727 (2011), accessible at: http://openscholarship.wustl.edu/law_globalstudies/vol10/iss4/3 See also T. Henquet, "The Jurisdictional Immunity of International Organizations in the Netherlands and the View from Strasbourg", 10 *International Organizations Law Review* 2 (2014), at 538.

Despite cooperation is a legal obligation of States according to the regime established by the Rome Statute there are still no mechanisms to enforce it. The only formal possibility for the International Criminal Court to deal with non-cooperation issues is to refer to political organs (the Assembly of States Parties to the Rome Statute, the United Nations Security Council).

The concern addressed is how the regimes based on international cooperation currently function, according to the universal purpose of creating a global 'system' of international criminal justice. New perspectives are necessary on the question how international cooperation can be better matched by a corresponding system of international responsibility, which would facilitate compliance and accountability, as the fundamental prerequisite of a global 'system' of international criminal justice. The challenge is still to convert broad political proclamations and engagements into policy, law and practice for the creation of such a 'system'. The dominant principle of individual responsibility of States and international organizations, and the scholarship based on it, provide neither the concepts nor the perspectives for addressing shared responsibilities between States and other actors involved in humanitarian interventions in conflict and post-conflict situations. Now that the International Law Commission concluded its longstanding project to develop principles and doctrine on international responsibility of IOs,[45] without even having addressed the problem of shared responsibilities, there is a critical need to move beyond such an impasse. Until such responsibilities are not clearly set and defined, either compliance or accountability in the international legal order remain both a distant and complex ambition of the international community and its global governance institutions. After all, the lasting peace and justice debate could only be resolved embracing such responsibilities, especially on the ground in the field operations.

3.4.5 Political determinations and legal frameworks

In conclusion, it needs to be noted that the legislation of the UN political organs is very poor with regard to the Court's presence and activity in the field missions and operations, including diplomatic and political pressure to the States in question offered by the UN. The triggering mechanisms between such organizations of universal character will need further attention in the near future. Further evolution will depend on the jurisdictional

45 UN Doc. A/CN.4/L.778, *Responsibility of international organizations*, International Law Commission Sixty-third session, Geneva, 26 April–3 June and 4 July–12 August 2011. See ILC, "Draft Articles on the Responsibility of International Organisations" in *Yearbook of the International Law Commission*, 2011 vol. II, Part Two, accessible at: http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf See also J. Wouters, J. Odermatt, "Are all International Organisations created equal? Reflections on the ILC's Draft Articles on the Responsibility of International Organisations" (DARIO), *Global Governance Opinions* March 2012, accessible at: https://ghum.kuleuven.be/ggs/publications/opinions/opinions13-wouters-odermatt.pdf

progress of the Court, and hopefully on the universal ratification of the Rome Statute. The Assembly of the States Parties to the Rome Statute (ASP), as the political and legislative organ, has specific responsibilities in this regard. In theory, the principle of universality is not limited to the number of States that become parties to the Rome Statute but to the universal obligation of any State to fight against the impunity of serious crimes. As it is understood by the analysis of the Rome Statute regime, universality is definitely implemented when States execute their obligation to investigate and prosecute the most serious crimes under international law at the national level, in their national courts. Nevertheless, the obligation of domestic justice systems to fight the impunity of crimes of common concern is essential at the same degree of insisting on compliance in the political and executive bodies of the United Nations. The issue of cooperation of binding character deserves to be put on the table in political fora and finally resolved in order to maximize the results in the field operations.

The policy approach of some powerful States divided very soon the positions over the authority of the International Criminal Court, particularly on the notion of the rule of international law, its preservation, implementation and institutions. The rejection of the Rome Statute by some relevant members of the United Nations would be in their view a reason of their strong commitment to the rule of law and *not* an opposition to it. Political standpoints would refer to the discourse over the rule of international law, including constitutional and legal matters at domestic level. The success of the Rome Statute institutions on the other hand, is directly related to the will of the States and intergovernmental organizations to support it, either at bilateral or multilateral levels, with the unique role of the Assembly of States Parties (ASP) ensuring adequate assistance to the independent judicial institution on one side, and to the States on the other in order to harmonize their legislations to the Rome Statute which activity, of course, also faces quite a few challenges. The institutional design of the Rome Statute still needs to determine the evolution of the emerging regime of international criminal justice. Such 'contours' are extremely important for the preservation of the rule of international and domestic law between compliance and accountability.

With regard to the enforcement dilemma and the 'observer' status of the Rome Statute by the US, some political analysts have noted that the danger for the Court is to compromise itself with a government that not only refuses the role of international law, but that has also been accused of aggression in Iraq as a situation outside of the Court's jurisdiction. The indirect requests of political engagement addressed to the US to assist in apprehending criminal suspects have been lately discussed. The Obama administration has declared its interest in working more closely with the Court, not with the intent of becoming a party to the Rome Statute, but executing arrest warrants. In any case, "an alliance between the US and the Court that fails to demand the US ratification of the Rome Statute is a perfect example of the

risk for the Court accommodating itself to political power, and risks providing justification for the direct use of US military force under the guise of capturing war criminals".[46] Such policy trends will need to be seriously and effectively dealt by the Assembly of States Parties to the Rome Statute in the immediate, middle and long terms in order to avoid opportunistic and unilateral advantages of whatever States, jeopardizing the independence and multilateral character of the International Criminal Court.

3.5 An integrated approach of governance

Section outline

This last section underscores the necessity to find an integrated model of democratic governance between complementary global regimes fostering peace, justice and security. It suggests interactions challenging domestic realities affected by war and crime, and also for the preservation of the rule of law at regional and international levels. It reflects on the principles, the requirements, and the search of governance models universally applicable. It questions the status of the rule of law as a principle of governance and the model of governance proposed fostering peace and justice. There is awareness that while the 20th century brought the development of international norms and agreements, the 21st century opened with an abundance of international law (and treaty-based organizations) but a problem of compliance by the States became more evident. The compliance in the areas of arms control, justice and human rights has become a major challenge of the new millennium for international law and its institutions. The States do not always live up to the standards they set for themselves in international treaties. The explosion of international provisions has not been followed by a complementary development of international institutions able to monitor States' efforts to implement these norms and to facilitate their compliance, especially towards individual rights. On the other hand, to illustrate the prominent ways in which norms, law enforcement, and national interests inseparably interact in world politics, it suffice to think about the US political rejection

46 See S. Al-Bulushi, A. Branch, *Review Conference of the Rome Statute. In Search of Justice: The ICC and Power Politics*, 23 June 2010, Egypt, accessible in Arabic at: www.almasryalyoum.com See also B. Willson, 'US Aggression Against Iraq: Historical and Political Context', 1st January 2000, accessible at: http://www.brianwillson.com/u-s-aggression-against-iraq-historical-and-political-context/ For some controversial legal basis see W. H. Taft, T. F. Buchwald, "Preemption, Iraq, and International Law", 97 *The American Journal of International Law* 3, (Jul., 2003), at 557, accessible at: http://www.jstor.org/stable/3109840 See also L. Everest, "Oil Power and Empire: Iraq and the US Global Agenda", *Common Courage Press,* 2004, accessible at: http://www.worldcantwait.net/materials/OPE-CHAPTER%20ONE.pdf R. C. Kramer, R. J. Michalowski, "War, Aggression and State Crime. A Criminological Analysis of the Invasion and Occupation of Iraq", 45 *The British Journal of Criminology* (2005), at 446, accessible at: http://homepages.wmich.edu/~kramerr/BJC.pdf

of the International Criminal Court, including the controversial position of other permanent members of the Security Council.[47] It is clear that for an integrated approach of the governance of peace and justice it is fundamental the political convergence between the actors empowering complementary global regimes. In this section it is emphasized that human security requires systemic reforms. This section debates an integrated approach of governance to reach the domestic realities with preventive strategies of war and crime.

New responsibilities are common to 'sister' organizations such as the UN and the Rome Statute institutions. In order to influence the domestic sphere in situations of war and crime their interaction is important and needs attention in the years to come. Effective strategies of cooperation between universal mandates are necessary to create the precedents of deterrence destabilizing criminal regimes, while assisting national courts and domestic systems for the sake of fundamental rights (victims' rights). Global institutions reforms are extremely important for the implementation of such strategies preserving the rule of law at micro and macro levels. The interaction of universal institutions complementing domestic realities recall the necessity of implementing new rules regulating mandates involved in complex international affairs, while policy makers need to promote human security measures, incorporating justice in all stages of such interventions with programs and projects focusing on institutional capacity building.

3.5.1 The search of models of governance

Today, universal organizations have an important monitoring function for the sake of the rule of law at national and international levels complementing domestic realities. Global institutions came about to preserve the international order with global norms and values, mandated to preserve compliance by States and non-States actors during and after civil wars. The prohibition of the use of force contrary to the common interest of the international community through the remedy of accountability should characterize the progress of collective security. *Making War and Building Peace* for instance, examines the peacekeeping missions before and after civil wars, among other important issues. Doyle's work compares peace processes that received the UN involvement, to those that did not. Considering the failure of humanitarian interventions, Doyle and Sambanis argue that in order to optimize the results on the ground, each UN mission must be designed to fit the conflict, with the right authority and adequate resources being able to initiate projects of reconstruction, while serving other actors involved in the

47 See for the debate E. Luck, M. Doyle (eds), *International Law and Organization. Closing the Compliance Gap*, (2004). See J. R. Katalikawe, H. M. Onoria, B. G. Wairama, 'Crises and Conflict in the African Great Lakes Region: The Problem of Non-Compliance with Humanitarian Law', in *International Law and Organization: Closing The Compliance Gap*, (2004), 121 at 152.

field.[48] Between such relevant actors the International Criminal Court should receive an integrated position in the arrays of peace and security. However, for such an integrated approach of governance to take place, political convergence and institutional reforms are required. According to the existing binding treaties and in respect with the pillars of the modern international legal order (international human rights law, international humanitarian law, international criminal law and international refugee law) finding remedies of governance of today's international society must reflect the institutions of the twenty-first century, which need more than further legislative implementation at domestic, regional and international levels. The search of political convergence making systemic reforms is the right priority.

3.5.2 The reformist approach

The reform of global institutions and a new approach of mandate configurations on the ground are central for the governance of peace, justice and security at national, regional and international levels. According to the UN institutional sources, laying down strong legal foundations for transparent, accountable and efficient democratic institutions is crucial for the success of the establishment of lasting and sustainable peace. With the purpose to challenge policy making not yet sufficiently focusing on such interactions, an outline of the institutional contours preserving the rule of law at national and international levels for peace, justice and security is fundamental. In order to identify areas of interaction in respect of the delimitation of competences and complementary intervention between different mandates, the debate needs to engage on a prevention strategy of mass atrocity crimes including the reconstruction of disintegrated nation-states and institution building, monitoring, advising, planning, and assisting domestic realities in both conflict and post-conflict situations.

First of all, appropriate structural and normative adjustments are the important prerequisites for the creation of a system of international criminal justice. The adjustments and the reforms of modern institutions are necessary in order to optimize the results on the ground. In practice their interaction depends on: *a)* the determination to define appropriate political strategies and objectives to maximize the results in conflict and post-conflict situations towards accountability, integrity, effectiveness and transparency; *b)* the creation of a legal pillar of global institutional interactions and their responsibilities, complementing the compliance of international humanitarian law and human rights, thus contributing to freedom, security and justice and regulating further the international legal order preserving the rule of law as the basic prerequisite of democratic governance, towards the accountability of all actors involved in accordance with basic principles, such as legality

48 See M. Doyle, N. Sambanis, 'War-Making, Peacebuilding, and the United Nations', in *Making War and Building Peace: United Nations Peace Operations,* (2006), at 23.

and equality in the eyes of the law; *c)* further legislation at national, regional and international levels implementing democratic governance of justice and human rights *d)* and by making international justice locally relevant towards the awareness of victims' rights in domestic judicial systems.

The causes of the commission of serious crime in Africa are argued to be more of a capacity-building concern rather than a law enforcement issue during difficult political transitions. However, weak institutional capacity for effective policing, coupled with scarce basic information of criminal justice systems such as prosecutorial, courts and detention data, hamper efforts to make appropriate diagnostic solutions. The clear indication is a lack of efficiency and effectiveness of their criminal justice system including the main security sectors. Since 2004, the World Bank emphasized the need to focus on the security of developing countries. Security was defined as a public good that was conditional for development. The main concern is indeed State repression and ineffective security and justice systems. Development in Africa thus, requires a secure environment summarized by the so-called 'security first' or 'security and development' approach. Human security requires, first and foremost, an appropriate functioning of the State. Some current projects aim to encourage greater focus on State responsibility and capacity building to provide security. Such projects focus on the efficacy of the criminal justice system in these countries. This means offering the capacity building to deal with the nature of mass atrocity crimes with army, police and judiciary including the safeguard of victims and witnesses. In doing so, the implementation of such projects offers respect for human rights and the rule of law as key requirements for security and development. In order to build confidence among the public and the political leadership in countries where respect for human rights and the rule of law have been largely absent, the benefits of these actions have to be demonstrated from an empirical perspective on a case by case basis. The countries selected by the relevant global actors should receive sufficient support from electoral processes to domestic judicial systems preserving law and order.[49]

3.5.3 The principles

The rule of law as a principle of governance of complementary mandates needs attention. The interaction between the UN and the Rome institutions is extremely relevant and it is without any doubt a reflection of finding remedies preserving further the rule of law. The concept of the rule of law found in the UN reports has been defined as a principle of governance in which all persons, institutions and entities, public and private, includ-

49 For a good example of such assistance provided to Sub-Saharan countries and further implementation, see the project of the *African Human Security Initiative* (AHSI) 2 *Country Assessment on Crime and Criminal Justice,* 2001, accessible at: http://www.africanreview.org/docs/background/masterquest.pdf

ing the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[50] The rule of law as a principle of governance represents the tool for measuring democracy.[51] In order to approach the debate of global interactions the theory of the rule of law and its necessary re-conceptualisation in a global environment, is fundamental. In relation to global law and its application in new and existing institutions of global governance, Zifcak points out primarily that "the values that should underlie the rule of law globally are legality, equality, legitimacy, accountability and a commitment to fundamental human rights". The impact of globalization upon the rule of law is a fundamental value within liberal democratic sovereign States. Not many scholars have focused on studies to relate globalization exclusively to law.[52] The rule of law in the globalization process is important not only to influence domestic realities but also to regulate interactions between global mandates with regard to security, law enforcement and crime control in conflict and post-conflict societies. In 2006, the UN General Assembly adopted a resolution on "the rule of law at the international and national levels". The resolution noted that many organs, departments, bodies, offices, funds and programmes within the UN system are currently devoted to the promotion of the rule of law at international and national levels. It requested the Secretary-General to prepare an inventory of all the activities, as well as a report on how to strengthen and coordinate them".[53] As anticipated earlier "although the rule of law is now widely recognised as indispensable to effective peace operations, its delineation remains elusive". Researchers contest its substance while those most responsible for its implementation (*e. g.* the United Nations) promulgate only abstract notions needed to inform detailed

50 See UN doc. S/2004/616, Report of the Secretary-General on "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies". In this report the Secretary-General invited all States Members of the United Nations to move towards the ratification of the Rome Statute at the earliest possible opportunity. See S/2004/616 para. XIII. See also UN doc. A/RES/66/102 (2012) and A/66/749 (2012). For an extensive assessment of the future of accountability and the struggle of defining international crimes, see S. R. Ratner, J. S. Abrams, and J. L. Bischoff, *Accountability for Human Rights Atrocities in International Law: beyond the Nuremberg Legacy*, 2009.

51 See G. L. Munck and J. Verkuilen, 'Conceptualizing and Measuring Democracy: Evaluating Alternative Indices', February 2002, *Comparative Political Studies* Vol. 35, Nº 1, 5 at 34.

52 Regarding security and human rights and the new ways of thinking about global law and its application in new and existing institutions of global governance see, S. Zifcak, 'Globalizing The Rule of Law: Rethinking Values and Reforming Institutions', *Globalization and the Rule of Law*, (2006), 32 at 62.

53 See UN doc. A/RES/61/39, 18 December 2006.

decisions".[54] Some views underscore the current limits of the rule of law as a principle of governance. A report of the UN Secretary-General A/66/749 in preparation of the High-level Meeting on the Rule of Law was submitted to the General Assembly in March 2012, as requested in the Resolution A/RES/66/102. In order to galvanize collective efforts to strengthen the rule of law at the national and international levels, the Secretary-General proposed in his report that the General Assembly adopt a programme of action for the rule of law, agree to a process to develop clear rule of law goals and adopt other key mechanisms to enhance dialogue on the rule of law. The Secretary-General also encouraged Member States to take the occasion of the High-level Meeting to make individual pledges related to the rule of law.[55]

3.5.4 The requirements

The current debate on the impact of the Rome Statute system on victims and affected communities, the issues of positive *complementarity* and cooperation, the impact of international justice on peace processes and peace building, are all related to interaction strategies and to the rule of law at national, regional and international levels centralizing the rights of the victims.[56] Attention is necessary on finding remedies of interactions between the UN and the Court's mandate in peace building operations and the necessary reforms thereof in order to have in place prevention strategies of mass atrocity crimes. This is an important requirement for the creation of a global justice system. The prerequisite of such a system interacting with the UN refers

54 For an overview of the current debate see, B. Hughes, C. Hunt, 'The Rule of Law in Peace and Capacity Building Operations: Moving beyond a Conventional State-Centred Imagination', September 2009 *Journal of International Peacekeeping*, Volume 13, Numbers 3-4, pp. 267-293 (27).

55 See UN doc. A/66/749, 16 March 2012, *Delivering justice: programme of action to strengthen the rule of law at the national and international levels: Report of the Secretary-General*, accessible at: http://www.unrol.org/files/SGreport%20eng%20A_66_749.pdf See also UN doc. A/RES/67/1, 30 November 2012, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*.

56 For an extensive overview of the debate on reparations for victims see C. Ferstman, M. Goetz, A. Stephens, *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in place and Systems in the Making*, (2009). On the current debate over complementarity and the practice of the Court during the first year of its activity, see W. A. Schabas, C. Sthan and M. M. El Zeidy, 'The International Criminal Court and Complementarity: Five Years On', 2008 *Criminal Law Forum,* at 3, accessible at: http://www.springerlink.com/content/n86h134236147107/ For other contribution see also H. Takemura, *A Critical Analysis of Positive Complementarity,* accessible at: http://www.defensesociale.org/xvcongreso/pdf/cfp/16)_A_critical_analysis_of_positive_complementarity_Takemura.pdf For an overview of the discussions on the key strategic and policy issues facing the Office of the Prosecutor see a description of the first three years of the OTP's work; (Three Year Report June 2006); as well as to the strategy for the coming years (Prosecutorial Strategy September 2006) and the Interest of Justice paper. See Report on Prosecutorial Strategy (2006, 2007, 2008, 2009, 2010, 2011), accessible at: http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/

to solving the legislative lacuna between the responsibility to protect, peace operations and the empowerment of the Court's authority in law enforcement.

In recent years, with regard to democratization processes of global governance, a number of the resolutions of the United Nations General Assembly and its Economic and Social Council have called upon both the member States and the UN itself to gather information on governance innovations that hold promise for overcoming the challenges of exclusion, and that contribute positively to improve public governance systems and procedures. Such remedies should not only become transparent, but should foster and sustain accountability and, most importantly, participation. In response, several divisions, departments and sections of the UN institutions have launched several initiatives to support such participatory governance. The same trend of participatory governance should follow the activity of the Assembly of the States Parties of the Rome Statute which needs to be institutionally engaged for the assistance required to the States implementing legislation at national level, providing support for governmental processes and institutional capacity-building, comparative policy research and analysis, information sharing, training programmes, including advisory services. The legislative activity of the Assembly of States Parties including the yearly resolutions of the UN General Assembly on the Rome Statute system of institutions should support such implementation profiting the domestic harmonization of legislations according to the Rome Statute provisions. Such participatory governance need to include support also for non-State Parties, civil society organizations, research institutions and academics.

3.5.5 The model of governance proposed

Recent general reports on peace operations conclude how failed States can be helped to pave the road to peace after violent conflicts avoiding the risks of going back to the regime of war which characterize international crimes and mass atrocity scenarios.[57] New models are proposed to governments which are responsible of reviewing their policy work. At international level, as extensively clarified by Voorhoeve in his report *From War to the Rule of Law*, the role of the UN and the ICC in the peace building operations needs a systematic 'case by case' approach considering the following tasks: ending violence, emergency assistance, disarmament, economic reconstruction, transnational justice and reconciliation. The UN should ensure that the Court's activity is integrated into the strategic and operational planning of peace operations (peace-building). In his pragmatic book Voorhoeve under-

57 In his report "In Larger Freedom" Secretary General Kofi Annan prefaced his proposal for the creation of a United Nations Peacebuilding Commission with the alarming estimate that "roughly half of all countries emerging from civil war lapse back into violence within five years", Kofi Annan, *In Larger Freedom,* UN Doc. 59/2005.

lines that "in order to succeed, each task is often dependent on the effective execution of the others". International organizations are called upon to specific responsibilities, consolidating complementary regimes with a result-oriented approach in all stages of peace operations.

With regard to the dilemma of peace and justice in conflict societies, Voorhoeve makes clear that "it is particularly bitter to the population if war criminals are given amnesty as part of a cease-fire agreement or peace deal. This is one of the harshest examples of the trade-off between peace and justice. Distant theoreticians believe that peace and justice are basically the same. Making such compromises is one of the hardest tasks of the diplomatic mediators, political leaders and peacemakers, which often get them into trouble afterwards, once the situation has stabilised".[58] Peace and justice operations have to meet in the middle somewhere in order to maximize the results on the ground. Regarding the peacekeeping operations in Darfur, Barber's legal assumption is that "because the responsibility to protect[59] says little as to positive obligations, such as might require peace support operations to actively protect, it is important to assess whether there are obligations that can be drawn from international human rights or international humanitarian law that may assist in locating a substantive content for the responsibility to protect.[60] Considering the research findings on the failure of the African Mission in Sudan (AMIS) to provide protection to civilians in Darfur, and of the emerging doctrine of responsibility to protect, Barbers's argument is that "while the existence of the responsibility to protect has been widely endorsed, there has been limited attention paid to its content".[61]

The success of global institutions involved in peace, justice and security will depend on a number of critical factors. Among them there is the need to ensure a common basis in international norms and standards and to mobilize the necessary resources for a sustainable investment in justice. As underlined by Ryngaert "the casual link between international criminal justice and a durable peace, political reconciliation, and the entrenchment of the rule of law has not yet been conclusively proven".[62] In order to have

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58 See J. Voorhoeve, 'From War to the Rule of Law. Peace Building after Violent Conflicts', 2007, WRR, *Dutch Scientific Council for Government Policy*, accessible at: http://www.wrr.nl/content.jsp?objectid=4143

59 As described by the International Commission on State Sovereignty (ICISS) and endorsed by the UN Secretary General, the General Assembly and the Security Council.

60 For peace-support operations, for the States that send them, and most importantly, for the civilian population that expects to be protected by the soldiers sent to protect them.

61 See R. Barber, Reflections on the Peacekeeping Failure in Darfur: Is There Any Substance to the "Responsibility to Protect"? September 2009 *Journal of International Peacekeeping*, Volume 13, Numbers 3-4, pp. 294-326 (33).

62 For an exhaustive overview of the case studies contributing to the rule of law and structural peace, towards the creation of a global criminal justice system, including models of post-conflict and restorative justice since the work of the international military tribunals, see C. Ryngaert, *The Effectiveness of International Criminal Justice*, Introduction, (2009), at vii-xvii.

a reliable evaluation of the effectiveness of international criminal justice in various post-conflict situations, empirical research by social scientists is necessary. In the context of sequencing peace and justice, however, it is well proved that sacrificing justice in the hope of securing peace is often projected as a more realistic option to end conflict and bringing about stability than holding perpetrators to account. Such option does not work, because crime would be committed over again, and stability further compromised. International law and humanitarian policy should evolve to the point where both peace and justice should be the objectives of negotiations aimed at ending a conflict where the most serious crimes under international law have been committed. At the very least, peace agreements should not foreclose the possibility of justice at any stage of the negotiations.[63] Arbour's suggestion that "we need to be more strategic about the convergence of justice with the resolution of armed conflicts" is absolutely right. This cannot be done by either peace or justice trumping the other, she clarifies, "as in effect it would through sequencing one before the other, but rather by seeking in every case an outcome that maximises both. This in turn requires compromise both sides have to give".[64] The second part of this work offers an in-depth analysis of complementary global institutions and the politics of justice. Particularly, between the responsibility to protect civilians and the fight against the impunity of international crimes, which should progress towards the implementation of human security measures advocated in this study.

3.6 Concluding remarks

It is now time to summarize and conclude the first part of this study dealing with the dilemma of human security and the quest of complementary global regimes fostering it. It can be concluded that human security requires an integrated approach of governance of international regimes of complementary character dealing with international criminal justice and peace enforcement, civilian protection duties and the responsibility to protect civilians, and the rule of international law and comlementarity with domestic jurisdictions. War and crime are frequently manifesting in modern societies. The danger is constantly what history defines as a repetition of the spiral of war, if no action will influence domestic and international criminal regimes. There is no chance of achieving peace without justice. After Rwanda we are still witnessing to genocide, alleged crimes against humanity, crimes of war

63 See for a very useful overview of fact-findings, informing the debate on *justice v. peace* specifically over accountability and peace, Human Rights Watch, *Selling Justice Short. Why Accountability Matters for Peace,* Report July 2009, accessible at: www.hrw.org

64 See L. Arbour, D*octrines Derailed?: Internationalism's Uncertain Future,* Global Briefing 2013 opening speech from the International Crisis Group's President & CEO Louise Arbour, 28 Oct 2013, accessible at: http://www.crisisgroup.org/en/publication-type/speeches/2013/arbour-doctrines-derailed-internationalism-s-uncertain-future.aspx

and extreme violence against civilians during difficult political transitions. Extreme tyranny and dysfunction of power bring both civil society and institutions to refer situations where the dignity of life of the human being seems to be forgotten. The international community is deeply concerned by the chaos characterizing modern societies, this considering the large regional *inter*-state conflicts which represent a grave threat to peace and security. Human rights offences are presently taking place in the Middle East, Africa, South America,[65] Asia, and even in some parts of Europe, with the Security Council politicizing intervention with resolutions creating merely some *ad hoc* tribunals under its own regime of selective justice which started decades ago.

At the beginning of the 21st century some critical developments took place and suggested that the world was getting ready to make individuals accountable for violations of human rights. Ethnic and religious micro-conflicts, aggression between nations, crises of domestic governance systems, constitutional disregarding of regional and global organizations, new threats to peace and security, and severe violation of international humanitarian law, are some of the fundamental causes and effects of international crimes. Providing *retributive* and *restorative* justice after violent conflicts has received more attention by the international community. Since 1945 there have been some 250 conflicts in almost every region of the world which have caused, at the low end, an estimated 70 million casualties, and at the high end, 170 million human lives. Yet, only a few of those responsible for such atrocities have been prosecuted. Most of the perpetrators have benefited from impunity, in part due to the absence of post-conflict justice mechanisms.[66] On the top of strengthening accountability it is absolutely necessary to implement the emerging norms and practices associated with the protection of individuals in situations of genocide, crimes against humanity, and war crimes; including the international criminal prosecution of such crimes; and the provisions of humanitarian interventions under the flag of the responsibility to protect. Such an approach would help to understand the interactions and trade-offs associated with these various international responses and the conditions under which one or more of the responses may be used by the international community. In this part of this study the protection, relocation and rehabilitation of civilians is considered as a shared responsibility between the two regimes, UN and ICC, during armed conflicts and in the post-conflict stages.

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65 See Human Rights Watch, *Child Soldier Global Report 2010*, Bolivia, Colombia, Ecuador, Chile, Paraguay, Peru, accessible at: http://hrw.org/doc?t=south_america&document_limit=300,20

66 For an extensive overview of the rise of international criminal law principles see, C. Bassiouni, "Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights" in *Post-Conflict Justice,* (2002), at 3. For some reports on Armed Conflicts and Conflict Management see www.sipri.org. See also T. B. Seybolt, "Controversies about Humanitarian Military Intervention" *Humanitarian Military Intervention: The Conditions for Success and Failure*, (2007), at 294.

The universal principles regulating the UN and the ICC are respectively expressed in the UN Charter and in the Rome Statute. These principles represent the moral values for the promotion of international criminal justice and the foundations of public international law. They are applicable either for member States or for international governance institutions. This assumption refers to the interaction between complementary global regimes and their shared responsibilities when dealing with the accountability of States and individuals. Such interaction permits to evaluate the evolution of governance in peace and justice issues. The rule of international law and the human security policy are the tools to determine a global constitutional strategy of the world community. New legal techniques are necessary for international lawyers in the innovative field of public international law enhancing also the accountability of governance. The question is whether such legal approaches would regulate the interactions of complementary public mandates and their shared responsibilities in the current state of affairs of international relations. The argument is based on the urgent priority to keep alive the constitutional struggle of the international community for international criminal justice, while national implementation of legislations would progress at domestic level.

The fight against serious crimes of common concern of the international community is an important aspect preserving the human security doctrine. It requires strategies of prevention, retribution and restoration strengthening the international legal and political order dealing with conflict and post-conflict societies. This part discussed the importance of complementary global regimes fostering peace and justice for the sake of human security at domestic, regional and global scale. In order to verify if there is a preventive strategy in place between the maintenance of peace and security and the emerging regime of international criminal justice, normative, political and institutional mechanisms applied at domestic, regional and at international level, either for humanitarian protection or collective security, received reflections.[67] This part offered some legal and political considerations in respect to the responsibility to protect civilians promoted by the United Nations. It recalled the discrepancies characterizing the humanitarian intervention regime in conflict scenarios without following and enforcing

67 For an overview of the debate to enforce international criminal law by the use of universal jurisdiction in national courts, see C. K. Hall, "Universal Jurisdiction: Developing and Implementing an Effective Global Strategy" in W. Kaleck, M. Ratner, T. Singelnstein, (eds.), *International Prosecution of Human Rights Crimes*, 2007, at 85.

the judicial outcomes of the International Criminal Court.[68] Obviously, this analysis focuses on the dichotomy of the administration of justice of *last resort* of the Court on one side, and the conflict management, including humanitarian intervention and peace operations of the United Nations, on the other. It advocates the necessity of an effective preventive strategy, deepening the determination of States to put an end to the impunity regime of international crimes and human rights violations. Such a strategy would reconcile the fight against international crimes for peace, justice and deterrence in conflict and post-conflict societies. The target is to prove in the end that this very basic theory to be sustained in both policy and law making processes, recalls the interdependence between the administration of conflicts, warfare, peacekeeping and post-conflict justice.[69]

The current status of the Court's jurisdiction; its lack of law enforcement resources; the current interaction with the UN; and the weak cooperation pillar established with the States Parties and non-parties to the Rome Statute are further characterized by the following concerns: are complementary global regimes focusing on the implementation of a preventive strategy of mass atrocity crimes in place? Is the regime of the Rome Statute sufficient and self-reliant in the application of human security measures, such as relocation, and rehabilitation, while broadening victims' protection in situations of mass atrocity crimes? Besides, observing the political standpoints and the legal obligations of the African States in accordance with the Rome Statute, is there space for a preventive strategy of mass atrocity crimes? The African Union requires a clear and well defined working relationship between the Security Council and the Court.[70] From a legal perspective, the AU decisions against the Court with regard to the Bashir case in the Sudan, and the Kenyan situation granted under Article 15 of the Rome Statute, point out issues such as: *a)* the ability of the Security Council to refer matters to the ICC under Article 13 of the Rome Statute; *b)* the Security Council's exclusive deferral powers under Article 16; *c)* the role of regional bodies such as

68 "Humanitarian intervention," defined simply, is military action taken to prevent or terminate violations of human rights that is directed at and is carried without the consent of a sovereign government. In the last decade this manifested in authorizing military intervention in the affairs of sovereign States for "humanitarian reasons." For an analysis of the controversiality of such intervention, see L. S. Sunga, "The Role of Humanitarian Intervention in International Peace and Security: Guarantee or Threat?" in H. Köchler (ed.), *The Use of Force in International Relations,* 2006, 41, at 83. See also G. Evans, *Rethinking Collective Action*, 2004 CASR, edited excerpts, accessible at: http://www.casr.ca/ft-evans1.htm

69 See for an extensive overview, C. Bassiouni, *Post-Conflict Justice, International and Comparative Criminal Law Series* (2002), at 286.

70 See D. Akande, M. Du Plessis, C. Chernor Jalloh, Position Paper, *An African Expert Study on the AU concerns about Article 16 of the Rome Statute of the ICC*, Institute for Security Studies, 2010.

the AU with respect to ICC decisions on prosecutions and investigations; *d)* the position of immunities for individuals from non-ICC member States; *e)* the relationship between Articles 27 and 98, which respectively place a requirement on States to arrest individuals and a requirement to observe other international obligations, including international customary law arising from immunities.[71]

This part reflected the controversial debate of authority in humanitarian intervention, the maintenance of peace and security by the Security Council, and the possible role of international criminal justice, which seems to be considered as a deterrent tool without receiving a *road map* of governance between peace, justice and applicable measures of human security on the ground in the field operations. The analysis of complementary global regimes indicates the lack of progress about the theory of checks and balances in the international legal order. The controversial debate between the choice of peace processes and criminal proceedings needs to be re-opened. Article 16 of the Rome Statute immediately follows several provisions (Articles 13-15) establishing how situations can be referred to the ICC for investigation and prosecution. Entitled, "Deferral of investigation or prosecution," Article 16 reads, "No investigation or prosecution can be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions". In order to provide reliable answers, institutional, legal and political settings deserve analysis, including the part of the Rome Statute linked to the authority of the Security Council and to the Charter of the United Nations on peace and security maintenance. Strategically, and hopefully in the short term, the UN and the ICC need the African Union on their side in order to have a fundamental contribution on a prevention strategy and early warnings of mass atrocity crimes. Testing the political convergence required by the African continent would open the door to further regional support, and hopefully, also coming from other intergovernmental organizations, such as the League of Arab States. This remains the expression of the genuine wish of advocacy for these groups of States to protect their own citizens in their own territories. Hopefully their political reality would not turn out their position in the opposite direction of human security.

71 See D. Akande, "The African Union takes on the ICC Again: Are African States Really Turning from the ICC?" Blog of the *European Journal of International Law*, 2011, accessible at: http://www.ejiltalk.org/the-african-union-takes-on-the-icc-again/

The second part of this study deals with the challenges, obstacles and concerns in the evolution of democratic governance of complementary global regimes fostering peace, justice and security universally, and the political convergence required between different legal systems and traditions injured by the disintegration of nation-states. It examines the challenges, the structure and the political convergence required in the governance of complementary global regimes, including the global responsibilities preventing and responding and also rebuilding situations affected by mass atrocity crimes. These global responsibilities are considered as important opportunities to further progress and neutralize any impasse in such governance. The definition of the complementary character of global institutions for the sake of human security is without any doubt an important opportunity. The governance systems centralizing the rights of individuals towards their institutional structures, operational mandates, judicial proceedings and rehabilitation programs will require further attention in the years to come. The next part provides the views about: *a)* the place that the emerging regime of international criminal justice should receive in the arrays of peace and security, and *b)* the meaning of complementary regimes governing peace, justice and security at global scale. The evolution of an institutional architecture dealing with international threats and crimes and the possible extension of universal jurisdiction require political convergence of expectations, policy definitions and complementary policy requirements. Before exploring the current practice applied on the ground in the peace operations, the second part of this study offers an overview of the frameworks involved in peace enforcement, including the *protective*, *retributive* and *restorative* aspects of justice based on international cooperation. It emphasizes the challenges to preserve further the rule of law and human rights as important prerequisites of democratic global governance of complementary global regimes involved in conflict and post-conflict situations.