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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5 The Governance Structure of Complementary Global Regimes and their Competence

Preliminary remarks

As reported in the previous chapters, at the end of the six-week diplomatic conference held in Rome in 1998, 120 countries voted in favour of the Rome Statute. The political support and the development of the treaty-law meant the establishment of new public institutions committed to end the impunity of the gravest crimes known to humanity and bring justice to the victims. The Rome Statute institutions are: the International Criminal Court with exclusively a judicial mandate, the Assembly of States Parties which is the management oversight and legislative body of the Court, and the Trust Fund for Victims implementing Court-ordered reparations and provide physical and psychosocial rehabilitation or material support to victims of crimes within the jurisdiction of the Court. The US joined China, Libya, Iraq, Israel, Qatar, and Yemen as the only seven countries voting in opposition to the treaty, while twenty-one countries abstained. When looking at: *a)* the rejection of the Rome Statute by powerful States; *b)* the political impasse at the regional level as for instance in the African Union; and *c)* the difficulties of complementarity at international level, we notice that cooperation is very difficult to realize. In order to implement a global architecture fostering peace, justice and security able to influence *'l'état de droit'* and the institutional capacity-building in domestic realities, competence allocation, delimitation of competence, institutional reform, mutual and complementing support between such international institutions, are fundamental preconditions of democratic governance involved in the prevention of mass atrocities, including the importance of their working methods in case of international interventions and judicial referrals in situations of war and crime.[1]

The first section of this chapter focuses on the institutional contours characterizing the emerging regime of international criminal justice responsible of a systemic change promoting the links between human security and justice (Assembly of States Parties, Trust Fund for Victims and the Court). In order to build a model of international criminal justice it is important to start with strong fundaments at institutional, administrative and legislative levels complementing an independent international judiciary. Such institu-

1 See F. Bensouda, Prosecutor of the International Criminal Court, *Statement to the United Nations Security Council on the Subject of "Working Methods of the Security Council"*, New York, United States, Thursday, 23 October 2014.

tional contours dealing with human rights and justice represent the indicator of public authority and the resources allocated in these fields of global governance. In the previous chapter it has been concluded that balancing powers in the international legal order will require the implementation of new fields of law and further political consensus enforcing the Rome Statute regime. For the political promotion of the Assembly of States Parties (ASP) the representation of such institution in regional and global organizations is recommended. In the last years the ASP adopted resolutions on several issues, including the Review Conference of the Rome Statute, the establishment of an independent oversight mechanism, the possible establishment of a liaison office at the African Union Headquarters, the permanent premises of the Court in The Hague, and the programme budget useful for its strategic plan for the next years. During the first Review Conference in Kampala the Assembly adopted resolutions on complementarity; cooperation; aggression; independent oversight mechanism; permanent premises; victims and reparations; amendments to the Rules of Procedure and Evidence; the "omnibus" resolution; and the Court's budget. In the long term the legislative activity of the ASP could have an impact on the maintenance of peace, justice, and security at global level. This section also offers an overview of the Trust Fund for Victims supporting the necessity of a comprehensive strategy for victims' rights, implementing the tools of *restorative* justice.

The second section approaches the legal tools regulating the relationship between the Court and the United Nations, the procedural matters and the agreement provisions, including the inter-institutional liaison between the Court and the UN. It emphasizes the inevitability of further implementation of such legal and institutional tools creating the premises of international criminal justice and its place in the peace and security regime executing *protective* justice with civilian protection measures. The third section offers some conclusions on the necessary challenges to implement the interactions between the Court and the UN. It examines the urgent proposals of the UN peacekeeping and peace building reforms, including the general proposals addressed by the Secretary-General on the security sector reform in peace operations, with clarifications on the rule of law sectors incorporating justice. It offers an overview of the efforts integrating *restorative* justice and reconstruction, into the strategic and operational planning of new post-conflict and peace-building operations. The fact findings deriving from the analysis of the current practice in the field operations indicate many gaps in these areas. This section concludes that there is the necessity to harmonize regimes working for peace, justice and security avoiding duplication, competition or inaction. This of course, is only possible if a strong consensus is reached on democratic institutional reforms of the United Nations, including the binding cooperation required by the regime of the Rome Statute.[2]

2 See ICC-CPI-20141031-PR1057, *ICC President addresses United Nations General Assembly, calls for universal ratification of the Rome Statute*, Press Release : 31/10/2014. Speech, Statement and Report of the International Criminal Court to the United Nations for 2013/2014 are accessible at: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1057.aspx

In order to conclude the topics dealt in this chapter (on the governance structure of complementary global regimes in their respective competence, and their potential to establish an interaction framework), the fourth section specifically debates on the rule of law and justice in conflict and post-conflict societies under the UN premises, the sectors of the rule of law at international level, the coordination of the rule of law activities within the UN, and the criminal accountability of the UN officials and experts on the ground during the field operations. The purpose of such an assessment is useful to identify feasible solutions on the accountability gaps, including the implementation of interactions between complementary global regimes in the short, middle and long terms. After all, laying strong legal foundations for transparent, accountable and efficient democratic institutions is crucial for the fight against mass atrocity crimes in all aspects of peace and security, such as its preservation, maintenance and restoration.[3]

The view expressed in this chapter is that strengthening the International Criminal Court and the Assembly of States Parties needs political consensus on substantive reforms at structural and normative levels, challenging the relationship with the United Nations system with primary law. The report on cooperation for instance, which was submitted by the Court to the States Parties, contains a high number of United Nations related entries in all categories of cooperation. The United Nations is understood in this report as including all principal organs, as well as peacekeeping operations and missions, funds and programs but not the independent specialized agencies such as the World Bank, WHO and UNESCO. The working group on cooperation between the organizations would offer significant progress about their interaction. Given the scope of the Court's cooperation requirements and the States Parties' obligations about cooperation, a working group is more suited to take this interaction forward than a single focal point. A working group could also be composed of a number of States Parties representatives based in key cities, including The Hague, New York, Brussels, Tokyo and Addis Ababa. The geographic reach of such a working group would have the potential to improve cooperation to the Rome Statute system from regional organizations such as the EU, and the AU, among others.[4]

Pursuant to paragraph 60 of resolution ICC-ASP/10/Res.5 of 21 December 2011, the Bureau of the Assembly of States Parties submitted for consideration by the Assembly the report on complementarity. The report reflects the outcome of the informal consultations held by The Hague Working Group of the Bureau with the Court and other stakeholders (including the UNDP and other UN specialized agencies). The Assembly of States Parties is the custodian of the Rome Statute system. While the Assembly itself has a very limit-

3 This concept has been underlined by the UN Secretary-General and by any renowned scholars and practitioners, such as Benjamin Ferencz, Cherif Bassiouni, Claus Kress, Antonio Cassese, and William Schabas, including other highly regarded authors.

4 See ICC-ASP/6/21, 2007, p. 16.

ed role in strengthening the capacity of domestic jurisdictions to investigate and prosecute serious international crimes, it is a key forum for matters of international criminal justice. Combating impunity both at the national and the international level for the most serious crimes of concern to the international community as a whole, is the core objective of the Rome Statute. In this respect the Assembly has an important role in encouraging and promoting capacity-building at the national level and thereby strengthening the States Parties pillar of the Rome Statute system. Assisting States in assuming their primary responsibility to investigate and prosecute through promoting complementarity in new and existing rule of law programmes and other relevant instruments constitutes an important element in the fight against impunity.[5] In this chapter, however, the idea is to extend complementarity between the UN system and the Rome Statute institutions promoting a governance structure in accordance with their respective competence.

5.1 The Role of the Assembly of States Parties and the Trust Fund for Victims

Section Outline

It can be affirmed that an important element arising in the international contours of international criminal justice is the presence of a new forum in the political apparatus of the Rome Statute: the Assembly of the States Parties. The legislative and political organ of the Rome Statute regime would prepare some grounds to the parliamentary activity of the UN General Assembly, either in the fight against the impunity of mass atrocity crimes or stimulate the debate on global threats and crime definitions. It has the potential to be a forum promoting consensus much closer to the *intra*-state difficult realities of the African Union (AU), the Arab League (LAS), the permanent members of the UNSC, and other regional organizations, while promoting the Rome Statute at universal level in all judicial systems of the world. A comprehensive strategy for victims for instance, needs to be established towards the interaction between the ASP, the Trust Fund for Victims, the Court's organs and the important partners of the Rome Statute institutions, including the UN actors and regional intergovernmental organizations. Unfortunately, the enthusiasm about these liaisons was undermined by the decision of the AU rejecting the Court's presence in the region. This section focuses on the institutional interaction currently in place between the Court and the United Nations since the establishment of the liaison office (New York) and the permanent Secretariat of the Assembly of States Parties (The Hague) which both started their activities since 2004.[6]

5 See ICC-ASP/11/24, 2012, p. 3.

6 See ICC-ASP/3/6 on the *Establishment of a New York Liaison Office for the International Criminal Court and the Secretariat of the Assembly of States Parties*.

The report pursuant to the Assembly resolution ICC-ASP/2/Res.7 concluded that the Court and the Secretariat required a permanent presence in New York. This conclusion was shared by the Court and the Secretariat. The liaison office would liaise and have a representative function with: the United Nations; the States Parties and States that are not parties to the Rome Statute; the international and regional organizations; the non-governmental organizations; the media organizations.

This section also offers an overview of the ICC-UN relationship agreement and the role of the Assembly of the States Parties (ASP) in order to establish an interaction strategy between the Rome Statute and the United Nations institutions.[7] Furthermore, it explores the reporting activity of the Court to the United Nations; the general provisions regarding international cooperation between the UN and the Court; the features of judicial assistance, according respectively to Part III of the ICC-UN relationship agreement and Part IX of the Rome Statute; the legislative role of the ASP and the establishment of an independent oversight mechanism, including the operation of the inspection and evaluation functions of the Court within such governance control mechanism currently debated in the ASP. In order to provide an understanding of the necessary implementation, this section examines the institutional interactions including the information exchange, communication channels and resource sharing between the ICC and the UN institutions, including mechanisms measuring their efficiency, transparency and economy. The purpose is to encourage concrete actions finding appropriate legal remedies of harmonization of complementary mandates dealing with international criminal justice, to be applied in both conflict and post-conflict situations. The States Parties should always promote the activities of the Court in regional and international organizations. This can be done through resolutions, declarations and other forms of political support, as well as different forms of technical assistance. These tools may also be used to facilitate arrest and surrender, with a last resort being the use of coercive instruments available within some of these organizations as international actors contributing to the enforcement of law. The second part of this section approaches the activity of the Trust Fund for Victims, the establishment by the Court of a strategy for victims' rights, and the necessary elements for the implementation of an effective system of global justice which depends on the interaction between complementary global regimes.

7 See the Statement "*President of the General Assembly meets with the President of the Assembly of States Parties of the ICC*", New York 10 April 2012, General Assembly 66th Session, accessible at: http://www.un.org/en/ga/president/66/news/PRStatements/ps100412.shtml

5.1.1 Global interactions and political determinations

There are no doubts that international regimes of complementary character have an important role to play safeguarding individual rights in conflict and post-conflict societies, while challenging the traditional concept of national and international security. The political determination of the States Parties to the Rome Statute refers to the specific function of its institutions, monitoring and destabilizing criminal regimes, while contributing to the preservation of peace and security in accordance with the purpose and principle of the UN Charter. Such high expectations depend on the intersection of policy and law on global issues complementing conflict and post-conflict intervention with retributive and restorative justice in domestic realities, reaching victimized communities on the ground according to the principle of *complementarity*. Regarding the future expectations of remedies implementing interactions in the emerging regime of justice, the Assembly of the States Parties in the resolution "*Strengthening the International Criminal Court and the Assembly of States Parties*" declared:

> "*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".[8]

For the judicial proceedings national courts have the priority under the Rome Statute system. The States have the opportunity to bring cases to an international judiciary that they might not otherwise pursue. In each of the situations that the Court is investigating policy efforts have been made to improve domestic justice mechanisms for serious international crimes as a result of the Court's involvement (Uganda, DRC, Sudan, Central African Republic, Central African Republic II, Kenya, Côte d'Ivoire, Libya and Mali) including the situations under preliminary analysis (Afghanistan, Colombia, Nigeria, Guinea, Georgia, Honduras, Iraq, Ukraine).[9] At global level, additional legal mechanisms will be necessary regulating the principle of accountabilities in international legal relations of public organizations and private corporations, limiting the authority and the powers of the Security Council, while reinforcing legal features in the field of human rights. As previously argued the ideal would be a review of the UN Charter and the Rome Statute accordingly, after decennia of paralysis and fragmentation in peace,

8 See ICC-ASP/6/Res.2 (2007), *Strengthening the International Criminal Court and the Assembly of States Parties*.

9 See ICC website » Structure of the Court » Office of the Prosecutor » Preliminary Examinations.

justice and security governance matters. Political consensus is necessary to balance powers in the international legal relations. This is true considering the question of judicial review of the acts of the Security Council which is one of the most urgent issues facing the United Nations.[10] In order to have an overview of the institutional setting of the Rome Statute system interacting with important global actors, it is important to look at the legislative activity of new institutions (ASP, TFV), including the norms regulating such interactions based on binding cooperation at least for the States being parties of such institutions.

a) The Assembly of States Parties

The Assembly of States Parties (ASP) is the management oversight and legislative body of the International Criminal Court. It is composed of representatives of the States that have ratified and acceded to the Rome Statute.[11] The Assembly of States Parties has a Bureau, consisting of a President, two Vice Presidents and 18 members elected by the Assembly for a three-year term, taking into consideration principles of equitable geographic distribution and adequate representation of the principal legal systems of the world. On its second session in September 2003 the Assembly of States Parties decided to establish the Permanent Secretariat (ICC-ASP/2/L.5). The Assembly of States Parties decides on various items, such as the adoption of normative texts and of the budget, the election of the judges and of the Prosecutor and the Deputy Prosecutor(s). According to article 112(7) of the Rome Statute, each State Party has one vote and every effort has to be made to reach decisions by consensus both in the Assembly and the Bureau. If consensus cannot be reached, decisions are taken by vote. [12]

The ASP promotes international criminal justice through the Rome Statute and further empowerment of the jurisdiction of the Court. At this stage the Court, with multiple investigations, situation analysis and the issuance of

10 See for discussions, H. Köchler, 'The ICC: Signaling a Paradigm Shift in International Criminal Law?' in H. Köchler (ed.) *Global Justice or Global Revenge? International Criminal Justice at the Crossroads*, 2003, 222 at 224. For an overview of the evolution of human rights law which provides a broad political history of the emergence and development of the human rights movement in the 20th century through the crucible of the United Nations, focusing on the hopes and expectations, concrete power struggles, national rivalries, and bureaucratic politics that modelled the international system of human rights law, see R. Normand, S. Zaidi, *Human Rights at the UN The Political History of Universal Justice*, (2007). For other scholars' publications involved on the UN Intellectual History Project see the list accessible at: http://www.unhistory.org/ For an overview of the scholarly debate on the UNSC started since the nineties, see M. Bedjaoui, *The New World Order and the Security Council: Testing the Legality of Its Acts*, (1994), 56 at 90.

11 See Rules of Procedure of the ASP, *ASP First session, New York, 3-10 September 2002*, accessible at: http://www.icc-cpi.int/iccdocs/asp_docs/Publications/Compendium/Compendium.3rd.08.ENG.pdf

12 See the Assembly of States Parties structure on the ICC-ASP Portal, accessible at: http://www.icc-cpi.int/asp.html

arrest warrants, needs further support by the States Parties and non-States parties. In order to receive it, the ASP engagement is vital. This for two reasons, first, to secure cooperation from States, various agencies of the United Nations and other inter-governmental organizations, and second, to engage the ASP responsibilities allocating sufficient resources to the Court. There can be no doubt that active support by the States Parties will influence the future of the Court and determine whether the permanent judicial institution ultimately reaches the goals of its establishment. Moreover, the long-term success of the ICC depends on the ASP to act as a politically engaged and supportive body of international criminal justice. The ASP has an important role to play in ensuring that the Court is efficient and operates as intended, complementing national courts and making a meaningful contribution to the cause of justice. As a new and unique institution facing enormous challenges, the Court is responsible in developing best practices becoming an excellent model of public administration of criminal justice. The Court needs to benefit from close engagement by the ASP particularly in this early phase of considering reviews of the Rome Statute. Where there are shortcomings in practice, States Parties can point them out. Thus, aside from being essential to secure cooperation, the active involvement of the ASP with the Court is necessary to guarantee the most effective judicial institution possible.[13] The responsibility of the ASP interacting with the UN liaises in the first part of the Rome Statute on the establishment of the Court. Article 2 states: "The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf". The implementation of such interaction with the UN is a responsibility of the ASP.[14] In the next paragraphs we will see how the ASP functions in practice.

b) Institutional, Managerial and Political Settings of Cooperation

The ASP represents the bridge between the States, the UN institutions and the Court, necessary for the promotion of the regime of justice. In the process of allocating public powers and competences at global level, the judicial empowerment of the Court promoted by the ASP would influence the multilateral system or regime for human rights protection, the national sovereignty and peaceful international disputes, promoting the rule of law at micro and macro level. However, the institutional identity of the ASP is still in progress, as many difficulties arise considering the absence on board of the majority

13 See Resolution ICC-ASP/3/Res.8, *Intensifying the Dialogue between the Assembly of States Parties and the International Criminal Court*, 10 September 2004, accessible at: http://www.icc-cpi.int/asp/documentation/doc_3rdsession.html

14 See Coalition for the ICC (CICC, Cooperation Team), *Comments and Recommendations to the Tenth Session of the Assembly of States Parties, 12-21 December 2011, New York*, 2 December 2011, accessible at: http://www.coalitionfortheicc.org/documents/CICC_Cooperation_Team_Paper_(ASP10).pdf

of the States of the Arab League, Israel, the US, Russia and China.[15] Some of these States opposed the Court since the beginning of its existence. At political level a strategic definition of the global fight against international crimes is expected by the ASP, the UN General Assembly, the Security Council an the Secretary-General. The Court's relationship with the UN and the institutional matters will need further implementation, especially considering the impact on the accession campaign of the Rome Statute, the pillar of cooperation, the definition of crimes and universal jurisdiction, the accountability of corporations and the controversial issue of the UN peacekeepers.[16] The Court itself cannot do anything about statutory matters, as the institution is only dealing with judicial assistance at ministerial level. This is an ASP political responsibility. For any review in fact, the Statute provides the involvement of the ASP for whatever revision. Political consensus is indispensable.

Both the ASP and the UN institutions remain the premises where to address decision-making exclusively based on democratic consensus. Regarding the cooperation, since 2007 the working documents of ASP indicate an extensive activity of its working groups (The Hague and New York). The overall aim of the issues dealt by the two Working Groups has been to create and promote an enabling environment for the Court. It was sought to identify problems and barriers in providing cooperation of a general and structural nature, and highlight generic solutions and models dealing with these interactions which were based on the report submitted by the Court on cooperation, The Hague Working Group decided to organise its work in thematic meetings focusing primarily on the role of the States Parties. The New York Working Group decided to organise its work around two main themes, namely the relationship between the UN and the Court, and the role of the States Parties with respect to the Court in the UN context, in view of crosscutting nature of the UN related issues. Furthermore both working groups deal with the issue of international and regional organizations.[17] From these reports it is clear that the ASP is engaged on one side on the managerial, institutional and

15 See M. P. Scharf 'Results of the Rome Conference for an International Criminal Court', (August 1998), *The American Society of International Law*, accessible at: http://www.asil.org/insigh23.cfm See also M. P. Scharf, 'The Politics of Establishing an International Criminal Court', (1996) *Duke Journal of Comparative and International Law* 6 , 167 at 173.

16 For an overview of the debate of human rights protection and criminal proceedings against corporations between the UN and the ICC see, C. Chiomenti, 'Corporations and the International Criminal Court', in O. De Schutter (ed.), *Transnational Corporations and Human Rights*, 2006, 287 at 312. See also L. van den Herik, "Corporations as future subjects of the International Criminal Court: An exploration of the counterarguments and consequences", in C. Stahn, L. van den Herik (eds.), *Future Perspective of International Criminal Justice*, (2010).

17 For an overview of the clusters of cooperation and the general legal mechanisms which will need further implementation in ASP see, ICC-ASP/6/21, Report of the Bureau on Cooperation, 19 October 2007, pp. 17-22. See also Resolution on Cooperation, ICC-ASP/11/Res.5, 21 November 2012, accessible at: http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP11/ICC-ASP-11-Res5-ENG.pdf

political settings of cooperation creating a system of interactions with important partners, such as the UN, while empowering the public authority of the Court promoting its transparency, economy and efficiency. The problem arising in these reports is a lack of concrete actions or *road map* to be performed in the short, middle and long terms by the actors involved, respectively the Rome Statute institutions, the States Parties and the UN. Provisions should be made to ensure, that there is a platform for taking forward the work on cooperation as well as a general channel of communication between the Court and States Parties. Such clusters of cooperation and the general legal mechanism regulating them will need further implementation (information sharing, national focal points, procedures and structures of cooperation, and sensitive thematic aspects such as witness relocation and enforcement of sentences agreements) including institution-building between the Rome Statute institutions and the UN. The States Parties should ensure that adequate implementing legislation and supplementary agreements are in place to enable cooperation and ensure that appropriate structures and procedures are established to make such cooperation run smoothly. In short, the States Parties should reinforce an enabling environment of interactions creating a global framework of cooperation.[18]

c) Transparency, economy and efficiency

In line with the supervision on the Court's practice and the performance appraisals by the ASP, article 112, paragraph 4 of the Rome Statute gives the authority to the Assembly of States Parties (ASP) to establish subsidiary bodies in addition to the judicial (OTP, Presidency and Chambers) and non-judicial organs of the Court (Registry). The Court is evolving into a fully operational and complex international judicial institution. Institutional matters and resource allocations require the ASP to fully perform its oversight function for enhancing the efficiency, economy and transparency of the Court. This is in fact the scope of an independent oversight mechanism. This supervisory function is to be carried out at various organizational levels relative to the different activities of the Court, including through investigation, inspection and evaluation of administrative, managerial, organizational and budgetary measures, as well as on the implementation of the regulatory framework of governance in the several Court's organs. The implementation of such organ is only at its initial stage but it is important to report on the provisional character of such mechanism.

18 For an overview of the set of recommendations that might further improve the cooperation between the United Nations and the International Criminal Court, bearing in mind the fact that cooperation between the two institutions is a relatively new phenomenon, including the conclusions in the Report of the Bureau on Cooperation, see ICC-ASP/6/21, 19 October 2007, Conclusions, p. 23, accessible at: http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-6-21_English.pdf

The Assembly of States Parties establishes, in accordance with a resolution, an independent oversight mechanism. The Registrar of the Court shall enter into a memorandum of understanding with the United Nations Office of Internal Oversight Services to provide support services on an annual cost recovery basis for the *operationalization* of the oversight mechanism.[19] The documents consulted indicate that such organ which reports to the ASP would start with administrative investigative activities inside the Court and at a later stage with inspection and evaluation in the several organs of the judicial institution. The independent oversight mechanism itself will be expected to develop the rules governing its work, with the following recommendations: *a)* the scope of the independent oversight mechanism will cover internal investigation, evaluation and inspection. The establishment of an independent professional investigative capacity will be implemented immediately and additional elements of oversight, such as inspection and evaluation as envisaged in article 112, paragraph 4, of the Rome Statute, shall be brought into operation following a decision of the ASP to be adopted; *b)* it is envisaged that the investigative unit of the newly established independent oversight mechanism will have *proprio motu* investigative powers and incorporate procedures and protection measures for staff; *c)* it is envisaged that the individuals covered by the oversight mechanism will include all Court staff subject to the Staff Rules and the Court, together with elected officials. It is also envisaged that the investigative unit of the oversight mechanism will be utilized for the conduct of investigations of any allegations of misconduct made against contractors retained by the Court and working on its behalf. Such investigations should be carried out in accordance with the terms of the contract. In circumstances where a contract is silent on the manner and/or the modalities of any investigation, the oversight mechanism will conduct its investigation in accordance with its own established procedures and recognized best practice. The findings of any investigation will be used to determine the applicable sanctions, if any, under the existing contractual regime between the Court and the contractor. Within this context, it is recommended that the Court develops and incorporates into its procurement contracts a code of conduct and also appropriate disciplinary procedures to be followed in circumstances of alleged misconduct. *d)* In all cases, if criminal activity is suspected in the course of an investigation, the oversight mechanism must notify the relevant national authorities, such as the State where the suspected crime was committed, the State of the suspect's nationality, the State of the victim's nationality, and where applicable, the host State of the seat of the Court.

19 See ICC-ASP/8/2/Add.3, Report of the Bureau on the Establishment of an Independent Oversight Mechanism, 4 November 2009, accessible at: http://www.icc-cpi.int/NR/rdonlyres/E603F5B0-F342-4A25-A792-8947AAC8ABDC/0/ICCASP82Add3ENG.pdf

5.1.2 The Trust Fund for Victims and a Strategy for their rights

The Rome Statute provided that the Court's legislative body, the ASP should create a Trust Fund for the benefit of victims of crimes falling under the jurisdiction of the Court. The Court can order money and other property collected through fines or forfeiture or orders of reparations against a convicted perpetrator to be transferred into and distributed by the Trust Fund for Victims (TFV). The special target groups of the Trust Fund's assistance efforts are the victims of sexual violence, former child soldiers and abducted children, the families of murder victims and victims of other brutal crimes, and victimized villages. The Fund's assets are mainly used for the physical and psychological rehabilitation of victims. The Fund may also pay victims damages or other reparations by virtue of a decision given by the ICC during a trial. Initiatives for assistance projects come directly from target areas approved by the ICC. At present, a number of projects are under way in the Democratic Republic of Congo and in Uganda. The intention is to expand the scope of activities to the Central African Republic and to Sudan (Darfur). The volume of the funds used for assistance comes as voluntary donations from States. The donations can also be made, for instance, by corporations, private individuals and organizations. The Court may also order that fines or other assets obtained would be transferred to the Trust Fund.

The ASP established the Trust Fund in 2002 and a five member Board of Directors to oversee its activities.[20] The States Parties have been grouped into geographical areas, each of which has a representative on the Board of Directors of the Trust Fund for Victims. The Board's principal task is to guide the Trust Fund's activities and allocation of resources and to coordinate and oversee assistance projects. The Board reports to the Assembly of States Parties. In 2004, a Trust Fund Secretariat was created as part of the Court's Registry, funded by the Court's regular budget, and not out of the funds it holds for the benefit of victims.[21] In 2005 the ASP adopted the Trust Fund Regulations, and the Trust Fund began its operations in 2007. Since 2006, the Assembly of States Parties requested the Court to work further in the development of the strategic plan with regard to the "position of victims".[22] The Trust Fund has started implementing projects to provide physical and psychological assistance and material support to victims. Over 34 projects in DRC and Uganda were approved by the Pre-Trial Chambers in 2009.[23] According to a recent submission filed with Pre-Trial Chamber II, the Fund

20 ICC-ASP/1/Res.6. The ASP may, as and when the workload of the Trust Fund increases, create an expanded capacity, including the appointment of an Executive Director, and "as part of such consideration…consider the payment of expenses of the Trust Fund from the voluntary contribution accruing to it. An Executive Director was appointed in 2006.

21 ICC-ASP/3/Res.7. *Establishment of the Secretariat of the Trust Fund for Victims,* 10 September 2004, paras 2 and 4.

22 ICC-ASP/5/Res.2, Strategic Planning Process of the Court, para. 3.

23 See the Regulation 50 of the Regulations of the Trust Fund for Victims.

also plans to initiate assistance projects in CAR. This assistance is different by the judicial decisions on awards falling under victims' reparations. The ICC-ASP/8/45 is the Report of the Court on the strategy in relation to the victims. The NGOs were critical on the draft strategy prepared in the course of 2008. The NGOs considered that it was a merely descriptive document which failed to set concrete objectives and strategies. Following the recommendations made by the seventh session of the ASP (ICC-ASP/7/Res.3, *Strengthening the ICC and the ASP*), the Court continued to work on the document with a view to its finalization and presentation to the next sessions of the ASP. The political approach given in 2009 is that such a strategy still lacks on security issues and participation of victims into the proceedings, including notification obligations, protection measures and relocation programs. This means the need to establish an additional organ dealing with such matters. With regard to the reparations, which focused mainly on assistance projects implemented by the Trust Fund for some years, this does not address thoroughly how the Court will implement its reparations mandate.

The implementation of these projects has been ongoing in the last years. Victims have seen in the Rome Statute an unprecedented recognition of rights but the development of a comprehensive strategy is still in progress. The ASP will need to support the Court in such important implementation of victims' rights. The Trust Fund faces challenges inherent to a new and *sui generis* institutions working in on-going conflicts. Resuming the recommendations addressed by civil societies organizations during the Eight Session of the ASP in November 2009 three main points amongst others are extremely important: a) ensure greater transparency and visibility of the Trust Fund, both among international actors and potential beneficiaries; b) continue to devise and implement fundraising strategies; c) exercise effective oversight over the Trust Fund Secretariat and ensure appropriate coordination with other organs of the Court, especially considering the preparations that must be undertaken in view of the first reparations awards.[24]

Victims' rights were not fully taken into consideration by previous international criminal tribunals. The lessons learned from those tribunals determined the drafters of the Rome Statute to give a privileged position to victims before the Court (participation and reparation). The consideration of the interest of victims is at the heart of the Rome Statute. The success of the Court will be measured by its ability to develop and fully implement its mandate with respect to victims. Victims continue to show interest in the Court's proceedings and to participate actively in them. The first trial has seen the participation of 105 victims. Over 350 victims will participate in the Katanga and Ngudjolo trial (DRC). For CAR, 34 victims participated

24 See FIDH, "Victims and TFV: Providing Physical and Psychological Assistance and Material Support to Victims, and Preparing for the First Reparations Award", in *Recommendations to the Eight Session of the ASP*, November 2009, n. 532a, pp. 12-13.

in the confirmation of charges hearing against Bemba, and 78 did so in the Abu Garda hearing. While these are exciting developments, the Court must continue to work hard in order to make victim participation truly meaningful. The development of an adequate victims' strategy is essential for that to happen. In addition, meaningful participation of victims in the proceedings requires increased efforts for adequate legal representation.

5.1.3 An effective system of criminal justice

The institutional overview offered in this section indicates that the features of international criminal law are only one element moving forward the effectiveness of the emerging regime of international criminal justice centralizing victims' rights. While empirical reports would try to measure such effectiveness, new rules are necessary harmonizing the interactions of international governance institutions in order to maximize the results on the ground in conflict and post-conflict situations. Being effective is generally understood as having the quality of producing a desired or intended result, but the fight against the impunity of mass atrocity crimes is only at its initial stage of delivering results. The empowerment of an independent judicial channel balancing powers in the international legal order requires the implementation of interactions between complementary global regimes. The role of international governance institutions is fundamental in order to define areas of improvement in the institution building of complementary mandates involved in the administration of international criminal justice. Their involvement will need a well defined delimitation of competences, resource allocations and legal harmonization of administrative matters, including objectives and strategies with regard to their respective mandates in conflict and post-conflict situations. The purpose is to ensure that domestic legal systems, and other regional legal arrangements to which they are party, have the jurisdiction and the capacity to effectively prosecute international crimes or to extradite the suspects of such crimes.

This section clarified the competence and responsibility of the different institutions within the Rome Statute system. In particular, the capacity-building of the political and managerial channel of the Assembly of the States Parties (ASP) supposed to implement measures of assistance in the judicial systems of the member States and the rule of law sectors, profiting of the partnerships with the UN system in order to promote reforms in the post-conflict phase in domestic systems, preserving the security of individuals and the rule of law sectors (army, police and judiciary). In addition to the basic requirement of legal assistance, the ASP should develop a monitoring activity of national implementations of the Rome Statute provisions in national parliaments and constitutions, including their impact in domestic governance systems. Further political reach in regional realities is also required, integrating emerging public authorities and institutions engaged in the fight against the impunity of international crimes. The Trust Fund is the instrument to centralize

the rehabilitation and reparation of victims after long judicial proceedings. The Trust Fund needs a stronger commitment from all member States, global actors and relevant stakeholders. The UN remains of course one of the most relevant actors in order to promote country-specific programming activities of development in communities affected by war and crime, especially after the outcomes of an international judiciary assessing the truth in situations on a case-by-case basis, and which would require further assistance in domestic governance systems for the sake of order and sustainable peace. Humanitarian crisis and the impunity of serious human rights breaches have influenced the evolution of the rule of international policy and law developing multilateral tools for *preventive*, *retributive* and *restorative* justice. In order to fulfil the gaps between complementary but independent global mandates dealing with peace, justice and security, legislative adjustments and harmonization of laws are necessary. At this moment in time, the relationship between the United Nations and the Court has been established by secondary law, which is discussed in the next session.

5.2 The Institutional Liaison and the Relationship Agreement between the Court and the United Nations

Section Outline

In order to approach the causes of international threats and crimes with democratic tools, decision-makers need to focus on interaction strategies between complementary global actors. There are no doubts that the interaction between the United Nations and the Rome Statute system is a new phenomenon which needs implementation at institutional, procedural and operational levels. In order to deliver optimized results in the field where both mandates are involved, the UN operational support during peace operations to the Court needs attention. After the empirical analysis of the UN peacekeeping operations and their transition into peace-building in conflict and post-conflict situations, it can be concluded that the reconstruction phase can be effective in the field only by supporting new actors committed to peace and justice. The domestic realities in phase of reconstruction can only benefit of the UN peace-building when these are able to support other fundamental actors involved in such process of reconstruction improving human security. The Court of course is definitely one of these actors.[25] In order to have an understanding on the further implementation of the interaction necessary between the Court and the United Nations, this section clarifies the legal instruments currently at disposition, including the inter-institutional matters and liaison between the organizations. The purpose is to identify methods for a better relationship, cooperation and partnership in the regime of international criminal justice.

25 For the debate see M. Doyle, N. Sambanis, 'War-Making, Peacebuilding, and the United Nations', *Making War and Building Peace: United Nations Peace Operations*, 2006, at 23.

The relationship agreement between the Court and the United Nations envisages a number of ways in which each of the organs of the Court can cooperate with the United Nations and its organs, funds and programmes. Continued and active interface between the Court and the Security Council, *inter alia* with regard to referrals pursuant to article 13 of the Rome Statute, will be necessary. An analysis of the many functional and administrative links envisaged between the organs of the Court and the United Nations system strongly confirms the need to implement such relationship between the two entities. Since the relocation of the ASP Secretariat to The Hague, there can be no doubt that the absence of official and effective contacts, if allowed to continue, between the Court and the United Nations will adversely affect the working relationship between the two entities. The liaison office of the Court to the United Nations represented a positive accomplishment.

5.2.1 The inter-institutional liaison

With regard to the inter-institutional liaison an important contribution to the ICC-UN interaction came from the establishment of the ICC New York UN Liaison Office, for a number of reasons.[26] The Rome Statute institutions (the Court, the ASP and the TFV) sitting in The Hague are geographically remote from the Headquarters of the United Nations in New York. It was crucial to ensure that this geographical distance would not lead to the development of political and legal distance. To prevent the impact of such inter-institutional decentralization, the Court established a presence in New York, not only to keep the Rome Statute and its institutions on the international agenda, but also to reinforce the role of the Rome Statute institutions collectively, as an essential, dynamic and developing element of the international mosaic of peace and justice. In addition to these political reasons, there were strong practical and logistical justifications for having such a presence in New York. New York is and will remain the centre of international relations and diplomatic negotiations. New York-based representatives of States Parties are most likely to continue to be responsible for servicing the ASP meetings in The Hague. Indeed, almost all least developed and developing countries have representation in New York (as opposed to The Hague) at a level that allows them to follow closely the work of the Court. The next achievement for the Court would be to have support offices in regional organizations including the important requirement of focal points at ministerial level within the domestic governance structure by all States Parties.

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26 See ICC-ASP/3/6(2004), "Desirability of a New York Office", in *Establishment of a New York Liaison Office for the International Criminal Court and the Secretariat of the Assembly of States Parties,* p. 2, accessible at: http://www.icc-cpi.int/library/asp/ICC-ASP-3-6_New_York_liaison_office_English.pdf See the Report of the Committee on Budget and Finance on the Work of its Fifth Session, ICC-ASP/4/27, para.104.*Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fifth session, The Hague, 23 November to 1 December 2006* (International Criminal Court publication, ICC-ASP/5/32), part II, D.6 (a).

The value of developing direct contacts in various agencies of the United Nations is an important implementation issue. Now that the Court has entered its operational phase after the first decade of existence, a closer working relationship with the United Nations system is increasingly important. Although the Court is an independent entity, it was born out of the UN system and their interaction will provide a permanent basis for a continuing relationship and information-sharing between the two organizations, while respecting their autonomy and confidentiality regime. Some of the most relevant UN agencies that may assist the Court under a more structured cooperation agreement include the High Commissioner for Human Rights (OHCHR), the High Commissioner for Refugees (UNHCR), the UN Special Adviser on Genocide and the UN Children's Fund (UNICEF). Other partners would be the other offices of the UN responsible for the overall coordination of the rule of law activities at international level such as the Department of Political Affairs (DPA), the Department of Peacekeeping Operations (DPKO), the Office of Legal Affairs (OLA), United Nations Development Programme (UNDP), the United Nations Development Fund for Women (UNIFEM) and the United Nations Office on Drugs and Crime (UNODC). Most importantly, the UN humanitarian and peacekeeping missions, especially in conflict areas where atrocities are being committed, should provide the Court with vital information and services needed to achieve the Court's goals. The cooperation agreement with the peacekeeping should also facilitate Court's requests for testimony from UN officials, although the preference would be to have harmonization of such agreements with more detailed provisions on security issues of the Court's field offices. In the area of information sharing and MONUC, the practice indicates that the UN confidentiality regime brought some issues with consequences on the delay of DRC's proceedings (*Prosecutor vs. Lubanga*).[27]

5.2.2 The ICC-UN Relationship Agreement

Pursuant to Article 2 of the Rome Statute in 2004 the Secretary General of the UN and the President of the ICC signed an agreement that provides for the structure of the relationship between these international governance institutions.[28] The UN-ICC Relationship Agreement which entered into force

27 See Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008 No. *ICC-01704-01/06*, 13 June 2008, accessible at: http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1401-ENG.pdf

28 See Rome Statute Part I, Establishment of the Court. Article 2, Relationship of the Court with the United Nations. The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf. See Rome Statute accessible at: http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf

upon signature recognizes the mandates and independence of both institutions, defines the scope of their relationship, and outlines the conditions under which the UN and the ICC cooperate.[29] This relationship, as elaborated in the agreement, deals with both institutional issues and matters pertaining to judicial assistance and institutional cooperation. In this regard, it includes, *inter alia*, issues like the participation of the ICC in the capacity of observer in the UN General Assembly; exchange of information provisions; the obligation to consult each other on matters of mutual interest; exchange of representatives and high officials; administrative cooperation issues; the provision of conference services on a reimbursable basis; financial matters; and the possibility for certain ICC officials to use the UN laissez-passer as a valid travel document to the missions in the field. Concerning judicial assistance, the UN, in accordance with the Agreement and its Charter, agrees to cooperate with the Court whenever the latter requests the testimony of an official of the United Nations or of one of its programs, funds or offices. The Agreement also addresses issues pertaining to the waiver of privileges and immunities of UN officials as well as the protection of the content of documentation rendered to the UN by States or intergovernmental organizations on a confidential basis.[30] Article 18 of the Agreement sets out the terms of cooperation between the United Nations and the Office of the Prosecutor (OTP). The UN undertakes to cooperate with the OTP in particular when the Prosecutor exercises his or her duties and powers with respect to an investigation and seeks the cooperation of the United Nations pursuant to Article 54 of the Rome Statute. Such cooperation will consist mainly of the exchange of information for the purpose of generating new evidence, which can be subject to conditions of confidentiality of the information, protection of persons and security of any operation or activity of the UN.

a) The Procedural matters

As noted above, Article 1 contains the purpose of the Relationship Agreement "the present Agreement, which is entered into by the United Nations and the International Criminal Court, pursuant to the provisions of the Charter of the United Nations ("the Charter") and the Rome Statute of the International Criminal Court ("the Statute") respectively, defines the terms on which the United Nations and the Court shall be brought into relationship. The agreement contains 23 articles, divided into IV parts.[31] Part III of the ICC-UN relationship agreement refers to the cooperation and judi-

29 See ICC-ASP/3/Res.1, Negotiated Relationship Agreement between the International Criminal Court and the United Nations, Source: ASP/UN, Adoption: 04.10.2004 , accessible at: http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1_English.pdf

30 On the issue see P. C. Szasz, T. Ingadottir, 'The UN and the ICC: The immunity of the UN and its Officials', (2001) 14 LJIL 867, at 885.

31 Preamble; I. General provisions (Articles 1-3); II. Institutional relations (Articles 4-14); III. Cooperation and judicial assistance (Articles 15-20); IV. Final provisions (Articles 21-23). See the Relationship Agreement between the ICC and the UN accessible at: http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1_English.pdf

cial assistance, and contains the general provisions regarding cooperation between the UN and the Court. "With due regard to its responsibilities and competence under the Charter and subject to its rules as defined under the applicable international law, the UN undertakes to cooperate with the Court and to provide to the Court such information or documents as the Court may request pursuant to article 87, paragraph 6, of the Rome Statute".[32] Article 17 regulates the cooperation between the Security Council and the ICC. When the Security Council, acting under Chapter VII of the Charter of the United Nations, decides to refer to the Prosecutor "a situation in which one or more of the crimes referred to in article 5 of the Statute appears to have been committed, the UN Secretary General would transmit the decision to the Prosecutor together with documents and any other material that may be pertinent to the decision of the Council. The Court will keep the Security Council informed in accordance with the Rules of Procedure and Evidence".[33] This cooperation contains also the procedure to apply when the Security Council adopts a resolution requesting the Court not to commence or proceed with an investigation or prosecution under Chapter VII of the UN Charter. The Court will, where a matter has been referred to the Court by the Security Council, communicate any failure by a State to cooperate with the ICC. Article 18 of the agreement regulates the cooperation of the UN with the ICC Prosecutor on exchange of information.[34]

b) The Agreement provisions

The preamble of the relationship agreement between the ICC and the UN recalls the purposes and principles of the Charter of the United Nations. In this light the Rome Statute, also in its preamble, reaffirms both purposes and principles of the UN Charter. The ICC-UN relationship agreement resumes the role assigned to the ICC in "dealing with the most serious crimes of concern to the international community as a whole, as referred to in the Rome Statute and which threaten the peace, security and well-being of the world". Furthermore, it clarifies the independence of the ICC from the UN system, and provides for an institutional interaction between the two organizations. The conclusion is that within the general provisions of the relationship agreement, the obligation of cooperation and coordination of the arrest warrants from the Security Council would be the part that needs some attention in the years still to come.

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32 See Article 15, Relationship Agreement between the ICC and the UN. Article 87 (6) Rome Statute: "The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate".

33 See Article 17, Relationship Agreement between the ICC and the UN, Cooperation between the UNSC and the ICC.

34 See Article 18, Relationship Agreement between the ICC and the UN Cooperation between the UNSC and the Prosecutor.

The second part of the relationship agreement contains the institutional relations between the ICC and the UN. Article 4 refers to the reciprocal representation. The Court "may attend and participate in the work of the General Assembly of the UN in the capacity as observer", while the UN Secretary General shall have a standing invitation to attend public hearings of the Chambers of the Court "that relate to cases of interest to the United Nations and any public meeting of the Court". Listing some areas of mutual interests it would also give more specification to the personnel arrangements and its presence on the ground, which seems to be a matter of concern, due to the fact that this is regulated by an additional treaty. In fact "strive for maximum cooperation in order to achieve the most efficient use of specialized personnel, systems and services" would mean to use specific training of staff involved in the ICC field office operations and in areas where there would be a need of exchange of expertise and intelligence.[35] This would of course facilitate the gathering process of information and evidence and speed up the investigative activity. After all the UN peace operations on the ground and the political affairs department for country and situation specifics, is a useful tool for the ICC situation analysis. This would surely avoid duplications, at least sharing the general country background (statistics, military and factual data in ongoing conflicts), receiving information of the leadership of the specific State monitored under UN premises would be then part of the evidence gathering of the ICC. Administrative cooperation, services and facilities, access to the UN Headquarters and *laissez-passer* procedures fall in the agreement. Article 13 contains no mandatory financial responsibility of the UN. Agreement on costs and expenses resulting from cooperation shall be subject to separate arrangements between the UN and the Court.[36] In brief, the UN needs to provide critical support to the ICC based on its relationship agreement. Member States are encouraged to ratify the Rome Statute without delay and to cooperate with the Court. This relationship will need to be implemented.

5.3 The United Nations and the pursuit of complementarity

Section Outline

At this stage the advocacy expressed in this study should be clear. It recalls the necessity of concrete actions incorporating justice between the peace and security operations of the UN and the necessary support needed by the Court (judicial assistance, logistical support, security of field offices, relocation of witness and victims, law enforcement of judicial decisions, including the security of staff and assets). According to the theory that sustain-

35 See Article 8, Relationship Agreement between the ICC and the UN, accessible at: http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1_English.pdf

36 See Part II; Article 4 – 14, Institutional Relations, Relationship Agreement between the ICC and the UN.

able peace at domestic level is only feasible through justice establishing the truth, the Court's role in peace operations (peace-making, peace-keeping and peace-building) will need to be legally clarified in the years to come. The Court is indeed an important actor deserving such support when investigations and prosecutions are taking place during ongoing conflict situations, including the assistance on security issues for witnesses and victims (protection, relocation, participation, reparation). At institutional and operational levels and in order to provide such support to the Court the interaction between the UN Department of Peacekeeping Operations (DPKO), the UN Development Programme (UNDP) and the political and legal affairs departments of the UN will need to strengthen their cooperation efforts.

The implementation of the interaction between the Court and the United Nations will only be possible towards a strong political support of State and non-State actors. Although both organizations are currently active in the same situations which are all characterized by judicial referrals, their interaction is left to further normative definition and harmonization in the peace building operations. Attention is needed to avoid duplications, competition and lack of support between these mandates which are currently only shaped in memorandum of understanding between the Court and the UN peace operations in the field. For cooperation in relation to the DRC, a specific memorandum of understanding (MoU) was agreed between the Court and the UN concerning cooperation between the UN mission in DRC (MONUC) and the Court. The MoU was concluded as a supplementary arrangement within the general framework of cooperation set out in the *Relationship Agreement* (ICC/ASP/3/15). The MoU provides for a range of assistance measures to the ICC from MONUC/MONUSCO, including the area of logistical support and judicial assistance.[37] As previously discussed, the reasons of the delay of finding appropriate remedies for such interactions in conflict and post-conflict situations, is to be found in the considerations about the status of reforms in the UN peace operations and the further commitment of the decision makers to optimize results on these sensitive governance issues.[38] In order to offer an overview of the priorities, in the interaction model proposed between complementary global mandates, complementing the Court's regime with the United Nations peace operations, this section recalls the recommendations on the concept of restorative justice in peace building operations; the "lessons learned" addressed to the

37 See the Report of the International Criminal Court to the UNGA, UN Doc. A/61/217, 3 August 2006, para. 47.

38 At institutional level the UN Department of Peacekeeping Operations (DPKO) just created in 2007 the Office of Rule of Law and Security Institutions (OROLSI) to provide an integrated and forward-looking approach to United Nations post-conflict assistance in the areas of rule of law and security institutions. Such office brings together the following DPKO entities: the Police Division (PD), the Disarmament, Demobilization, and Reintegration (DDR) Section, the United Nations Mine Action Service (UNMAS), the Security Sector Reform (SSR) Unit and the Criminal Law and Judicial Advisory Service (CLJAS).

decision makers of governments in peace operations; the Court's potential, and the indispensable enforcement of its judicial decisions in the field operations. In line with an harmonization model of complementary mandates any State or individual would be responsible of any action in the field, where relocation, protection of refugees, victims and witnesses, security and risk assessments will need a well-defined strategy of interactions between these actors (agencies, funds, programs of the UN system and the Court). General rules respecting statutory matters are necessary to define a normative cluster of support by the UN peace operations to the Court, where interdependent tasks from both sides will need to bring visible results in conflict and post-conflict situations.

Besides, in order to verify the feasibility of the necessary support expected by the UN to the Court in the short, middle and long terms, this section recalls first the controversial issue of peacekeepers and the necessity of implementing internal justice systems related to the UN peacekeeping operations on the ground, solving the lacuna of accountability, transparency and integrity. It also reports about the Court's political rejection on one side, and on the UN efforts incorporating international criminal justice in the context of peace and security maintenance on the other. The legislative and reporting activity between the UN institutions regarding the Court, the Court's reports to the General Assembly and Security Council includes the last developments at institutional level in the area of peacekeeping operations in order to verify the readiness of such tools assisting important actors such as the Court. The last paragraph approaches the theories of eminent scholars about restorative justice in peace building operations. The purpose of this section is to bring attention on the definition of a clear strategy implementing the relationship and partnership of the UN and the Court fostering peace, justice and security.

5.3.1 The background of peace operations

The so-called 'right' of humanitarian intervention has been one of the most controversial foreign policy issues of the last two decades both when intervention has happened, as in Kosovo, and when it has failed to happen, as in Rwanda. With the advent of the new century, shortly after the release of the UN-commissioned reports on the 1995 massacres at Srebrenica and on the 1994 genocide in Rwanda, the administrative leadership of the United Nations determined that the peace operations needed serious re-evaluation "with a view to minimizing as far as possible the likelihood of such tragedies occurring again in the future".[39] The Secretary-General, in his report to the General Assembly at the beginning of the new century, challenged the inter-

39 UN doc. A/55/305, UN doc. S/2000/809, for an overview of the Report of the Panel on United Nations Peace Operations accessible at: http://www.un.org/peace/reports/peace_operations/

national community to try to forge consensus, once and for all, around the basic questions of principle and process involved, specifically "*when* should intervention occur, under whose authority, and *how*". The same approach and policy trend is visible with regard to the relationship between peace and justice. In the report of the Secretary-General entitled *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* it is emphasized that "the question can never be whether to pursue justice or peace, but rather *when* and *how*".[40] Such controversial issues are still waiting to be clarified. It is hoped that this analysis will contribute not only to the debate about law versus politics, but also on the elevation of law over power politics, against old models of conflict management, national security and protection of human rights.[41] Many observers would see the Court as an enforcement mechanism to be associated with post-conflict assessments preventing further crimes, violence and instability, taking a specific role into the state-building activity initiated by the reform of domestic security institutions (army, police and judiciary). The problem is that the Court is involved during armed conflicts with poor resources and assistance and only once political transitions have already failed in the way of reaching sustainable stability.[42] This study simply verifies whether the interaction between complementary global regimes would represent the opportunity for a progress of international law in situations of war and crime, with measures and perhaps new institutions dealing with the protection of victims and witnesses. The implementation of the relationship between such complementary global regimes should be settled by the political premises enforcing them, while their partnership further strengthen by agreements and arrangements between international governance institutions on a case-by-case basis. The protection of human rights, the fight against the impunity and the domestic governance of human security are the factors for

40 UN doc. S/2004/616, para. 21.

41 For an overview of prosecution of human rights crimes on the national and international level and a new demand for accountability and the universal jurisdiction of the ICC, see W. Kaleck 'et al', *International Prosecution of Human Rights Crimes*, (2006), at 5. See also *An Agenda for Peace,* the report written for the UNSC by the Secretary-General in 1992, introducing the concept of "post-conflict peacebuilding", defined as an "action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict". See B. Boutros-Ghali, *An Agenda for Peace*, UN doc. A/47/277 – S/24111, II.21, 17 June 1992, accessible at: http://www.unrol.org/files/A_47_277.pdf See also J. S. Sutterlin, "An Agenda for Peace: Fifteen Years Later", in *Disarmament Times*, August 2007, accessible at: http://disarm.igc.org/index.php?view=category&id=59%3Adt2007fall&option=com_content&Itemid=2

42 Court's officials constantly underline such lack of international cooperation. Right at the beginning of the Review Conference of the Rome Statute in Kampala the President of the Court stated: "Every year, the Assembly of the States Parties looks at the Court and how it is functioning. But the Court is only a small part of this system. Without cooperation, there will be no arrests, victims and witnesses will not be protected, and proceedings will not be possible". See Judge Sang-Hyun Song, President of the International Criminal Court, *Opening Remarks of the Review Conference*, 31 March 2010, accessible at: http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-statements-JudgeSong-ENG.pdf

the preservation of order in difficult political transitions. The links between human development and sustainable models of governance at national, regional and international levels are the keys in accordance with democratic principles and open societies. The basic parameters of civilization have to be preserved at all costs respecting the principle of self-determination, but also the interdependence between regimes at domestic, regional and international levels. The ideal would be the progress in the constitution of the world community and a regulatory framework dealing with peace and justice with an integrated model of governance.

In the theoretical background of peace operations according to the English school and by some other international relations theorists of international conflict management, the categories of peace support operations have been categorized in conflict prevention, peacemaking, peacekeeping, peace enforcement and peace-building. The first categories of such operations focus on identifying the causes of conflicts and preventing their occurrence, persistence or resumption through military presence, while the second category operates through diplomacy, ceasefire agreement or peace settlement to bring an end to violence. The peacekeeping relies on military forces and police operating with host consent of the national authorities to underpin a peace settlement or ceasefire agreement. The peace enforcement implies force used coercively to get compliance with agreements, impose a peace agreement, or protect civilians from hostilities. Peace-building operations support long term regeneration of war-torn societies establishing sustainable peace through institutional, judicial, military, economic and political capacity-building.[43]

The military role of peacekeeping has once more been dramatically reaffirmed in the last decades. The empirical data resulting from wide ranging conflict study, and the analysis of lessons learnt from past operations such as those in Rwanda and Somalia, in Kosovo, East Timor and in the DRC indicate that either prevention or peace-building strategies repeatedly failed in the context of offering sustainable peace. Another concern is that old models of conflict management by peacekeeping do not receive appropriate configurations in conflict and post-conflict situations in order to serve the emerging regime of international criminal justice dealing with mass atrocity crimes. Such an approach is quite controversial as the peace enforcement resolutions by the Security Council (under Chapter VII) are all characterized by serious breaches of international humanitarian law and human rights law. This political trend represents the evident consequence of the decision-making rejecting the use of multinational forces for the sake of justice; whether from a legal perspective the individuals involved in peace operations would also have immunity status by the emerging regime of international criminal justice.

43 See A. Linklater, H. Suganami, *The English School of International Relations*, 2006, at 8.

The independent International Commission on Intervention and State Sovereignty was established by the Government of Canada, shortly after the UN-commissioned reports to respond to the challenges of humanitarian intervention.[44] In regard to the chronology of peace enforcement and the assessments of civil conflicts characterized by ethnic violence as in Kosovo, Somalia, Rwanda and the former Yugoslavia, international humanitarian intervention emphasised the challenges for the UN peacemaking role and the maintenance of collective security. The UN Secretary-General convened an international panel to conduct a major study on the United Nations peace operations chaired by the Under Secretary-General and former Algerian Foreign Minister Lakhdar Brahimi. The panel was tasked to conduct a wide ranging study and analysis over lessons learnt from past peace and security operations from preventive to post-conflict peace building, including observation missions, peacekeeping and peace enforcement. Confronted with the problems encountered by peacekeeping forces, the Security Council did not establish any operation in the late nineties. The inaction of the Security Council was indeed the consequence of humanitarian disasters and also of military intervention of States or coalitions guided by unilateral strategic interests. Continuing crises in the DRC, the Central African Republic, East Timor, Kosovo, Sierra Leone and Ethiopia-Eritrea, successively led the Security Council to establish six new missions in 1998-2000.[45]

In the practice the UN missions of the last decade, especially in sub-Saharan African countries, have been characterized by comprehensive mandates and multidimensional peacekeeping operations. Lately, the humanitarian protection duties of civilians would allow intervention, peace enforcement and the use of force. A regulatory system of governance of such sensitive issues is nearly inexistent. For some observers the operational character of such interventions should follow configurations and engagements in the form of international police of multinational nature, assisting international investigations and prosecutions of recognized international crimes.[46] In theory, the UN tried to clarify the right of humanitarian intervention through the duty to protect civilians when the States would fail in their own responsibilities, while the practice displays several overlaps. In the Sudan, UNMIS was not able to deploy to Darfur due to the government's steadfast opposition to a peacekeeping operation undertaken solely by the UN as envisaged in Security Council Resolution 1706 (2006). The UN then embarked on an alternative and innovative approach to stabilize the region through the phased strengthening of AMIS, before transfer of authority to a joint AU/UN peace-

44 For an overview of the report see 'The Responsibility To Protect" accessible at: http://www.iciss.ca/pdf/Commission-Report.pdf

45 For an overview see the United Nations Peacekeeping Operations, Background Note, 30 November 2007, accessible at: http://www.un.org/Dpts/dpko/bnote.htm

46 G. Day, C. Freeman, "Operationalizing the Responsibility To Protect. The Policekeeping Approach", 11 *Global Governance* 2, 2005, at 139.

keeping operation. Following prolonged and intensive negotiations with the government of the Sudan and significant international pressure, the government accepted the peacekeeping operation in Darfur. Successively, the Security Council by its Resolution 1769 (2007), authorized the establishment of the United Nations-African Union Hybrid Operation in Darfur (UNAMID).[47] With regard to the controversial policy issue of civilian protection duties, political consensus has been emphasized several times at the UN on the mechanisms of humanitarian interventions, including the issue of public authority of the Security Council to authorize it.[48] The eventual evolution from the 'right' to intervene in *intra*-state conflicts to the 'responsibility' to protect deserve implementation of policy and law especially with regard to the operations in the field by complementary mandates.

In the DRC, unanimously adopting Resolution 1925 (2010) under Chapter VII of the United Nations Charter, the Security Council decided that MONUSCO, the new version of MONUC's mandate, would be deployed further, authorizing to concentrate its military forces in eastern DRC while keeping a reserve force capable of redeploying rapidly elsewhere. The Security Council decided that MONUSCO would comprise, in addition to the appropriate civilian, judiciary and correction components, a maximum of 19,815 military personnel, 760 military observers, 391 police personnel and 1,050 members of formed police units. Future reconfigurations of MONUSCO would be determined as the situation evolved on the ground, including: the completion of ongoing military operations in North and South Kivu as well as Orientale provinces; improved government capacity to protect the population effectively; and the consolidation of State authority throughout the territory.[49] Emphasizing that the protection of civilians must be given priority, the Security Council authorized MONUSCO to use all necessary means to carry out its protection mandate, including the effective protection of civilians, humanitarian personnel and human rights defenders under imminent threat of phys-

47 The African Union/UN Hybrid operation in Darfur, referred to by its acronym UNAMID, was established on 31 July 2007 with the adoption of Security Council resolution 1769 (S/RES/1769, adopted by the Security Council at its 5727th meeting, on 31 July 2007) . On 31 July 2008, the Security Council extended UNAMID's mandate for a further 12 months to 31 July 2009 and then again on 6 August 2009, for a further 12 months to 31 July 2010. UNAMID has the protection of civilians as its core mandate, but is also tasked with contributing to security for humanitarian assistance, monitoring and verifying implementation of agreements, assisting an inclusive political process, contributing to the promotion of human rights and the rule of law, and monitoring and reporting on the situation along the borders with Chad and the Central African Republic (CAR). For an overview of the mandate, see Protecting civilians, facilitating humanitarian aid and helping political process in Darfur by UNAMID, accessible at: http://www.un.org/en/peacekeeping/missions/unamid/

48 T. G. Weiss, "The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era", 2 *Security Dialogue* 2004, at 135.

49 For an overview of the nature of such comprehensive peacekeeping mandate see http://www.un.org/en/peacekeeping/missions/monusco/mandate.shtml

ical violence, as well as the protection of UN personnel, facilities, installations and equipment. The UN mission would also support government efforts to fight impunity and ensure the protection of civilians from violations of international human rights and humanitarian law, including all forms of sexual and gender-based violence. The support to the investigations and prosecutions of the ICC is not detectable by the configuration of the peacekeeping mandate in the country, while the agreements and arrangements between peace operations and the Court are not maximizing the results on the ground.

5.3.2 Peacekeeping reforms and the accountability on the ground

On the top of the lack of credibility of humanitarian interventions and the issues of coordination, the reform of the UN peacekeeping with the purpose of improving transparency, accountability and integrity is an on-going issue. As pointed out by Schwartz during his testimony before the US House International Relations Subcommittee on Africa (Global Human Rights, and International Organizations), "the United States and other members of the UN Security Council now regularly ask peacekeepers and their civilian counterparts to remake societies coming out of internal conflict: negotiating peace agreements; reforming security sectors and operations; promoting political reconciliation and effective and democratic governance; rebuilding domestic systems of justice. The activity by the DPKO started a process of recent reconstruction with the aim of developing an "exit strategy" for peacekeeping, working closely with partners to ensure a bridge from immediate post-conflict situations towards long-term development. In the years to come the DPKO will need to focus on delivering efficient and effective peace operations by enhancing the partnerships it has established within and outside the UN system. This phase of reconstruction should focus on supporting the Court's field offices.[50] Moreover, in the absence of local capacity, UN troops and international civilian police have been asked to ensure public security in post-conflict environments, responding to threats while mentoring and training local security forces". Schwartz in his capacity of consultant in the US Council on Foreign Relations during his testimony at the Congress in 2005 underlined that the US administration must ensure effective peacekeeping reforms, while sustaining support for UN activities that are critical not only to international peace and security, but also to US national integrity. According to Schwartz it is not possible to discuss seriously peacekeeping reform without addressing the issue of sexual exploitation and abuse by UN peacekeepers in the DRC and in other UN operations. The attention on this issue by the Members of Congress and others is highly appropriate and critically important both because ending victimization is a humanitarian imperative, and because an effective policy of 'zero tolerance' is essential to ensur-

50 For an overview see the portal of the Office of Rule of Law and Security Institutions (OROLSI) accessible at: http://www.un.org/en/peacekeeping/orolsi.shtml

ing the future credibility of the UN peace operations.[51] The ideal should be to consider such forces on the ground as also at the disposition of the Court enforcing its judicial warrants, while being accountable of international crimes falling under the Rome Statute. For an overview of the debate on the mechanisms that need to be established in order to enable peace enforcers to arrest war criminals and of what lessons future peace enforcement missions can learn from the experience of IFOR, SFOR and KFOR, the views expressed by experts in peace, security and justice studies are extremely formative for decision makers.[52]

During his testimony Schwartz recalls the issue of sexual exploitation and abuse by peacekeepers in some field operations in Africa, referring to the report of Prince Zeid Ra'ad Zeid Al-Hussein to the Secretary-General, to advise him on this issue and prepare a public report with urgent recommendations. Prince Zeid's report described a range of shortcomings, including a *mosaic* of rules and regulations that create a lack of clarity such as: *a)* the absence of a system-wide commitment to investigation and, as appropriate, punishment of members of military contingents; *b)* the absence of local enforcement capability for investigation and prosecution of civilian members of the UN missions; *c)* lack of resources, personnel and procedures for effective investigations, training, and interaction with local populations; and *d)* the absence of redress or compensation for victims. Finally, without seeking to excuse sexual exploitation and abuse, the report notes that "absence of organized recreational activities for troops can contribute to aberrant and unacceptable behavior".[53] From the recommendations settled in this report, accountability and integrity must be the two important elements for an appropriate reform of the UN peace operations. The Conduct and Discipline Unit (CDU) was formally established in the Department of Field Support in 2007 following the initial formation of a Conduct and Discipline Team in the Department of Peacekeeping Operations which started its activity only a few years ago. It was launched as part of a package of reforms in UN peacekeeping designed to strengthen accountability and uphold the highest standards of conduct. The new content complies with a General Assembly resolution requesting "the

51 See E. P. Schwartz, 'UN Peacekeeping Reform: Seeking Greater Accountability and Integrity', 2005, US Senate, *Council on Foreign Relations*, accessible at: http://www.cfr.org/publication.html?id=8113 See UN Doc ST/SGB/2003/13, UN Secretary General's *Zero tolerance policy on sexual exploitation and sexual abuse,* in SGB, Secretary Generals Bulletin, Special measures on protection from sexual exploitation and sexual abuse, 2003. For an overview of the debate, see O. Simic, 'Rethinking Sexual Exploitation in UN peacekeeping operations', July-August 2009, *Women's Studies International Forum,* Volume 32, Issue 4, pp. 288-295. See also UN News, *UN team looking into alleged sexual misconduct by blue helmets in DRC,* 2009, accessible at: http://www.un.org/apps/news/story.asp?NewsID=32857

52 See M. Lyck, 'UN Peace Missions' Involvement in Securing Justice and Transitional Justice', *Peace Operations and International Criminal Justice: Building Peace After Mass Atrocities*, 2009, 35 at 70.

53 See UN doc. A/59/710 (2005).

implementation of an effective outreach programme to explain the policy of the UN against sexual exploitation and abuse, and to inform the public on the outcome of all such cases involving peacekeeping personnel, including cases where allegations are ultimately found to be legally unproven."[54]

5.3.3 Peacekeepers and the Court

The issue of peacekeepers and the role of the Court have been controversial since the first treaty negotiations. It can be said that this was an explicit reason of the Court's rejection by the US albeit that its resistance related particularly to the American peace soldiers. The Rome Statute contains many safeguards that would prevent the Court from pursuing politically motivated prosecutions against peacekeepers. The Court can only investigate the designated types of very serious crimes that fall within the Court's jurisdiction, including crimes that are unlikely to be authorized or engaged in as part of any peacekeeping mission. The judicial decision by the Court to summon a rebel leader allegedly responsible for the killing of members of the African Union peacekeeping forces in Darfur underscores the gravity of attacks against those deployed to protect civilians. The rebel commander Bahar Idriss Abu Garda appeared voluntarily before the ICC judges to respond to the summons related to such attacks on peacekeeping forces. The US is able to impede the ICC action by investigating any charges against American peacekeepers, even if it does not lead to prosecution. The American Service-Members' Protection Act (ASPA) was a federal law introduced by US Senator Jesse Helms as an amendment to the National Defense Authorization Act and passed in August 2002 by Congress. The stated purpose of the amendment was "to protect the US military personnel and other elected and appointed officials of the US government against criminal prosecution by an International Criminal Court to which the US is not party". Moreover, the UN status of forces agreements including troop contribution agreements applicable to peacekeeping missions, already provide for the US jurisdiction over many criminal offences committed by the US military and civilian members in host countries.[55] This section is not intended to discuss the American national security policy and the reasons of its attacks to the Court, which are well known. However, it should be time to define the US role as non-State Party to the Rome Statute, hopefully characterized by the transition from "rejecting to supporting" the Court with concrete, visible and transparent actions.

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54 See CDU portal accessible at: http://cdu.unlb.org/

55 For an overview of the practice of UN peacekeeping, in four detailed case studies on El Salvador, Cambodia, Rwanda and the former Yugoslavia, see also, M. Katayanagi, *Human Rights Functions of United Nations Peacekeeping Operations,* (2002). For an chronological overview see, J. Washburn, *Background on Peacekeeping and the ICC*, AMICC, accessible at: http://www.iccnow.org/documents/FS-AMICC-Peacekeeping.pdf For an overview of the practice of UN peacekeeping, in four detailed case studies on El Salvador, Cambodia, Rwanda and the former Yugoslavia, see also, M. Katayanagi, *Human Rights Functions of United Nations Peacekeeping Operations,* (2002).

5.3.4 The challenges and opportunities

The reporting activity of the Secretary-General to the UN institutions, specifically addressed to the Security Council, has been characterized by the necessity of supporting the role of the Court since its establishment. In the report delivered to the Security Council "*The rule of law and transitional justice in conflict and post-conflict societies*" the Secretary-General noted that the Court offers new hope for a permanent reduction in the phenomenon of impunity and the further ratification of its Statute is thus to be encouraged. He stated: "…undoubtedly, the most significant recent development in the international community's long struggle to advance the cause of justice and rule of law was the establishment of the International Criminal Court. The Rome Statute entered into force only on 1 July 2002, yet the Court is already having an important impact by putting would-be violators on notice that impunity is not assured and serving as a catalyst for enacting national laws against the gravest international crimes. It is now crucial that the international community ensures that this nascent institution has the resources, capacities, information and support it needs to investigate, prosecute and bring to trial those who bear the greatest responsibility for war crimes, crimes against humanity and genocide, in situations where national authorities are unable or unwilling to do so".[56]

The Secretary-General continued: "The Security Council has a particular role to play in this regard, empowered as it is to refer situations to the International Criminal Court, even in cases where the countries concerned are not States parties to the Statute of the Court. At the same time, all States Members of the United Nations should move towards the ratification of the Rome Statute at the earliest possible opportunity". Upon receipt of this report from the Secretary-General, the Security Council discussed the matters during the ministerial meeting "*Justice and the rule of law: the United Nations role*".[57] Pleuger (the German representative during the UNSC meeting *5052*) pointed out that the Secretary-General's report, as thorough and thoughtful as it may be, is only the beginning of a long-term global agenda. Pleuger stated: "… important and often difficult questions remain unresolved. Here, I am referring to policy questions such as the proper sequencing and timing of measures to promote peace, justice and reconciliation; to institutional questions such as the cooperation between the UN, notably the Security Council and the ICC; and to resource questions. With regard to the latter, action by the UN must be complemented by assistance that States make available to each other if a State is in need of certain capacities, materials or expertise. The Security Council will urge Member States that are able to do so to contribute national expertise and materials". In his statement Pleuger makes clear that

56 See UN doc. S/2004/616, para. 49, at 16.

57 See UN doc. S/PV.5052 accessible at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/IJ%20SPV5052.pdf

"the Secretary-General's report on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616) is a 'landmark document'. It represents a significant step forward in conceptualizing the rule of law and transitional justice and in explaining their relevance to the work of the UN". Such statement was in line with the position expressed by the representative of the Netherlands on behalf of the EU.

Danforth, the former US representative responded as follows: "…as this Council and the wider membership of the UN know full well, the US has fundamental objections to the ICC created by the Rome Statute. Our problems with the ICC concern the rule of law. We believe the Court should not have jurisdiction over citizens of States that are not parties to the Rome Statute. We believe that the Rome Statute does not reflect due process of law as we understand it, because, among other things, it allows multiple jeopardy and does not provide for jury trials, as our Constitution requires. We believe the ICC runs a high risk of politicization and is not accountable. And we believe the ICC clashes with the international system of the United Nations Charter. It should come as no surprise, therefore, that we do not endorse the report's embrace of the ICC. We can accept the draft presidential statement today because it respects our inability to support the ICC and does not explicitly or implicitly endorse the ICC".

The conclusion would be that the political priority, resource allocations and the determination of the Security Council only focused on the peace operations and security reform for the operational improvements in the African deployments, practically ignoring the Court's presence in the field such as MONUC, UNMIS, UNAMID and MINURCAT.[58] One year later in 2005 the ICC received the first Security Council's referral (Sudan, Darfur). However, the paragraph 7 of the Resolution 1593 (2005) stated that the Security Council "*Recognizes* that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily; The paragraph 8 "*Invites* the Prosecutor to address the Council within three months of the date of adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution".

5.3.5 Relationship and partnership implementation

Further consensus will be necessary to provide political support for the Court's work towards concrete actions implementing the relations between the Court and the UN, including the ways the international community

58 For an overview of the last developments in the field missions of the United Nations and the peace operations in Africa see http://www.un.org/Depts/dpko/dpko/currentops.shtml#africa

would work with the Court. Some fundamental issues on the importance to have a permanent Court operating in the field have been underestimated by some governments, preferring to argue on triggering mechanisms instead of recognizing the public authority of the Rome Statute institutions. The UN General Assembly resolutions supporting the work of the ICC served three main objectives: to provide political support for the Court's work, to underline the importance of the relations between the Court and the UN, and to show the need for the international community to work with the Court.[59] The General Assembly:

> " […] *Welcomes* the cooperation and assistance provided thus far to the International Criminal Court by States parties as well as States not parties, the United Nations and other international and regional organizations, and calls upon those States that are under an obligation to cooperate to provide such cooperation and assistance in the future, in particular with regard to arrest and surrender, the provision of evidence, the protection and relocation of victims and witnesses and the enforcement of sentences; 6. *Emphasizes* the importance of cooperation with States that are not parties to the Rome Statute […].

Despite such resolutions the support to the Court is still weak.

5.3.6 Peace building and post-conflict justice

From the notion of restorative justice the literature reveals that it is possible to generate processes and institutions that can serve the needs of justice during the transition from civil war to the rule of law in domestic realities. These structural and normative international efforts can establish a strong foundation for peace, justice and reconciliation of domestic realities on their own in post-conflict situations. Some scholars emphasize the decentralized policies for the regime formation of restorative justice and the lack of resources on one side, but also the progress through the classic features of international criminal law, for instance in the freezing of assets of criminal perpetrators. Such features represent the income for the reparation of victims but much more will need to be accomplished in the context of sustainable peace and capacity-building. At institutional level, this has been proposed by the UN Secretary General at several stages, bringing as positive outcome the establishment of the UN Peace-building Commission.

> "By establishing the Peacebuilding Commission, Member States of the United Nations have created an important new structure to support fragile societies recovering from the devastation of war" as stated by Secretary-General Ban Ki-moon (SG/SM/11063, 27 June 2007).

59 See UN doc. A/64/356, 17 September 2009, Fifth Report of the International Criminal Court to the United Nations for 2008/2009, accessible at: http://www.icc-cpi.int/NR/rdonlyres/1BC01710-9C42-44AC-8B18-85EE2A8876EB/281210/A_64_356_ENG2.pdf

The Peacebuilding Commission (PBC) is a new intergovernmental UN advisory body that supports peace efforts in countries emerging from conflict, and is a key addition to the capacity of the international community in the broad peace agenda. The Peacebuilding Commission plays a unique role in *a)* bringing together all of the relevant actors, including international donors, the international financial institutions, national governments, troop contributing countries; *b)* marshalling resources and to *c)* advising on and proposing integrated strategies for post-conflict peacebuilding and recovery and where appropriate, highlighting any gaps that threaten to undermine peace. The concurrent General Assembly and Security Council resolutions establishing the Peacebuilding Commission also provided for the establishment of a Peacebuilding Fund and Peacebuilding Support Office, which together form the UN peacebuilding architecture.[60] The forward-looking orientation of restorative justice is one of the features that render it most attractive to the work of peace building in the post-conflict phase. Therefore while such peacebuilding architecture consolidates itself it is required that it would become an important actor in the field of justice and accountability. The States parties to the Rome Statute should develop a strong relationship within such architecture in order to promote the Court towards such important partnerships.

5.3.7 The concept of restorative justice

In conclusion, the *restorative* justice refers to societies seeking to establish, or re-establish, solid institutions and just practices that will sustain and support a peaceful future. It requires capacity-building. Lambourne defines peace-building activities as "strategies designed to promote a secure and stable lasting peace in which the basic human needs of the population are met, and violent conflicts do not recur. Justice and order are important aspects of peace-building in a post-conflict situation where there is a need to end violence, disarm combatants, restore the rule of law, and deal with the perpetrators of war crimes and other human rights abuses".[61] Cornwell appraises the potential of *restorative* justice to make "corrections" more effective, civilised,

60 UN doc. A/64/341-S/2009/444, Report of the Peacebuilding Commission on its third session, 8 September 2009, accessible at: http://www.un.org/peace/peacebuilding/docsandres.shtml

61 See W. Lambourne, 'Post-Conflict Peacebuilding: Meeting Human Needs for Justice and Reconciliation', April 2004, *Peace, Conflict and Development Journal* 4, accessible at: http://www.peacestudiesjournal.org.uk/docs/PostConflictPeacebuilding.PDF See also W. Lambourne 'Transitional Justice and Peacebuilding After Mass Violence', 2010 *International Journal of Transitional Justice* (forthcoming). W. Lambourne 'Justice After Genocide: The Rwandan Experiment with Gacaca Community Justice', 2010 (forthcoming), in proceedings from the conference "Social Justice and Human Rights in the Era of Globalisation: Between Rhetoric and Reality", Katholieke Universiteit Leuven, Belgium, 21-23 August 2006. W. Lambourne (2007), "Peacekeeping and Peacebuilding" in United Nations Association of Australia, *Australia and the United Nations*, UNAA, pp. 27-32.

humanitarian, pragmatic and non-fanciful, by looking at "bedrock issues" in contemporary criminology and penology and demonstrates that *restorative* justice offers no "soft options", rather the demands of remorse, acceptance of responsibility, and the repairing of harm done. Cornwell points out that "*restorative* justice makes the case for the radical overhaul of existing approaches on the basis of principle rather than political expediency".[62] Bassiouni clarifies that "a number of different concepts are used to refer to what is sometimes called post-conflict justice, including transitional justice, strategies for combating the impunity, peace-building, and post-conflict reconstruction. These terms have evolved over the past two-a-half decades and, while their definitions and values often overlap, they are rarely used in a consistent manner. Some concepts emphasize the demands of nation-building and democratic governance, while others focus more on institutional development, rule of law, and security". The text of the *Chicago Principles on Post Conflict Justice*, a document that links a theoretical consideration of post-conflict justice with a practical consideration of policy development, was prepared by Bassiouni and Rothenberg. The final draft was presented in the hope that the principles would be integrated into a wider international approach of post-conflict justice.[63] These valid contributions deserve to be mentioned as they represent one of the appropriate voices for a change in policy and law, offering clarity about the implementation of complementarity, linking domestic, regional and international responsibilities in transition societies from conflict, violence and crime, to stability and reconstruction.

5.4 Preserving the Rule of Law towards pluralistic jurisdictions

Section Outline

The requirements in the policy formulation to extend complementarity between the UN system and the Rome Statute institutions have been debated in the previous sections. The view argued in this section is that the promotion of the rule of law towards complementary global regimes refers to

62 Restorative justice is a paradigm that was developed over the last twenty years by practitioners working in the field of criminal justice. Because of these modern roots, the concept has been almost exclusively identified with criminal justice. See D. J. Cornwell, 'New Horizons: International Perspectives on Restorative Justice', in *Criminal Punishment and Restorative Justice. Past, Present and Future Perspectives*, (2006), at 108. For an important overview of the debate on restorative justice placing victims of crime at the centre of the criminal justice process see also D. J. Cornwell, *Doing Justice Better. The Politics of Restorative Justice*, (2007).

63 See the Excerpt from IHRLI's Chicago Principles on Post Conflict Justice: Combating impunity through Prosecution; Truth-Telling and Investigations of Past Violations; Acknowledging Victims' Rights and Providing Remedies of Reparations; Ensuring Accountability through Vetting Sanctions and Administrative Measures; Supporting Memorialization, Education, and the Preservation of Historical Memory; Respecting Traditional, Indigenous, and Religious Approaches to Justice and Healing; Enabling Institutional Reform and Effective Governance.

the implementation of a legal framework of interactions advocated in this study, including the constant effort to enhance visibility and accountability of their actions. Such interaction framework, which has still to be found, would enhance both efficiency and credibility of global mandates in the fight against the impunity of international crimes and the quest of sustainable peace. In order to provide a comprehensive assessment on these issues, this section contains an extensive analysis of the UN position concerning the rule of law at international level and the efforts for the creation of an international justice system in conflict and post-conflict societies, including the criminal accountability and the internal justice cluster for the UN officials and experts on mission. The positions of the UN bodies and institutions will be discussed taking into account the reporting activity of the Secretary-General to the Security Council and the resolutions of the General Assembly on these matters. In 2012 the UN members in the General Assembly Rule of Law Declaration explicitly stated "we recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions".[64]

The involvement of the UN in the promotion and preservation of the rule of law activities at international level is determined by the actors responsible of the overall coordination of the UN efforts in this sensitive area of governance, mainly the Department of Political Affairs (DPA), the Department of Peacekeeping Operations (DPKO), the Office of the High Commissioner for Human Rights (OHCHR), the Office of Legal Affairs (OLA), the United Nations Development Programme (UNDP), the United Nations Children's Fund (UNICEF), the Office of the United Nations High Commissioner for Refugees (UNHCR), the United Nations Development Fund for Women (UNIFEM) and the United Nations Office on Drugs and Crime (UNODC). The rule of law is at the very heart of the UN mission and structure. In the World Summit Outcome Document (2005) the UN members stressed the need for universal adherence to, and implementation of, the rule of law at both the national and international levels. The UN is engaged in an on-going process to strengthen its attention to the rule of law. Principal landmarks in this process have included in chronological order: the Millennium Declaration (2000); the Report of the Panel on the UN Peace Operations ("the Brahimi report", 2000); the Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies" (2004)[65] including the other Reports of the Secretary-General: Uniting our strengths: Enhancing the UN support for the rule of law (2006);

64 See UN doc. A/RES/67/1, 30 November 2012, accessible at: http://www.unrol.org/files/A-RES-67-1.pdf

65 See the Secretary-General, Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 5, UN Doc. S/2004/616, August 23, 2004.

Strengthening and coordinating the UN rule of law activities (2008); Annual reports on strengthening and coordinating the UN rule of law activities (2009), Delivering justice: programme of action to strengthen the rule of law at the national and international levels.[66]

At the opening of the general debate of the General Assembly in 2004, following the serious violations of international law and the war in Iraq, the Secretary-General made the following remarks, "we must start from the principle that no one is above the law and no one should be denied its protection. Every nation that proclaims the rule of law at home must respect it abroad, and every nation that insists on it abroad, must enforce it at home. The rule of law starts at home but in too many places it remains elusive. Hatred, corruption, violence and exclusion go without redress. The vulnerable lack effective recourse, while the powerful manipulate laws to retain power and accumulate wealth. At times, even the necessary fight against terrorism is allowed to encroach unnecessarily on civil liberties. It is the law, including the Security Council resolutions, which offers the best foundation for resolving prolonged conflicts, in the Middle East, in Iraq, and around the world. And it is by rigorously upholding international law that we can, and must, fulfill our responsibility to protect innocent civilians from genocide, crimes against humanity and war crimes…".[67]

There are a number of approaches defining the rule of law, or at least identifying the principal elements that constitute such concept. For example, the Secretary-General has defined it in these terms: "the rule of law is a concept at the very heart of the UN mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including 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". As Tolbert asserts, this is a good *black letter* definition of the rule of law because "it covers the principal elements that lawyers expect in terms of how the law is created and applied. An important element is missing from such definition". [68]

66 See UN doc. A/66/749 (2012).

67 See K. Annan *The Rule of Law Remains Elusive,* addressed at the opening of the general debate of the fifty-ninth session of the General Assembly New York, 21 September 2004, accessible at: http://www.un.org/Pubs/chronicle/2004/issue3/0304p4.asp

68 See D. Tolbert, A. Solomon, "What is the Rule of Law, Which Rule of Law?", in United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies, 2006 *Harward Human Rights Journal* 19, p. 29, accessible at: http://www.law.harvard.edu/students/orgs/hrj/iss19/tolbert.shtml#fn10 See also T. Carothers, 'The Rule of Law Revival', 1998 *Foreign Affairs* 77, at 95.

One area that is repeatedly mentioned both in terms of UN reform and the future role of the organization is in building the rule of law in developing countries, in general, and post-conflict societies, in particular. Both Tolbert and Casper put this in the same way asserting however, that the rule of law is not a recipe for detailed institutional design. The concept of the rule of law does not contain such a prerogative. It is an interconnected cluster of values".[69] In Casper's view "the concept of the rule of law is a fairly empty vessel whose content, depending on legal cultures and historical conditions can differ considerably and, therefore, can give rise to vast disagreements and, indeed, conflicts. One can easily see how differences in the various approaches might lead to conflict. For example, in Iraq there has been considerable debate regarding the extent to which *Shari'a* law, as opposed to secular approaches, should be incorporated into the Iraqi constitution and its legal system". On the other hand, the rule of law at national and international levels as a principle of governance finds deep and solid roots in the UN Charter and in the major declarations adopted by the General Assembly. The rule of law appears as a powerful notion that embraces the most classical and fundamental principles of the international legal order, allowing to face the most urgent and contemporary concerns of the international community, such as the maintenance of peace and security, the respect for human rights and fundamental freedoms, the fight against impunity and universal justice. According to the Charter, the United Nations will need to place "conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". The intent of this section is to provide an assessment of the last developments in the preservation of the rule of law and justice in the UN.

5.4.1 The Rule of Law and Justice

In the last period of his mandate Secretary-General Kofi Annan pleaded and insisted with the General Assembly that the rule of law is at risk around the world. He pointed out that there is a framework of fair rules and institutions but "the gaps in applying the rules fairly and impartially is huge".[70] The analysis of the United Nations documents since 2004 contains a common language of justice, incorporating concepts of "justice", "rule of law" and "transitional justice".[71] On 6 October 2004, at the initiative of the Unit-

69 See G. Casper, *Rule of Law? Whose Law?* note Address, 2003 CEELI Award Ceremony and Luncheon, San Francisco, Cal. (Aug. 9, 2003) quoting Martin Krygier, International Encyclopedia of the Social & Behavioral Sciences 13404 (Smelser & Baltes eds., 2001), accessible at: http://iis-db.stanford.edu/pubs/20677/Rule_of_Law.pdf

70 See UN Press Release SG/SM/9491 GA/10258, Kofi Annan's ground-breaking address at the opening of the 59th session of the UN General Assembly on 21 September 2004. See also Secretary-General's remarks on ringing the Peace Bell, New York, 21 September 2004, accessible at: http://www.un.org/sg/statements/index.asp?nid=1088

71 UN doc. S/PV.5052 accessible at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/IJ%20SPV5052.pdf

ed Kingdom, the Security Council held a meeting to discuss *"Justice and the rule of law: the United Nations role"* after the Secretary-General's report of 23 August 2004, entitled *"The rule of law and transitional justice in conflict and post-conflict societies"*.[72] In a statement made on behalf of the Security Council at the conclusion of the meeting, the President of the UNSC stressed the importance and urgency to restore justice and the rule of law in post-conflict societies, not only to come to terms with past abuses, but also to promote national reconciliation and to help prevent a return to conflict.[73] The Security Council later requested the Secretariat to make proposals for implementing the recommendations, set out in paragraph 65 of the Secretary-General's report, aimed at strengthening the efforts of the United Nations system to address the rule of law and transitional justice issues in conflict and post-conflict situations. In the conclusions and recommendations of this document in the Part XIX, *Moving Forward,* the Secretary-General addressed: *a)* the considerations for negotiations, peace agreements and Security Council mandates and *b)* the considerations for the United Nations system.

Paragraph 65 of the report contains the determination of the Secretary-General within his own institutional powers, explicitly addressed to the Security Council and General Assembly. He expressly stated: "I intend to instruct the Executive Committee on Peace and Security, building on the earlier work of its task forces, to propose concrete action on the matters discussed in the present report, for the purpose of strengthening the UN support for transitional justice and the rule of law in conflict and post-conflict countries and to give consideration, *inter alia*, to: *a)* making proposals for enhancing United Nations-system arrangements for supporting the rule of law and transitional justice in conflict and post-conflict societies; *b)* ensuring that rule of law and transitional justice considerations are integrated into our strategic and operational planning of peace operations; *c)* updating the current list of United Nations guidelines, manuals and tools on rule of law topics and supplementing those materials as needed; *d)* proposing new or enhanced United Nations system mechanisms, including common databases and common web-based resources, for the collection and development of best practices, documentation, manuals, handbooks, guidelines and other tools for transitional justice and for justice sector development; *e)* reviewing best practices and developing proposals for workable national-level rule of law coordination mechanisms involving justice sector institutions, civil society, donors and the United Nations system; *f)* developing approaches for ensuring that all programmes and policies supporting constitutional, judicial and legislative reform promote gender equality; *g)* Convening technical-level workshops on the rule of law and on transitional justice experiences from

72 UN doc. S/2004/616 accessible at: http://www.un.org/depts/dpko/dpko/reports.htm

73 UN doc. S/PRST/2004/34 accessible at: http://www.un.org/Docs/sc/unsc_pres_statements04.html http://daccessdds.un.org/doc/UNDOC/GEN/N04/539/38/PDF/N0453938.pdf?OpenElement

around the world; *h)* establishing arrangements for creating and maintaining an up-to-date roster/database of justice and transitional justice experts, based upon explicit criteria, reflecting geographic, linguistic, gender and technical diversity, and organized according to particular areas of expertise; *i)* organizing interdepartmental staff-training programmes on the rule of law and on transitional justice; *j)* ensuring systematic debriefing of personnel involved in rule of law and transitional justice operations.

While such institutional policy would take shape with the purpose of strengthening the UN support to justice and the rule of law sectors, the UN political body also deliberated on the situation in Sudan. In 2005 with Resolution 1593 the Security Council refers the situation in Darfur to the Court.[74] On 22 June 2006, the Security Council met to discuss the item entitled "*Strengthening international law: rule of law and maintenance of international peace and security*".[75] In its preparation for the debate Denmark circulated an informal discussion paper setting out various suggested themes and questions for discussion. Under the broad title proposed for the debate, it was suggested to address three related distinct themes, each critically important for the promotion of the rule of law and human rights: *a)* the promotion of rule of law in conflict and post-conflict situations; *b)* ending impunity for international crimes; and *c)* enhancing efficiency and credibility of UN sanctions regimes. In a presidential statement the Security Council reiterated the need for the Secretariat to provide proposals reported above in paragraph 65 of the Secretary General's report on the rule of law and justice in conflict and post-conflict societies.

In the presidential statement (S/PRST/2006/28), "The Security Council emphasizes the responsibility of States to comply with their obligations to end impunity and to prosecute those responsible for genocide, crimes against humanity and serious violations of international humanitarian law. The Security Council reaffirms that ending impunity is essential if a society in conflict or recovering from conflict is to come to terms with past abuses committed against civilians and to prevent such abuses in the future. The Security Council intends to continue forcefully to fight impunity with appropriate means and draws attention to the full range of justice and reconciliation mechanisms to be considered, including national, international and 'mixed' criminal courts and tribunals and truth and reconciliation commissions". The document does not refer explicitly to the ICC but it only recalls the main responsibility of the UN Member States in a general sense.[76]

74 UN doc. S/RES/1593 (2005). Adopted by Vote of 11 in favour to none against, with 4 abstentions (Algeria, Brazil, China, United States). Other UNSC resolutions are accessible at: http://www.un.org/Docs/sc/unsc_resolutions05.htm

75 See UN doc. S/PRST/2006/28.

76 For an overview see UNSC Presidential statement "Strengthening international law: rule of law and maintenance of international peace and security" accessible at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/401/59/PDF/N0640159.pdf?OpenElement

5.4.2 The sectors of the rule of law

In his report to the General Assembly and Security Council, "*Uniting our strengths: Enhancing United Nations support for the rule of law*" (2006),[77] the Secretary-General points out the normative foundation for legal assistance, namely: the Charter of the United Nations, together with the four pillars of the modern international legal system international human rights law, international humanitarian law, international criminal law and international refugee law; the wealth of United Nations human rights and crime prevention; and criminal justice standards. The rule of law and transitional justice issues must be consistently integrated into the strategic and operational planning of new peace operations and Member States almost universally must recognize the establishment of the rule of law as an important aspect of peacekeeping. As a result, the Security Council should be engaged in including human rights and the reform of policing, judicial, penal and legal systems in peacekeeping mandates. According to the legislative history of the UN on these issues, a stronger political will is necessary in respect to the presence of the ICC in the post-building phase developing specific strategies in countries under investigation. Moreover, the rules of law activities are just about to start in the UN. For purposes of coherence and coordination such rule of law activities of the UN can be grouped into three main sectors. The first one, the *Rule of law at the international level*, includes issues related to the Charter of the United Nations, multilateral treaties, international dispute resolution mechanisms, the International Criminal Court and advocacy, training and education regarding international law. The second, the *Rule of law in the context of conflict and post-conflict situations*, includes two components: transitional justice and strengthening of national justice systems and institutions. The activities under transitional justice will include the following: national transitional justice consultation processes, truth and reconciliation processes, reparations, international and hybrid tribunals, national human rights institutions, vetting processes and ad hoc investigations, fact-finding and commissions of inquiry. The second component of the rule of law in the context of conflict and post-conflict situations is also the core component of the third sector, on the *Rule of law in the context of long-term development*, and comprises activities in the area of strengthening of national justice systems and institutions (domestic institution building). These include work to strengthen legal and judicial institutions (e.g. prosecution, ministries of justice, criminal law, legal assistance, court administration and civil law), policing, penal reform, the administration of trust funds and monitoring. In addition, the following additional priority areas have been identified: customary, traditional and community-based justice and dispute resolution mechanisms; victim and

77 UN doc. A/61/636, UN doc. S/2006/980, 14 December 2006, Uniting our strengths: Enhancing United Nations support for the rule of law, addressed by the Secretary-General to the Security Council and the General Assembly, the report is accessible at: http://www.un.org/docs/sc/sgrep06.htm

witness protection and assistance; combating corruption, organized crime, transnational crime and trafficking, and drug control; legal education; public law issues (e.g. land and property, registration, national identification, citizenship and statelessness); interim law enforcement and executive judicial functions performed by the UN; and security support to national police agencies. So as to ensure coherence, the activities in the final sector, the *Rule of law in the context of long-term development*, will closely mirror those activities being undertaken in the context of conflict and post-conflict societies. As the conclusive part of the Secretary-General report points out, the UN human rights standards and norms will be integrated throughout these sectors of the rule of law in all peace operations.

5.4.3 The Coordination of the Rule of Law Activities in the UN System

At the national level, the rule of law activities involve among other aspects, strengthening the constitution, internal laws, institutions of justice, and domestic governance of security sectors (such as army, police and judiciary). Since the rule of law is today at the centre of the UN concerns, the organization needs to deepen and rationalize its rule of law activity, strengthen its capacities, enhance its institutional memory and coordinate more effectively within the UN and with outside actors. To achieve these objectives, a division of labour is being established among the key UN actors. The UN work on rule of law covers a wide area involving a range of themes and subtopics. Some themes can be described as "cross-cutting" as they are common to the work of most, if not all the UN actors conducting rule of law activities. The organization also supports judicial mechanisms, such as the *ad hoc* criminal tribunals and hybrid tribunals, established mainly to address past international crimes in war-torn societies, and fact-finding-investigatory bodies. Many of these mechanisms are hybrid tribunals or commissions, involving often mixed national and international composition and jurisdiction. They are set up in cooperation with national authorities under the UN auspices and with mandates tailored to the specifics of each situation.[78] To ensure better coordination and adequate capacities across the system, lead entities, designated in accordance with their mandates, will assume clearly defined responsibilities for specific areas of the rule of law activities. Lead entities will be obligated to take action to ensure that required capacities exist upon which the whole system can draw. The designation of lead entities is intended to ensure a much higher degree of coherence, predictability and accountability in the delivery of rule of law assistance to Member States. Many offices within the system are involved in the promotion of the rule of law: an inventory issued by the Secretary-General in 2008 (A/63/64) identified as many as 40 entities active in this field and listed 520 different categories of activities performed for the promotion of the rule of law.

78 For an overview of the activities of the UN Rule of Law see the portal accessible at: http://www.unrol.org/

In view of the tremendous magnitude and diversity of the UN involvement in this area, the Secretary-General proposed in 2006 to establish a Rule of Law Coordination and Resource Group, chaired by the Deputy Secretary-General and consisting of the main rule of law actors in the system, to ensure the overall coordination of the UN efforts. As already listed in the section outline the membership of the Group consists of the Department of Political Affairs (DPA), the Department of Peacekeeping Operations (DPKO), Office of the High Commissioner for Human Rights (OHCHR), the Office of Legal Affairs (OLA), United Nations Development Programme (UNDP), The United Nations Children's Fund (UNICEF), The Office of the United Nations High Commissioner for Refugees (UNHCR), the United Nations Development Fund for Women (UNIFEM) and the United Nations Office on Drugs and Crime (UNODC).

The Group has prioritized partners to engage in the development and implementation of the Joint Strategic Plan. In developing the Plan, members of the Group and the Rule of Law Unit consulted with the UN system (headquarters and field offices) and external partners. For implementation of the Plan, the Group will draw upon the expertise and cooperation of a wide range of partners depending on the purpose of the partnerships (financial, political, and programmatic) and corresponding to the Plan outcomes. Partners include the wider UN system, Member States, civil society groups, academics and training institutes in donor and recipient countries and international and regional assistance providers. Existing partnerships should be drawn upon to the extent possible. This Group has taken a new strategic and results-based approach to the UN rule of law work, agreeing on a Joint Strategic Plan for 2009-2011 and for the years to come (see *Results Framework*)[79] developing Guidance Notes of the Secretary General on the UN Approach to Rule of Law Assistance, Justice for Children and Constitution-making. The Rule of Law Coordination and Resource Group is responsible, under the leadership of the Office of Legal Affairs, for further guidance on the rule of law at the international level. Such activities support the development, promotion and implementation of international norms and standards in most fields of international law. Furthermore, the issues relating to the rule of law at international level are being discussed in different political fora within the UN. The Security Council, for example, has held between 2003 and 2006 several thematic debates on matters relating to the rule of law. Since 2006, on a joint proposal by Liechtenstein and Mexico, the General Assembly has included the item "The rule of law at the national and international levels" on its agenda, entrusting it to the Sixth Committee.[80] In the resolution 62/70

79 See Joint Strategic Plan for 2009-2011, Implementation and Partnerships, 2009, pp. 3-4, accessible at: http://www.unrol.org/doc.aspx?doc_id=2140

80 The Sixth Committee is the primary forum for the consideration of legal questions in the General Assembly. All of the UN Member States are entitled to representation on the Sixth Committee as one of the main committees of the General Assembly.

of 8 January 2008 the General Assembly reaffirmed further the need for universal adherence to and implementation of the rule of law at both the national and international levels and its solemn commitment to an international order based on the rule of law and international law, which, together with the principles of justice, is essential for peaceful coexistence and cooperation among States.[81] In the resolution 63/128 of 11 December 2008, the General Assembly has invited Member States to focus their comments at the sixty-fourth session, in October 2009, on the sub-topic of "Promoting the rule of law at the international level". The rule of law is a core principle of governance that ensures justice and fairness, values that are essential to humanity. The rule of law is central to the vision of the Secretary-General for the coming five years, and must guide the collective response to a fast-changing world.[82] The High-level Meeting of the 67th Session of the General Assembly on the Rule of Law at the National and International Levels took place at the UN Headquarters in New York on 24 September 2012. This was a unique occasion for all Member States, non-governmental organisations and civil society represented at the highest level, to discuss and agree a forward looking agenda on strengthening the rule of law.[83]

5.4.4 Criminal accountability of United Nations officials and experts on mission

From the extensive analysis of the UN documents related to the rule of law at national and international level a couple of points need to be clarified. First of all, that the maintenance of peace, justice and security needs to be based on the principle of accountability of all actors involved in mission operations in the field, and second that a consistent strategy of cooperation between the UN and the Court will need to be implemented in addition to the bilateral agreements with peacekeeping forces. At its sixty-first session, in 2006, the General Assembly decided that the agenda item entitled Comprehensive review of the whole question of peacekeeping operations in all their aspects, which had been allocated to the Special Political and Decolonization Committee (Fourth Committee), should also be referred to the Sixth Committee for discussion of the report of the Group of Legal Experts on ensuring the

81 The General Assembly has considered the rule of law as an agenda item since 1992, with renewed interest since 2006 and has adopted resolutions at its last three sessions. See A/RES/61/39, A/RES/62/70, A/RES/63/128. The Security Council has held a number of thematic debates on the rule of law (UN docs: S/PRST/2003/15, S/PRST/2004/2, S/PRST/2004/32, S/PRST/2005/30, S/PRST/2006/28) and adopted resolutions emphasizing the importance of these issues in the context of women, peace and security (SC res 1325, SC res. 1820), children in armed conflict (e.g., SC res 1612), the protection of civilians in armed conflict (e.g., SC res 1674). The Peacebuilding Commission has also regularly addressed rule of law issues with respect to countries on its agenda.

82 UN doc. A/66/749, 16 March 2012, Report of the Secretary-General, *Delivering justice: programme of action to strengthen the rule of law at the national and international levels*, accessible at: http://www.unrol.org/files/SGreport%20eng%20A_66_749.pdf

83 See UN doc. A/RES/67/1 (2012), Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels.

accountability of the UN staff and experts on mission with respect to criminal acts committed in peacekeeping operations (see A/60/980), submitted pursuant to Assembly resolutions 59/300 and 60/263 and decision 60/563 (decision 61/503 A). At the same session, the General Assembly decided to establish an Ad Hoc Committee, open to all States Members of the UN or members of specialized agencies or of the International Atomic Energy Agency, for the purpose of considering the report of the Group of Legal Experts, in particular its legal aspects (resolution 61/29). At its sixty-second session, the General Assembly strongly urged States to consider establishing to the extent that they had not yet done so jurisdiction, particularly over crimes of a serious nature, as known in their existing domestic criminal laws, committed by their nationals while serving as United Nations officials or experts on mission, at least where the conduct as defined in the law of the State establishing jurisdiction also constituted a crime under the laws of the host State; requested the Secretary-General to bring credible allegations that revealed that a crime might have been committed by United Nations officials and experts on mission to the attention of the States against whose nationals such allegations were made, and to request from those States an indication of the status of their efforts to investigate and, as appropriate, prosecute crimes of a serious nature, as well as the types of appropriate assistance States might wish to receive from the Secretariat for the purposes of such investigations and prosecutions (resolution 62/63).

At its sixty-third session (2008), the General Assembly encouraged States, in accordance with their domestic law or any applicable treaties or arrangements on extradition and mutual legal assistance, to afford each other assistance in criminal investigations or criminal or extradition proceedings, including with regard to evidence; encouraged all States, in accordance with their domestic law, to explore ways and means of facilitating the possible use, in criminal proceedings regarding crimes of a serious nature allegedly committed by UN officials and experts on mission, of information and material obtained from the UN, bearing in mind due process considerations; to provide effective protection to witnesses and others who provide information in respect of such crimes; and to explore ways and means of responding adequately to requests by host States in order to enhance their investigative capacity; decided that the consideration of the report of the Group of Legal Experts on the topic (see A/60/980) should be continued during the sixty-fourth session in the framework of a working group of the Sixth Committee; requested the United Nations to consider any appropriate measures that might facilitate the possible use of information and material for purposes of criminal proceedings initiated by States in respect of such crimes, bearing in mind due process considerations; encouraged the United Nations to take appropriate measures, in the interests of the Organization, to restore the credibility and reputation of officials and experts on mission, in the case of unfounded allegations; urged the UN to continue cooperating with States exercising jurisdiction in order to provide them, within the framework of

the relevant rules of international law and agreements governing activities of the UN, with information and material for purposes of criminal proceedings initiated by States; emphasized the importance that no action be taken by the UN that would retaliate against or intimidate UN officials and experts on mission who reported allegations concerning such crimes; and requested the Secretary-General to report to the Assembly at its sixty-fourth session on the implementation of the resolution, as well as with respect to any practical problems in its implementation, on the basis of information received from Governments and the Secretariat, and to include in the report information on the number and types of credible allegations and any actions taken by the UN and its Member States regarding crimes of a serious nature committed by the UN officials and experts on mission (resolution 63/119).[84]

5.4.5 Conclusions

In general, the practice of governing conflict and post-conflict situations shows that the rule of law has been ignored in many cases as a consequence of the accountability gaps and capacity of institutions. The rule of law has been defined as elusive according to UN official reports and by the analytical approaches of many scholars. Acceptable standards of compliance at international level have been weak in the last decades. Under the rule of law national leaders are accountable when committing international crimes. This basic principle, ignored in international affairs for decennia, received legal provisions since the establishment of a permanent International Criminal Court. As discussed above, there is less andless space left for the concept of immunities and for norms that belong to an era where the sovereignty of the nation-state was perceived as absolute.[85] The concept of the rule of law expressed by Tomuschat contains a constitutional framework of the interna-

84 The item entitled "Criminal accountability of United Nations officials and experts on mission" was included in the provisional agenda of the sixty-fourth session of the General Assembly pursuant to Assembly resolution 63/119 of 11 December 2008. UN doc. A/64/446, 12 November 2009. For an overview of the activity of the Ad Hoc Committee on the Criminal accountability of United Nations officials and experts on mission see information accessible at: http://www.un.org/law/criminalaccountability/index.html

85 In March 2009, the Pre-Trial Chamber (PTC) of the International Criminal Court (ICC) authorized the issue of an arrest warrant in respect of President al-Bashir of Sudan in relation to the alleged atrocities committed in Darfur. The request for the arrest warrant raised the issue of whether a serving head of State may rely upon immunity under international law to shield themselves from proceedings before international criminal tribunals. The decision was the first occasion on which the question of State immunity has been raised before the ICC and the first time an international criminal tribunal has considered the issue in respect of an incumbent head of State. For a legal commentary of head of State immunities in international law and the obligation of States, including Sudan, to comply with the Court's request for cooperation in the execution of the arrest warrant, see S. Williams and L. Sherif, 'The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court', 2009 *Journal of Conflict and Security Law* 14 (1), 71 at 92.

tional community which includes the basic rules and norms of *jus cogens* and obligation *erga omnes*, but which also permit sovereign action.[86] The individual criminal responsibility, as distinct from the State responsibility, of those who act on behalf of sovereign entities, or on behalf of intergovernmental organizations, must not be left out of the system of international norms and regulations for the protection of human rights. This is the most important prerequisite to preserve the rule of law towards democratic international governance institutions.

The question under what conditions member States of an international organization may be responsible for international wrongful acts committed by international organization has become a question of fundamental importance in modern international law. There has been a continuing transfer of powers to international organizations. At the same time, for injured parties (whether States or private persons) it remains virtually impossible to find a proper remedy against wrongful acts committed by international organizations, *inter alia* due to lack of jurisdiction of international courts, immunity in domestic courts.[87] As a result of these and related factors, in several instances injured parties have tried to pierce the veil of organizations and have attempted to invoke responsibility of Member States in relation to wrongful the acts of international organizations. In 1999 the Former Republic of Yugoslavia brought claims against member States of NATO in regard to the bombardments carried out by NATO in response to the crimes committed in Kosovo.[88] In 2007, the European Court of Human Rights had to determine whether certain member States of the UN could be held responsible in regard to a failure of the UN to protect civilians from a mined area in Bosnia Herzegovina. The considerable growth of UN activities, as well as the increasing quality demands emanating from the "global rule of law", require a more adequate legal framework for assessing the conduct of the UN.[89]

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86 See, C. Tomuschat and J. M. Thouvenin, *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, (2006), 376 at 400.

87 See N. Blokker, "International Organisations: The Untouchables?" in 10 *International Organizations Law Review* 2, 2014/2013, at 259. See also N. Schrijver, "Beyond Srebrenica and Haiti", in 10 *International Organizations Law Review* 2, 2014/2013, at 588.

88 The International Court of Justice (ICJ) ruled that Serbia and Montenegro's claims against NATO members Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal and Britain should be rejected because the Balkan country was not a member of the United Nations at the time the complaint was filed in April1999. The ICJ can only rule on disputes between UN Member States, unless they have signed conventions giving the court jurisdiction or two States agree to let the ICJ consider its dispute or if the UN Security Council refers a case for an advisory opinion. See Legality of the Use of Force Application of the Federal Republic of Yugoslavia (*Yugoslavia v. Belgium*) 1999 I.C.J. 105 (Apr. 29).

89 See UN Secretary-General, *Delivering Justice: programme of action to strengthen the rule of law at the national and international levels*, 16 March 2012, UN doc. A/66/749. See also N. Schrijver, "Beyond Srebrenica and Haiti", in 10 *International Organizations Law Review* 2, 2014/2013, at 592.

The rule of international law dealing with the accountabilities of States and individuals waits for further progress in the political convergence of expectations by complementary regimes dealing with war and crime which have to be accountable of their actions. As discussed above, for the implementation of the emerging regime of international justice, which is still under construction, the first step should be to reinforce the accountability mechanisms between States, international and regional organizations, and all parties involved in situations at serious risk during humanitarian interventions. In the long period the practice of accountability would empower the judicial power of the Court in the international legal and political relations. In reality we are still very far from such realization. The problem is that the emerging regime of international criminal justice did not receive any role in the monitoring activity of international humanitarian interventions under the flag of the responsibility to protect. Moreover, as we have seen from the previous assessments, several gaps characterize the governance of civilian protection duties in times of war and crime. Therefore, political convergence is still to be found.

5.5 Conclusive observations

Section Outline

In order to provide a definition of *complementary* global regimes, it is required to look at the construction of law enforcement intended by established international regimes and emerging sub-regimes, dealing with the criminal accountability of individuals. Those need the determination of the Security Council of unlawful acts committed by the States not parties to the Rome Statute, before the Court, in accordance with the principle of territoriality, would determine the criminal behaviour of individual perpetrators during *intra-* and eventually *inter*-state armed conflicts. The Security Council authorized an increasing number of diverse international peace operations, ranging from standard peacekeeping deployments to multifaceted peace-making and peace-enforcement operations. Despite rising political support for the strategic use of military presence and force to strengthen the protection of civilians, important aspects of the legal frameworks regulating peace operations remain unclear in support of justice and accountability. This lack of clarity has also raised significant concerns about the impunity for abuses committed in the course of peace operations, especially those established under US Status of Forces Agreements conferring immunity on foreign military personnel (SOFAs).[90] Acting under Chapter VII of the United Nations Charter, the Security Council requested that the ICC, for a twelve-month period

90 See E. Rosenfeld, "Application of US Status of Forces Agreements to Article 98 of the Rome Statute", 2 *Washington University Global Studies Law Review*, 2003 at 273, accessible at: http://law.wustl.edu/wugslr/issues/Volume2_1/p273Rosenfeld.pdf

beginning on 1 July 2002, refrain from commencing or continuing investigations into personnel or officials from States not a party to the ICC Statute. The Security Council expressed its intention to renew the measure within twelve months for as long as necessary. Obviously, such position of the Security Council was incompatible with the Rome Statute, demonstrated the improper lawmaking use of the Security Council, and contradicted the UN Charter and other international law. In 2004 the Security Council refused to renew the exemption again after pictures emerged of US troops abusing Iraqi prisoners in Abu Ghraib, and the US withdrew its demand.[91] Against the backdrop of recent disagreement about the applicability of international humanitarian law and international human rights law to members of peace operations, the political convergence on such matters is still absolutely required.

This part argued about the shortcomings fostering peace and justice in the field operations, including the lacuna of human security measures and the capacity-building at national, regional and international levels. The topics approached in this part want to emphasize that the deterrent effect of the emerging regime of international criminal justice is identical either in the North or in the South of the world. The culture of accountability is the only catalyst for the legitimacy and compliance in every legal system or constitution. This study addresses recommendations to the leaderships of any government. Such leaders have to be visible, responsible and accountable of their choices having negative consequences on individuals. What we currently see in western societies is that some leaders have been accused, by knowledgeable groups and individuals throughout the world, of complicity in war crimes, crimes against humanity, and other gross human rights abuses. The systemic collapse of legality including the shortcomings of domestic jurisdictions on criminal and corrupted behaviours, require higher standards of accountability. The States Parties to the Rome Statute have accepted obligations going beyond customary law in relation to the immunities of their own officials. In Western society, the return of great recessions is a visible sign that governance systems may even be designed to control over the life of individuals.[92] Rich get richer, and ordinary people are left in a deeper condition of poverty and pressure to perform against corrupted domestic governance systems. For many, the capitalistic system causes a widening gap between the rich and everyone else; constant warfare is justified as necessary to fight 'terrorism'; erosion of personal freedoms; expanding power allocated to the military and police; pervasive control and inequalities; complete lack of accountability by politicians for their fraudulence and crimes; a

91 See UN doc. S/RES/1422 (2002) and UN doc. S/RES/1487 (2003).

92 M. Chossudovsky, A.G. Marshall, *The Global Economic Crisis: The Great Depression of the XXI Century*, Centre for Research on Globalization, 2010. See also R.C. Cook, 'The Nature of the current Financial Crisis: The System is designed to exert Total Control over the Lives of Individuals', 2009 *Global Research*, accessible at: http://www.globalresearch.ca/index.php?context=va&aid=13551

mass media devoted solely to the establishment of propaganda, and a clash of ethic, social, political and religious values sustaining multicultural differences, are only some of the effects of the systemic crisis of governance. These are some of the reasons why it is important to rely on international governance institutions for the preservation of accountability and compliance of universal values. The political forces empowering them have a specific call to be fulfilled.

5.5.1 The challenges and opportunities of governance systems

In this realistic scenario the rule of law, as setting values and as principle of governance, is extremely important as well as multilateralism. The accountability of national leaders combined with compliance mechanisms of the States is the only valid catalyst in this state of affairs, either at domestic, regional, or at international levels. Multilateral and intergovernmental settings have to take concrete measures in order to rebuild weak States in such systemic break downs and transitions, while safeguarding individual rights. In conflict and post-conflict societies of underdeveloped countries the situation is indeed worse. The list of so-defined 'failed' States is growing extensively. The quest for development, cooperation and sustainability in devastated societies is shaped by military enforcement during micro-conflicts, combined with humanitarian interventions involved in the destabilization of criminal and corrupted regimes wasting individual lives. Despite these important reasons for the existence of complementary regimes, there is a lacuna in the accountability and compliance of international entities and mandates involved in the so-called international humanitarian escalations of *last resort* addressed to multilevel jurisdictions and which are established by political organs. The discourse on the responsibility to protect, for instance, is analogous to the doctrinal and normative frameworks of human rights and democratic governance, but still argued in delimiting multilateral interventions and State sovereignty. It is also argued that powerful nation-states are still a central actor of international governance in peace and in conflict. These are some of the reasons why it is important to asses the extent of which individual rights are kept central in conflict and post-conflict multilateral interventions, according to international criminal justice and human rights standards, including victim rights advocates. The supranational character of a governance system is still absolutely required.

5.5.2 The global effort of interactions

The complex interaction between international governance institutions fostering peace, justice and security deserves a detailed analysis at structural, normative and functional levels. The past failures or delays by the international society to respond to mass atrocities discharge important lessons. Protecting civilians in violent conflicts involves understanding the links that the military, political, humanitarian and development aspects entail, as

well as recognizing the failure in upholding respect for justice and human rights. The consequences of serious breakdowns in conflict and post-conflict situations determine global responsibilities for complementary governance institutions. There are still gaps when it comes to achieving a wide-ranging protection instrument of individuals in conflict and post-conflict situations, including mechanisms promoting victim rights in domestic judicial systems. These are only some of the reasons why the interaction between complementary international mandates deserves attention from both legal and political perspectives in order to verify feasible ways and further progress centralizing individuals in global matters. Moreover, as we have seen the interaction between the UN bodies and the Rome Statute institutions raises important questions about the project of universal jurisdiction, the enforcement of law and civilian protection duties.

Political consensus will be necessary to determine provisions regulating the relationships, partnerships and operational interactions between complementary global mandates which deal with the reconstruction of societies affected by armed conflicts, towards universal values, such as the rule of law and justice, human rights and democracy, according thus, to the principles of democratic governance. This is the only chance to fulfil the absence of *trias politica* or separation of powers in international relations. This is also the only option for a democratization process which should at least characterize a *road map* for a regime of *checks and balances* of international humanitarian interventions in sovereign States, where the accountability concerns all actors involved, including individuals or States responsible of misconduct. One prerogative of democratic governance is that global governance institutions (UN and Rome Statute institutions) would interact appropriately between them in order to deal with the escalations of humanitarian atrocities, influencing in the short, middle and long terms domestic realities with law and order. The democratisation of such complementary governance institutions through widespread participation is of course a 21st century imperative. Therefore, the quest for democratisation should be pragmatic rather than idealistic and find its place in specific actions and accomplishments.

To that end, and before reporting on the current position of the African Union and other regional organizations, according to the deliberations of the last decade of the EU institutions, it was suggested that the EU should support the expansion of the UN Security Council through the promotion of India, Japan, South Africa and Brazil as permanent members, but that new ways of decision-making should also be explored in parallel in order to avoid the paralysis of the Security Council. Moreover, there should be a greater reliance on those organs and institutions which already reflect a fair measure of democratisation, such as the General Assembly, the Economic and Social Council, the Human Rights Council, the Peace-building Commission, including the Rome Statute institutions which represent fundamental actors for the quest of human rights and for a rule-based interna-

tional order. The EU systematically pursues the inclusion of an ICC clause in negotiating mandates with third countries. On the initiative of the European Commission, as anticipated earlier, the Cotonou Partnership revised Agreement with ACP countries, in 2005, includes an ICC clause.[93] This is the reason why the Sudan refused to ratify the revised Cotonou Agreement.[94] Under the European Neighbourhood Policy, the European Commission has also negotiated the insertion of ICC clauses into many related Action Plans as well as in association agreements with countries in Latin America. The EU engaged its support to the Rome Statute institutions with the Common Position in 2003 and an Action Plan immediately after in 2004. The EU can do more in such a process of democratization of governance institutions, promoting the widespread ratification of the Rome Statute towards: *a)* a coordination of EU activities in each of its institutions; *b)* promoting the universality and integrity of the Rome Statute in peace building mandates; and *c)* campaigning for the independence and effective functioning of the ICC supporting the participation of civil society.[95] It is important to analyse the developments in another important regional reality, especially in the African Union but also in the League of Arab States, ASEAN and other political regional realties.

93 Cotonou Agreement (ICC clause), from the Preamble: *considering* that the establishment and effective functioning of the International Criminal Court constitute an important development for peace and international justice (...) and Article 11 reads, "in promoting the strengthening of peace and international justice, the Parties reaffirm their determination to: share experience in the adoption of legal adjustments required to allow for the ratification and implementation of the Rome Statute of the International Criminal Court; and 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." Furthermore, 16 negotiating directives for agreements under negotiation or to be negotiated include the ICC clause. See European Council, *The EU and the ICC*, May 2010, at 13, accessible at: http://www.consilium.europa.eu/uedocs/cmsUpload/ICC_may%2010_internet.pdf

94 See EC, Non-ratification of the revised Cotonou Agreement by Sudan FAQ (August 2009), accessible at: http://ec.europa.eu/development/icenter/repository/sudan_final_non-ratification_faq_200908.pdf

95 For an overview of the EU support to the ICC fostering the creation of a global criminal justice system see J. Wouters, S. Basu, 'A Global Criminal Justice System based on International Cooperation' in *The Effectiveness of International Criminal Justice*, Introduction, (2009), 128 at 140. For an overview of the ICC sub-area of the public international law working party (COJUR ICC) and the implementation of support by the EU in the UN, see Council of the EU (Consilium), "Support to the ICC in UN fora", in *The European Union and the International Criminal Court*, European Communities, 2008, DGF, EU doc. RS/07/2008, p. 15, accessible at: http://www.consilium.europa.eu/uedocs/cmsUpload/ICC_internet08.pdf

5.5.3 *The advocacy of systemic change*

The approach in this part of this study is that with the Rome Statute it can be contested whether any recognition exist of the links between an established system based on individual criminal accountability and the maintenance of international peace and security. The question is whether such links are put in practice during *intra* and *inter*-state conflicts, and whether they influence further jurisdictional progress for the emerging regime of international criminal justice and its public authority. This study points out that the interaction between the Rome Statute institutions and the UN takes place at several levels, but most importantly represents the nexus between global politics and the rule of law, interacting with several branches of international law, respectively humanitarian, criminal and the emerging law of human rights. There are no doubts that a result-oriented approach empowering the partnerships of universal organizations would replace the unilateral political or legal rhetoric of States for the preservation of individual rights in conflict and post-conflict societies. A strong political consensus or political convergence is necessary to strengthen the relationships and partnerships of complementary global mandates, initiating a democratization process of the international governance of justice, which at the moment excludes law enforcement of binding character of multinational forces, and is not in charge of humanitarian interventions, humanitarian police, and non-state actors. Considering the great expectations of international responses in mass atrocity crimes, while contributing to the formation of a global state-building apparatus dealing with 'failed' States, important solutions have to be found in the short, middle and long terms, on collective responsibilities, human security measures, domestic capacity-building and mutual accountability of interventions in conflict and post-conflict situations.

With the Rome Statute, the universal principle of individual criminal accountability of international crimes in domestic jurisdictions has been translated in legal humanitarian frameworks by complementary features and institutions. The purpose of such global architecture is to oppose the culture of impunity of mass atrocity crimes. The intent is to centralize victim rights during fair trials of the most responsible criminal perpetrators. The failure of the nation-state on such responsibilities generates other responsibilities. The concept of complementary regimes is also applicable at international level, considering the humanitarian escalations of violations between the UN and the Rome Statute institutions. Such complementary regimes, and their international governance institutions, deal respectively with the nation-state responsibility and the accountability of individuals. As an outsider from the UN institutional premises the emerging regime of international criminal justice is also being tested in the quest of peace and security for the first time in the Sudan and Libya, receiving jurisdiction under the authority of the Security Council. In accordance with the legal provisions of the Rome Statute, the governments of the Sudan and the Libyan authorities have an obligation to cooperate with

the Court even if they have not ratified its founding treaty. The jurisdiction of the Court resulted from the resolutions of the Security Council, and therefore applies to all member States of the UN.[96]

5.5.4 *International criminal justice: shifting or balancing power?*

The Security Council is a political body while the International Criminal Court is a judicial body. They deal respectively with the accountabilities of States and individuals. From a legal perspective and with regard to international conflicts (*inter*-state, or conflicts between States), the authority given to the Security Council under the UN Charter was not intended for a judicial determination of the question of aggression for purposes of individual criminal accountability. It was intended to enable the Security Council to take measures to maintain or restore international peace and security. With the Rome Statute, if further agreed, the Court would also receive jurisdiction in the context of peace and security maintenance investigating and prosecuting individuals responsible of aggression. The problem in the maintenance of international peace and security is characterized by the political impasse of the reform of the Security Council, and as counterpart by the presence of the International Criminal Court as a permanent judicial institution functioning through a cooperation pillar between sovereign States and international organizations such as the United Nations. In the words of Cassese, "the UN Security Council has been unable to keep up with increase of violence. No one can contest its inability to react promptly and effectively and to put a stop to massacres amounting to serious threats to the peace or breaches of the peace in Somalia, the former Yugoslavia including Kosovo, Sierra Leone, Ethiopia and Eritrea, Indonesia, the Middle East, and so on".[97] The reform of the Security Council encompasses sensitive democratization issues such as the categories of membership, the question of the veto held by the five permanent members, the regional representation, the size of an enlarged Security Council and its working methods. Currently, no African country has a permanent seat in the Security Council. This is seen as a major political issue negatively influencing the support expected by the African States according to their membership to the Rome Statute and by the African Union in

96 See UN doc. S/RES/1593 (2005) which refers to the Report to the Secretary-General of the International Commission of Inquiry on Darfur accessible at: http://www.un.org/news/dh/sudan/com_inq_darfur.pdf For an Afrocentric outlook of such historic referral by the Security Council see N. J. Udombana, "Pay Back in Sudan? Darfur in the International Criminal Court", *Tulsa Journal of Comparative and International Law*, Vol. 13, 2005-2006. See also Touko Piiparinen, 'The Lessons of Darfur for the Future of Humanitarian Intervention', 13 *Global Governance* 3, 2007, at 365. For an analysis of the conflict in Darfur discussing what the situation reveals about the response of international actors to mass atrocities, see D. R. Black, P. D. Williams, *Security and Governance. The International Politics of Mass Atrocities: The Case of Darfur*, 2010.

97 See A. Cassese, 'et al' "Failure of International Sanctions against Serious State Delinquencies" in *State, Sovereignty and International Governance*, (2004), at 240.

the maintenance of peace and security, including fighting against the impunity of international crimes, enforcing appropriately the emerging regime of international criminal justice. Moreover, considering the past, present and future achievements of international criminal justice both States and non-state actors are responsible of their responsiveness serving the "interests of justice" or so-called community obligations.[98] The simple question is what kind of authority characterizes the emerging regime of international criminal justice in the arrays of peace and security? How such authority would evolve in the future, considering its complementary role with the UN system? In order to provide a complete picture the political standpoints of regional organizations also deserve discussions. After all, they have to be completely involved in finding solutions on peace, justice and security in their own regional realities, upholding the expectations of the human security doctrine and the rule of law. The UN system and the Rome Statute institutions have a specific role on such sensitive issues which deserve further debate. The last paragraph of this section, which ends my conclusive observations, deals with the normative gaps of the Rome Statute, in particular, its nature as a governance system based on international cooperation of non-compulsory character.

5.5.5 The features of justice governance: the cooperation pillar of the Rome Statute

In conclusion, it needs to be noted that in addition to the relationship between international organizations and their member States, the law of international organizations also covers the interaction between themselves, where the literature is relatively scarce and some is pertinent to the case law. The Darfur case, as first referral to the Court by the UN Security Council, is the case study of such imperfect interaction.[99] According to the provisions of the Rome Statute, the Security Council is not obliged to enforce judicial deci-

98 On the way the institutional design of the ICC regulates the opportunities of States to shape and strengthen international criminal justice, see S. C. Roach, "Global Governance in Context", *Governance, Order, and the International Criminal Court. Between Realpolitik and a Cosmopolitan Court,* (2009), at 1.

99 In the situation in Darfur, Sudan, three cases are being heard before Pre-Trial Chamber I: The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"); *The Prosecutor v. Omar Hassan Ahmad Al Bashir and and The Prosecutor v. Bahr Idriss Abu Garda*. On 31 March 2005, The Security Council determined that "the situation in the Sudan continued to constitute a threat to international peace and security", and "decided to refer the situation in Darfur to the Prosecutor of the International Criminal Court", UNSCR 1593 (2005). See, Sixth Report of the Prosecutor of the ICC to the UN Security Council pursuant to UNSCR 1593 (2005) accessible at: http://www.icc-cpi.int/library/organs/otp/OTP-RP-20071205-UNSC-ENG.pdf See statement of H. Köchler, President of the International Progress Organization after the Darfur referral. H. Köchler, *Double Standards in International Criminal Justice: The Case of Sudan*, (2005), accessible at: http://i-p-o.org/Koechler-Sudan-ICC.pdf See also H. Köchler, *Global Justice or Global Revenge? International Criminal Justice at the Crossroads*, (2003).

sions. The Court simply operates through a judicial pillar, represented by the Court itself, and a cooperation pillar which belongs to the States Parties and through other cooperation agreements with international organizations such as the UN missions in the field.[100] In order to offer an overview of the cooperation regime established by the Rome Statute, Rastan points out that under Article 54 of the Statute the Court may seek the cooperation of any intergovernmental organization or so-called 'arrangements', which refer implicitly to the UN peacekeeping operations, and may enter into specific agreements with the UN, while Article 87 (6) enables the Court to ask any intergovernmental organization to provide information or documents, or other forms of cooperation that are consistent with its judicial mandate. Where the Security Council did not refer a situation, there is nothing preventing the Court from asking the cooperation and assistance of the Security Council pursuant to Article 87 (6) of the Rome Statute and Article 15 of the UN-ICC Relationship Agreement. Obviously, the legal modalities of such forms of cooperation fall outside the regime established by Part IX of the Rome Statute (International Cooperation and Judicial Assistance) which only deals with the State Party obligations. With regard to the cooperation with other international organizations, including the UN Security Council, the legal obligation to cooperate with the Court falls under separate arrangements and agreements. In fact, outside the forms of cooperation voluntarily agreed upon these specific legal arrangements, international organizations, namely the UN, are under no legal obligation to cooperate with the Court. Rastan further clarifies that "an international organization cannot be compelled to cooperate in the absence of such consent even when the ICC is acting pursuant to a Security Council referral".[101] In addition to this fragmentation of legal modalities of cooperation, a law enforcement pillar of the governance of justice is inexistent.

In substance, challenging old models of conflict management, intervention in humanitarian crises and ending the impunity of international crimes, requires a defined law enforcement strategy. Sovereign States still have to find the middle ground for an effective governance of justice in conflict and post-conflict situations. The argument in this study refers to the indispensable analysis of emerging complementary regimes working on humanitarian issues and international justice, securing the universality of the rule of law in the international legal order. The findings of this research propose a model of governance (institutional, normative and functional) of multilateral tools

100 For an overview of the legal practice of cooperation and judicial assistance between the ICC and the States, see R. Rastan, "Testing Co-operation: The ICC and National Authorities", (2008) 21 LJIL 431, at 456.

101 See R. Rastan, *supra*.

based on universal principles;[102] on global values for the protection of fundamental rights; and on the interdependence of international threats and crimes. Only through such considerations of international governance solving the vacuum of law enforcement effectively managed by the sovereign States, by the UN and the ICC, it is possible to challenge the causes of large-scale violations of human rights (due to ethnic conflicts, bad governance and resource exploitation), occurring during internal civil wars (*intra*-state conflicts), and State aggression (*inter*-state conflicts). According to the treaty law the States have the responsibility of solving the delay in the harmonization of their domestic legislations. The domestic jurisdiction of the States needs to be monitored according to the principles of universality and accountability. Another problem constantly debated is the deficiency of *checks and balances* regulating the relations between international public mandates and their complementary interaction. In the law of international organizations, vis-à-vis the theory of *checks and balances*, their fragmentation and decentralization is constantly a matter of concern in the scholarly or academic literature.

Summarizing the main issues, the emergent features of the governance of justice will need: *a)* to preserve the independence of the judicial pillar of the ICC and the implementation of its jurisdiction; *b)* to extend the further definition of international crimes; *c)* the individual and corporate criminal responsibility; *d)* the criminal responsibility of a State; and *e)* the enforcement of law with States that are not parties to the Statute of the Court. For an evaluation of the possible evolution of the features of justice governance, it will also be important to observe the institutional relations between the General Assembly of the UN, the Assembly of the States Parties to the Rome Statute, the Security Council, the Human Rights Council, the Trust Fund for Victims, the International Court of Justice and the evolution in their relations. A systemic approach, institutional and normative, illustrate this research, which supports the determination of the States expressed in the Rome Statute, establishing a permanent criminal Court in relationship with the UN system with jurisdiction over the most serious crimes of concern to the international community as a whole.[103] In any case, the rule of law should be applied domestically and the main responsibility for it rests with the States themselves.

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102 See C. Bassiouni and D. Rothenberg , "Facing Atrocity: The Importance of Guiding Principles on Post-Conflict Justice", *The Chicago Principles on Post-Conflict Justice,* (2007) International Human Rights Law Institute, Chicago Council on Global Affairs, Istituto Superiore Internazionale di Scienze Criminali, Association Internationale de Droit Pénal,, at 6, accessible at: http://www.isisc.org/public/chicago%20principles%20-%20final%20-%20may%209%202007.pdf

103 See the Rome Statute provisions in Part II, Jurisdiction, Admissibility and Applicable law, Article 5 (Crimes within the jurisdiction of the Court) until Article 21 (Applicable law), at 3, 16, accessible at: http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/

The next part of this study argues that pressuring the sovereign responsibility of any State on sustainable peace, impunity, meaningful justice to the victims and accountability of criminal perpetrators should be dealt with an integrated approach of governance. It selects two case studies and debates the findings deriving from them. In particular, it provides assessments of the country-specific situation in the Sudan (Darfur).[104] It debates the humanitarian escalations of *last resort* and their governance in the field operations. It argues about the issue of cooperation dealing with serious international crimes and with the fight against impunity while protecting civilian lives. Obviously, this case study cannot be considered as exhaustive. The next and last part of this study advocates for the political will to implement the duty to maintain and restore peace, justice and security according to the human security doctrine. The main requirement would be to develop interaction strategies between legal and political frameworks oriented on the *supranational* perspective of the international legal order and in accordance with the constitution of the world community. Such constitutional drift seems to become more distant in view of the pluralistic approaches taken at national, regional and international levels. This is particularly true if we look at the developments in the position of the African Union and the relationship with the Security Council and the International Criminal Court, either in the context of peace enforcement operations, or looking at the implications in the context of international criminal justice and human rights obligations of the African States. Moreover, only a minority of States Parties adjusted their internal legislation and constitutional parameters in accordance with the emerging regime falling under the Rome Statute. The lacuna of interaction strategies is also applicable in the bilateral approach of States and global actors implicated in mass atrocity crimes, including the important role of civil society organizations in their collection of fact-findings and reporting activities.

104 In December 2012 the new Prosecutor of the Court informed the Security Council that her office might pursue further investigations of individuals who may be responsible for attacks on civilians, attacks on the United Nations-African Union Mission in Darfur (UNAMID), and the disruption of the delivery of humanitarian relief. See F. Bensouda, *Statement to the United Nations Security Council on the situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005)*, 13 December 2012, accessible at: http://www.icc-cpi.int/iccdocs/PIDS/statements/UNSC1212/UNSCDarfurSpeechEng.pdf