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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8 Concluding Assessment

The governance architecture dealing with individuals in situations of war and crime

> "If you want to understand the causes that existed in the past, look at the results as they are manifested in the present and if you want to understand what results will be manifested in the future, look at the causes that exist in the present". *The Writings of Nichiren Daishonin, The Opening of the Eyes, 1272, Part I, p. 279.*

Preliminary remarks

The meaning of complementary global regimes fostering peace, justice and security depends on the ways they are governed in accordance with humanitarian principles. The international governance institutions deriving from such regimes have to meet the highest standards of accountability, effectiveness and quality management, including cooperation and support between them in order to protect civilians. The presence of the International Criminal Court and the United Nations involved in the same situations is not characterized by an integrated model of governance. The practice of saving human lives and alleviating the sufferings of civilians in conflict situations requires political convergence of expectations of decision-makers. This study debates the global humanitarian policy to intervene in conflict situations and the preparedness of international governance institutions dealing with mass atrocity crimes and aggression, including their public authority, delimitation of competence and responsibility. It contributes to the contemporary visions for the preservation of the international legal and political order, including the capacity-building of the international community governing *intra-* and *inter*-state conflicts on the ground, much more than as distant observers, or with militarized international responses deriving from the ideology of hazardous solutions. The dilemma of human security requires further policy efforts and a political *road map* to promote the extention of international complementarity between both legal and political frameworks of governance of the international community. The policy formulation of interaction strategies between multilateral premises of universal character dealing with international threats and crimes deserves debate for several reasons. Their complementary character depends on the political forces involved in the preservation of law and order and is considered absolutely necessary.

In this study the search of a definition of complementary global regimes is advocated *a)* for further progress of a universal jurisdiction of the world community; *b)* for the evolution of international governance institutions centralizing fundamental individual rights; and *c)* for systemic changes in the

prevention, response and reconstruction of situations of war and crime. The complementary nature of global regimes needs further political responsibilities and legal accountabilities if the national, regional and international realities have to benefit from such models of governance, including their resources and expertise. After all, the fight against the impunity of international crimes requires the ability to offer applicable models of domestic governance for the protection of civilians in domestic legislations and national consitutions. In this study the preservation of basic individual rights upholds the requirement to empower the links between sustainable peace, justice and human security necessary to the concept of *global justice* and its debates. Such debate challenges the assumption of established legal theory in which the normative framework of criminal justice can be abstracted from actual power relations. It offers elements of a new doctrine between power and the rule of law.[1] The open question is whether the challenges between statehood, sovereignty and international governance are seriously managed throughout complementary global regimes and by the governance structures deriving from them. The progress of a global society dealing with legal and political frameworks preserving human security in the current transition of the world order requires constant verification. Even with the advent of the Rome Statute system the dilemma of human security in conflict and post-conflict situations still remains. The preservation of the rule of law as a principle of governance in multilevel jurisdictions; the constellation of multilateral institutions of complementary character; the collective responsibility to intervene in humanitarian emergencies; the global solidarity and the mutual accountability indicate serious interaction gaps fostering peace, justice and security with a comprehensive model of governance. The political convergence and a *road map* solving the dilemma between capacity-building or only symbolic politics of law enforcement is required in the international responses in both *intra-* and *inter*-state civil wars. The *quo vadis* of civilian protection measures requires, without any doubt, a political *road map* compatible with the current times of violent political transitions characterized by criminal acts against civilians, disintegration of nation-states and destabilation of international peace and security.

8.1 The long way ahead of complementary global regimes

Section Outline

In this study the emerging regime of international criminal justice is interpetred as complementing the role of other universal actors in the constellation of treaty-based bodies and institutions fostering human security, but most importantly by the challenges occurred in the democratization of the international society, in the governance of international threats and crimes

1 See H. Köchler, *Global Justice or Global Revenge? International Criminal Justice at the Crossroads*, 2003.

and in the preservation of human rights standards. Its presence in the international legal order requires deeper responsibilities and systemic changes of international governance institutions of complementary character. Today the delimitation of competence between international humanitarian interventions in conflict and post-conflict situations and State sovereignty indicates that 'the States have a responsibility to protect their own citizens from avoidable humanitarian catastrophe, but when the States are unwilling or unable to do so, that responsibility must be borne by the broader intervention of the international community and its global governance institutions'.[2] Following the 'humanitarian' collective intervention performed in Darfur and Libya and the controversial political positions about Syria, the argument is that the responsibility to protect civilians operates in a contested doctrinal framework. Some observers would see such norm as a 'progress', while others as an 'empty promise' or only as a 'license for humanitarian intervention' or 'inaction'.[3] Another view is that the responsibility to protect norm addresses the international community's failure to prevent mass atrocity crimes. This responsibility can be interpreted as a new principle of international collective security not being legally defined.[4] It introduces the concept of shared responsibility and compliance with international law which theorists need to address at the present and in the years to come.[5]

The multidisciplinary topics proposed in this study including the debates found in the literature require the attention of relevant decision-makers on important issues. The main political challenges for the Assembly of the States Parties to the Rome Statute and its institutions; the implementation of the Rome Statute and cooperation with the United Nations; the role of the Rome Statute institutions in international governance systems; and the promotion of the universality of the Rome Statute are the main issues deserving further debate. The global efforts to protect human rights and to promote the rule of law, to maintain and restore international peace and security, as well as to prevent and punish serious international crimes are common objectives for the Rome Statute institutions and the United Nations. The recognition that international criminal justice is an integral element of conflict resolution would in concrete mean that it should receive support on the ground

2 See UN doc. A/RES/60/1, 2005 World Summit Outcome, para. 138-139.

3 G. Evans, 'Delivering on the Responsibility to Protect: Four Misunderstandings, Three Challenges and How to Overcome Them', Address to SEF Symposium 2007, *The Responsibility to Protect: Progress, Empty Promise or a License for Humanitarian Intervention*, accessible at: http://www.crisisgroup.org

4 The responsibility to protect norm (R2P or RtoP in the UN circles) did not receive binding character. For an overview of the strategic and tactical choices to develop and to accept the R2P norm see, E. C. Luck, 'Building a Norm: The Responsibility to Protect Experience', in R. I. Rotberg (ed.), *Mass Atrocity Crimes. Preventing Future Outrages*, 2010, at 108.

5 See for an overview G. W. Downs, A. Trento, 'The Compliance Gap: Some Conceptual Issues', in E. C. Luck and M. W. Doyle (eds.), *International Law and Organization: Closing the Compliance Gap*, 2004, at 19.

to be more effective. After all, within the cycle of maintenance and restoration of peace and security, justice is an important component upholding the doctrine of human security, but how is such 'cosmopolitan' idea dealt with in the practice? Moreover, is there a new impulse, moral, legal, political, based on the human security doctrine for the progress of the constitution of the world community? Are multilateral treaties linked to a *road map* of governance considering the controversial reality in world politics, the impasse in the democratization of global institutions and the collapse of governance systems at domestic, regional and international levels? According to the principles of the rule of law, multilateralism, collective responsibility, global solidarity and mutual accountability a systemic change in the governance of international humanitarian escalations in conflict and post-conflict societies is required. The governance of justice punishing the perpetrators of serious crimes is still waiting for implementation. Such governance does not include any law enforcement engagements and hopefully a strategy for victim rights will arise soon integrating the rehabilitation of communities victimized by war and crime to development programs, reconstruction and domestic capacity-building.

8.1.1 The last resort option of justice

Since the end of the cold war the threats to international peace and security include both *inter*-state and *intra*-state conflicts, including the commission of international crimes deriving from such conflicts. The legal and political developments to govern globally international threats and crimes resumed in forcible and non-forcible actions by the Security Council in several situations. Unfortunately, in the majority of the international humanitarian escalations, the causes and the effects of war and crime have not been diminished in sustainable ways. The engagement of the international community to formulate a system of governance protecting civilians in situations of war and crime is an on-going process. However, the severe violations of international humanitarian law have been treated as serious threats to international peace and security and would require a reliable structure of governance. The 'test' of the Security Council using subsidiary tools without fully supporting them does not bring any result. The notion that international criminal justice is a tool of the Security Council and a *last resort* instrument in the policy framework of the 'responsibility to protect', rather than the paradigm of *retributive* and *reparative* justice deserve further discussions. This study attempted to verify what is missing in the construction of a global architecture of governance fostering peace, justice and security which requires advocacy and political consensus.

First of all, a couple of concluding remarks deserve to be made about the international dimensions of internal conflicts and the strategic trends in the resolutions of the Security Council applied during *intra*-state civil wars. In the last decade the challenging resoluteness of the Security Council demon-

strated that even in purely internal armed conflicts, "the deliberate targeting of civilian populations or other protected persons and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security".[6] This trend has been controversial in the situation in Darfur (Sudan) referred to the Court. The rise, fall, and stabilization, including the selectivity of the resolutions of the Security Council dealing with specific civil wars over the past twenty years, can be explained with the following considerations, respectively: *a)* the trends in conflict patterns in civil wars, *b)* the humanitarian violations of laws internationally recognized and *c)* the considerations whether mass atroctities would spread at larger scale. Moreover, when addressing a larger portion of internal civil wars, the Security Council engaged in the civil war in Uganda under the agenda item entitled *'The situation in the Great Lakes Region'* which also addressed the internal wars in the Sudan, Burundi, in the DRC, and Rwanda.[7] Unfortunately, the fact that the Court was involved in the same region since the advent of the Rome Statute system in accordance with the positive complementarity principle did not mean any support from the Security Council. Furthermore its working methods with the Court are inconsistent since the configuration of its mandates on the same grounds.[8]

An accurate examination of the use of Chapter VII of the UN Charter after the cold war indicates an increased number of resolutions of the Security Council falling under its security provisions. The referral of the situation in Darfur (Sudan) and in Libya to the Court corresponds to such nature of the Security Council's resolutions addressing internal civil wars spreading at local, regional and international levels. One may expect that such an activity would have been rapidly aligned to the quest of justice in these countries, but this was not the case. Besides, the political strategy of mandate's configuration of the Security Council was constantly oriented to opt out for hybrid solutions of peace enforcement in *intra*-state conflicts. In the DRC and in the Sudan for instance, the political settlements of the Security Council would pressure (regional) authorities such as the AU to take over with military operations on the ground. Such security shifts carried out devastating consequences on civilians and on the humanitarian situation as a whole due to the gaps of resources. On top of that, the criminal offenders would rely on the

6 UN doc. S/RES/1296, (April 19, 2000).

7 UN doc. S/RES/1653, (January 27, 2006).

8 For an overview of the current debate on the working methods of the UNSC, on the cooperation and follow-up to UNSC referrals to the Court, including the search of mechanisms to ensure timely and coordinated support to the Court, see ICC-OTP-20141024-PR1055, *Justice plays a "crucial role" in maintaining international peace and security: ICC Prosecutor briefs the United Nations Security Council*, 24 October 2014. The ICC Prosecutor Statement to the United Nations Security Council on the Subject of "Working Methods of the Security Council", 23 October 2014, is accessible at: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1055.aspx

regime of impunity in these countries despite international judicial proceedings initiated by the Court. The practice applied through the Security Council indicates that mass atrocity crimes have been left in the limbo of impunity in several African situations, including the devastating consequences affecting civilians in such violent conflict zones. The risk is that such trend would persist even with the presence of the Court. The interrelation between the lack of support from the Security Council to the Court and its mandate configurations have been discussed during the case studies selected in this work. The conclusion is that the arrangements and agreements of *last resort* on the ground between them are not self-sufficient. They do not strengthen the engagements on the ground for the sake of civilians. Therefore, the mandate configurations should promote that peace and justice would work in parallel for the sake of individuals, giving a stronger deterrent signal of criminal activities in these countries, while pressuring for security sector reforms and judicial proceedings *in situ*.

8.1.2 The configurations of international mandates

The case studies selected demonstrate the necessity of an integrated model of governance of peace, justice and security for the sake of civilians in times of war and crime. At this moment in time the Court struggles to receive a better place in the arrays of international peace and security maintenance. The global efforts to maximize the results on the ground have to be fulfilled applying an integrated approach of governance which is absolutely not the case. The case studies offered an insight of the Security Council involvement in internal civil wars and mass atrocities such as in the DRC with the presence of the Court in the country, including the 'test' of referral activity to the Court from the Security Council in the Sudan and Libya, and the failure of consensus building with regard to the dangerous situation in Syria, and the violence spreading at regional level in the whole Middle East. The quantitative research findings of relevant analysts consulted in this study explicitly demonstrate that a capacity-building and a model of international assistance applicable into *intra*-state civil wars 'did not develop evenly over time'.[9] The same assumption is valid in the case of *inter*-state conflicts and the crime of aggression. Such accountability system is still in transition in global politics. There is not yet any agreement about its governance between the legal frameworks dealing with State responsibility and the individual accountabilities.[10] The involvement of international complementary tools foster-

9 For a quantitative analysis of the patterns of the Security Council engagement in civil wars and the understanding of compliance of its resolutions in (*intra*-state) armed conflicts see J. Cockayne, C. Mikulaschek, C. Perry, *The United Nations Security Council and Civil War: First Insights from a New Dataset*, 2010.

10 See F. Rosenfeld, "Individual Civil Responsibility for the Crime of Aggression", *Journal of International Criminal Justice*, Oxford Journals Law, 2012, Volume 10, Issue 1, 249-265. See also M. Vesterdahl, "Re-defining the Crime of Aggression: The Evolution of an Outdated Ideal to Include Non-State Actors", 2010, available at: http://works.bepress.com/matthew_vesterdahl/1

ing peace and justice in *inter*-state conflicts will be the next 'test' of global governance. However, it remains to be seen how it will work between the responsibility of nation-states and the individual accountabilities of criminal perpetrators.

In order to complete this assessment some final observations about the mandate configurations of the Security Council in African civil wars are required. In accordance with the accurate data available on the trends in how the Security Council has engaged in civil wars, some conclusions are possible about the variations in *where* and *when* the Security Council chose to engage, including the gradual evolution of its response strategies in such conflicts. The combination of political and security settlements with the parties involved in the conflicts and the peace enforcement deriving from them surely influenced the responses of the Security Council. These responses were visible in its resolutions and in the UN legislative history since the end of the cold war. The analysis performed of the activity of the Security Council indicates that its demands to civil war parties were increasingly adopted in the context of multidimensional peace operations (deployment of peacekeeping, targeted sanctions, police and military law-enforcement operations, while providing access to humanitarian assistance).[11] These capacities and competences have not been put at disposition of international justice. It also needs to be noted that some of the factors characterizing the conflict management of the Security Council, such as: *a)* the political and strategic interests characterizing its engagements; *b)* the selectivity of its peace enforcement; *c)* the delay of sanctions about the exploitation of natural resources and embargos and *d)* the longstanding trend of exonerating criminal behaviors in the majority of the situations for the sake of managing conflicts and war parties.[12]

The configurations of its security mandates on the ground are still disconnected from the activities of complementary mechanisms such as international investigations, prosecution and the management of protection duties of civilians. The analysis of the cases dealt with in this study (DRC, Sudan), were limited to the peace operations characterized by the multidimensional component of the Security Council operations and the lacuna thereof found in its mandates' configuration in situations of genocide, crimes of war and crimes against humanity. The configuration of the respective mandates deployed in the field operations indicates that the Security Council increasingly addressed the political aspects of post-conflict peace-building without succeeding in the majority of the situations in Africa. Another problem also derives from the fact that shortly after its security settlements would be in place, they became soon volatile in the majority of the situations, with con-

11 See M. Malitza, "The Improvement of Effectiveness of UN Peacekeeping Operations", in UNITAR, *The UN and the Maintenance of International Peace and Security*, 1987, at 246.

12 See J. Cockayne et al, *supra*.

flict and violence recurring again, and requiring further engagements often shifted to domestic violent and criminal regimes. This is the case in the DRC, where the attacks of the M23 rebel group against civilians and also against the UN peacekeeping mission pose still serious threats. The consequences are also well known in the crises in Rwanda, Somalia, Angola, Sierra Leone, Uganda, Burundi, Mali, Kenya, Central African Republic and Sudan and at regional level in the main African Great Lakes Region.

In general, when the Security Council engaged in civil wars it did not merely seek to end an armed conflict, but rather it encouraged civil-war parties to reach and implement political and governance arrangements that could sustain peace and prevent conflicts deteriorate again. One of the tasks frequently performed during peace operations was to monitor compliance between civil-war parties, which was already in place between the belligerents, with security demands trying to destabilize conflict and violence.[13] The UN executive organ should absolutely be careful and avoid negotiating peace agreements with war criminals. The configuration of its mandates in the field operations should integrate justice and support the activity of the Court in accordance with its findings. Unfortunately, in both case studies selected this was not the case.

8.1.3 The Court's support to maximize the results

The evident political compromise characterizing the Rome Statute system limits in some ways the use of international justice in the arrays of peace and security. This study offered an overview of both limits and opportunities. The States Parties themselves recognized the complementarity character of the Rome Statute system to the UN in the quest of sustainable peace in conflict and post-conflict situations. It is recommended that the Security Council would support the Court's investigations and prosecutions, including programs of relocation of witnesses and victims combined with the mobilization and de-militarization of child soldiers and rehabilitation of ex-combatants. The configuration of the Security Council's mandates in the field operations where the Court is involved need to provide support and assistance to the Court, especially in the Sudan, Libya, Uganda and DRC and in other current and future situations. The ideal would be to provide the configuration of the Security Council's mandates under the flag of the 'responsibility to protect' with the demands of the Court to protect, demobilize, relocate and rehabilitate victims and witnesses, including law enforcement actions on the ground following the judicial outcomes of the Court. The ideal would be that the concept of 'responsible' sovereignty required by the nation-states protecting their citizens cannot be separated by the responsibilities of international governance institutions implementing political configurations between their

13 See J. Cockayne et al, *supra*.

mandates when intervening in domestic criminal regimes. The Court needs support before, during, and after the humanitarian escalations and referral activity coming from the Security Council would take place. There is, however, a long way to go.

We have seen that the 'responsibility to protect' (RtoP or R2P) is a norm or set of principles based on the idea that State sovereignty is not a privilege but a responsibility of the nation-states. Furthermore, in the international legal order the RtoP is a global policy directive, it is not a law. The RtoP provides a framework towards political engagements using tools that already exist to prevent mass atrocities, like mediation, early warning mechanisms, economic sanctioning, and Chapter VI powers. Civil society organizations, States, regional organizations, and international governance institutions have a role to play in the operationalization of the RtoP. The authority to employ the *last resort* options and intervene with military operations rests solely with the UN Security Council (Chapter VII) and the General Assembly. Full implementation of the RtoP is hindered by the perception that it is being used by western countries to serve their interests when justifying violations of sovereignty of other countries in developing regions. The same political standpoints are visible in the groundless critics addressed to the Court of targeting exclusively African countries. Besides, the UN easily underscored that the best way to discourage States or groups of States from misusing the responsibility to protect for inappropriate purposes would be to develop fully the UN strategy, standards, processes, tools and practices. The overview of the UN three pillar strategy implementing the RtoP, respectively, Pillar I: the Protection Responsibilities of the States; Pillar II: the International Assistance and Capacity Building; Pillar Three: Timely and Decisive Response, demonstrates that the Court is only seen as an effort of dissuasion and deterrence which role in the UN report is limited to the protection responsibilities of the State to become part of it, instead of emphasizing also global governance issues and interaction strategies in the second and third pillars: international assistance and capacity building, including timely and decisive response.[14] Therefore, it will be relevant to see in this regard the future developments in the political positions of the African Union (AU), Arab League and UN political institutions about the Rome Statute system. It is too soon to speculate whether the idealistic vision of merging civilian protection duties between complementary global regimes would find its place in the policy formulation at global level, after the first rejections of such governance approach by the permanent members of the Security Council and by the AU. These issues deserve further attention. The configuration of mandates on the ground considering the presence and the activities of the Court would be the most appropriate and cannot wait any longer. Another

14 See the Report of the UN Secretary-General, *Implementing the responsibility to protect*, 12 January 2009, UN doc. A/63/677.

problem of different nature refers to the political impasse to extend the jurisdiction of the Court with a range of other crimes.

Although the concept of sovereignty, statehood and international governance are currently in the work-in-progress, the political convergence and a *road map* dealing with the responsibilities towards civilians in extreme situations of war and crime are absolutely required. Such a *road map* should be visible *a)* in the interaction strategies between global regimes of complementary character and their political institutions, *b)* in the progress of their further empowerment, and *c)* in the decision-making enforcing them. The politics of international criminal justice will have to find solutions on these matters. Hopefully, the permanent members of the Security Council such as the US, Russia and China will join the Rome Statute system soon. Their role as distant observers undermines multilateral systems for the sake of fundamental individual rights. It still remains to be seen how far they will take over their global responsibilities towards individuals in times of war and crime. The place of international criminal justice and accountability in the arrays of peace and security maintenance raises many concerns. In order to offer sustainable peace in conflict and post-conflict situations, the challenges and opportunities require constructive debate in the Assembly of the States Parties of the ICC, in the UN General Assembly, in the regional political realities and in national parliaments and constitutions.

8.2 An integrated approach of governance

Section Outline
It can be concluded that there is still a long way ahead for an integrated approach of governance applicable on case-by-case basis in situations of mass atrocity crimes. The role of complementary global regimes to prevent mass atrocity crimes through timely intervention requires implementation. The peace operations should support law enforcement and civilian protection which should serve the quest of justice and accountability. The capacity-building offering reliable and sustainable models of governance in domestic and regional realities affected by war and crime require further efforts. The determination to fight against the impunity of international crimes requires without any doubt systemic changes. It is suggested to establish a joint vision of governance with early warnings. The international governance institutions of complementary character have to optimize their relationship and partnership jointly at global level and in the field operations. Solutions are expected *inter alia* on the protection of victims and witnesses of serious crimes by way of: *a)* developing appropriate alternative protective measures before the Court, *b)* the possible establishment of a joint international authority dealing with civilian protection activities and deployments of international humanitarian police, and *c)* the adoption of a joint approach to negotiate relocation agreements. In this respect, the States adapting to

the Rome Statute and implementing their legislation need to pay particular attention to the protection of victims and witnesses. After all, the Rome Statute's provisional character and its interpretation require such an effort at global, regional and domestic levels upholding human security measures. There are no doubts that multilateral systems require further progress on these delicate issues affecting the lives of civilians in situations of war and crime. This study addresses the emergence of an international architecture of governance fostering peace, justice and security which requires systemic changes at structural, normative and functional levels and an integrated model of governance.

8.2.1 The intersection between policy, law and institutions

This study offers an overview of the evolution of international law and its institutions dealing with civilians in situations of war and crime. It highlights the necessity to get closer to the individuals during mass atrocities (with peace operations and civilian protection mechanisms, international criminal investigations and prosecutions, including fair trials based on the preservation of human rights standards). The interaction between peace and justice in the field operations represents an important paradigm shift for international governance and its institutions. It can be affirmed that such interaction is characterized by institutional, normative and policy decentralization which are centered around the *political question* related to the definition of international threats and crimes, and the jurisdictional authority to decide when such crimes occur or the main *legal question,* including the *operationalization* of the international responses on the ground when massive crimes would occur.[15] The challenges, obstacles and concerns in such legal and political decentralization have been analysed in details. Firstly, in order to verify the global trends governing peace, justice and security, this study looked at the current interaction between complementary global regimes including their meaning in international relations and international law. In other words, this study focused on the theoretical fundaments for the creation of an architecture fostering peace, justice and security in accordance with the challenges of the time.

The main conclusion is that the areas of collective security, human rights and the rule of law still suffer from the impasse of democratic reforms of the UN political institutions and bodies.[16] Such an impasse has an impact on

15 See H. Köchler, *supra*.

16 See UN Watch Report, *Dawn of a New Era? Assessment of the United Nations Human Rights Council and its Year of Reform,* presented at UN Headquarters, May 7, 2007, accessible at: http://www.unwatch.org/site/apps/nl/content2.asp?c=bdKKISNqEmG&b=1330819 &ct=3842825 See also Yale Center for the Study of Globalization, *Reforming the United Nations for Peace and Security.* Proceedings of a workshop to analyze the Report of the High-level Panel on Threats, Challenges, and Change, 2005, accessible at: http://www.ycsg.yale.edu/core/forms/Reforming_un.pdf

the further relationship between complementary regimes which also require appropriate reviews such as the Rome Statute system. Their complementary role ultimately results from such reforms based on an integrated approach of governance.[17] The approach in this study contained two dimensions of governance: one relates to the struggle of complementary institutions of universal character cooperating with each other in their respective areas of competence, and the other, refers to the political determination to enforce them with appropriate institutional reforms, know-how, resources and cost-effective capacity-building. In conclusion, the governance of complementary global regimes requires a *road map* of interactions based on reforming activity, systemic change and an extention of complementarity at international level between complementary international mandates. The political forces need to design a *road map* of interaction, partnerships and relationships between international governance institutions dealing with mass atrocity crimes and other international threats and crime. The responsibility 'not to veto' would require the permanent five members of the Security Council to urgently agree not to use their veto power to block action in response to genocide and mass atrocities. The Rome Statute institutions are still struggling to identify themselves in the global order delivering a visible impact in the local realities affected by war and crime, including their relationship with the United Nations and regional institutions. Therefore, the domestic, regional and international responsibilities to protect civilians in times of war and crime require harmonization in universal laws in the UN Charter and in the Rome Statute.

The governance of the emerging regime of international criminal justice in the context of human security and sustainable peace in *intra* and *inter*-State civil wars represents a 'paradigm in the making' in modern international relations and international law. The rhetoric offered in this context is that in a world of global threats, security depends from an effective multilateral system based on well-functioning international governance institutions and a rule-based international order. However, there seem to be problems in reaching political convergence on such sensitive issues. Although extensive literature exists on international criminal justice, the relationship between threats and crimes, and the ideal direction crime control should take in world politics, must still be verified. Such relationship and its governance depends on too many factors, including the complex process of crime definition through the tools at disposition in the international legal and political order, characterized by the absence of a supranational organization, institutional fragmentation and a customized treaty-based jurisdiction dealing with individuals. Therefore, a political *road map* to govern global regimes of complementary character is absolutely required.

17 See R. Thakur, *The United Nations, Peace and Security. From Collective Security to the Responsibility to Protect*, 2006. See also R. Thakur, *Making States Work: State Failure and the Crisis of Governance*, 2005.

In order to accomplish a supranational order as emphasized by Delmas-Marty, it is required to return to politics "determining wheter legal and other symbolic system share common values".[18] The interaction between complementary global regimes represents a paradigm in the making, whether or not the concept of collective security and the use of peace enforcement would receive the exclusive purpose to protect individuals during violent conflicts. In any case, for human security experts international governance institutions have to promote an integrated approach when dealing with international threats and crimes affecting individual lives. International lawyers, political analysts and criminologists will increasingly have to become multidisciplinary in their vision and strategic planning, flexible enough in their ability to form working groups, teams and alliances. They have to construct methods to interact with each other and develop their own networks while deflating those of criminal groups.[19]

8.2.2 The current interaction strategies

In the preamble of the Rome Statute the States Parties established the Court in relationship with the United Nations system with the jurisdiction over the most serious crimes. Such relationship is too weak to destabilize criminal and violent regimes and requires additional arrangements and agreements in the field operations on a case-by-case basis, while it also requires the formulation and the harmonization of the humanitarian policy at global level in order to benefit the conceptual framework of the human security doctrine. The ideal would be to configure multidimensional peace operations under the flag of the responsibility to protect which would serve to safe and relocate civilians in extreme conflict environments. In this context, the Assembly of the States Parties to the Rome Statute not only struggles to find a defined political identity but also on the ways it would provide assistance to fragile domestic realities of its members. The struggle to strengthen national capacities on victims and witnesses protection programmes for instance, need to be directed through the Assembly and the multilateral partners active in the area such as the UN specialized agencies. These issues of capacity-building need solutions on the top of the civilian protections and law enforcement dilemma of the judicial decisions of the Court against warlords, when States or global actors do not cooperate, including the accountability of State and non-State actors in *intra*- and *inter*-state conflicts.

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18 M. Delmas-Marty, *Ordering Pluralism. A conceptual Framework for Understanding the Transnational Legal World,* 2009 at 165.

19 See W. Bruggeman, 'The ICC as an Important Partner in Enhancing Global Justice', *International Summit on Democracy, Terrorism and Security*, 8-11 March 2005 Madrid, the document is accessible at: http://english.safe-democracy.org/confronting/the-icc-enhancing-globaljustice.html

The findings of this study clearly demonstrate that the international governance of global regimes of complementary character can be more efficient and effective if they work together. An interaction strategy upholding human security measures between them is required at two levels: either between the political forces empowering them with consensus and political convergence of expectations, or between themselves with arrangements and agreements applied in the field operations in accordance with the treaty provisions of the Rome Statute. We have seen that mass atrocity crimes represent serious offences deteriorating human security and sustainable peace not only locally, but at larger scale. The case of Rwanda revealed how the gravity of such offences spread at regional level. It is clear that the judicial role of the Court is not sufficient to obtain the deterrent effect initially hoped in the fight against the impunity of international crimes. Many of the judicial outcomes of the Court still wait to be enforced. Its operations should receive further support on the ground. The configuration of international mandates of the Security Council should support the activity of the Court deriving from all type of referrals. After all, the quest of justice offers valuable orientation and guidelines applicable in peace negotiations. Nevertheless, after years of divergence in the debate of peace *versus* justice the regime of international justice falling under the Rome Statute has still an ambiguous place in the arrays of international peace and security. This is also true in regard to the controversial position taken by the African Union against the Court, after the investigation and prosecution of crimes committed during violent political transitions and against criminal perpetrators still in power (Sudan, Kenya). With the advent of the Rome Statute, however, it should be clear that any political compromise with criminal domestic regimes and their impunity during peace processes must be absolutely avoided.

The practice applied on the ground in conflict and post-conflict situations gives rise to the pessimistic view that the rule of law as a principle of governance is not self-sufficient. Multilateralism is characterized by serious political deadlocks and by the impasse of democratic institutional reforms of international governance institutions regulating their complementary roles. Collective and shared responsibilities to protect civilians in conflict environments and mass atrocity situations do not receive appropriate legal frameworks and normative regulations towards compulsory cooperation. Instead, such responsibilities may result on volatile military engagements with negative consequences on civilian populations. Global solidarity is characterized by several gaps in the governance of international threats and crimes and contains the risks of militarization under the flag of humanitarianism. Mutual accountability is still at its embryonic stage considering the gaps of jurisdiction of *last resort* and the accountability system falling under the Rome Statute. On the top of all these serious concerns, the main phenomena requiring action is to provide models of governance retaining the shortcomings, disintegration and systemic failure of governance in both nation-states, regional and international realities. Therefore, the governance of comple-

mentary global regimes in an integrated, harmonized and consolidated ways is further required with an extention of complementarity between the tools at disposition of the international community.

8.2.3 The lessons learnt

This study is partly based on case studies of international humanitarian escalations in case of failure to secure individuals during difficult political transitions of nation-states and the commission of mass atrocity crimes. It focuses on the impact of international governance institutions for the preservation of law and order. It offers an analysis of the regime of international criminal justice which depends on international cooperation without any assurance of police and law enforcement. It debates the difficulties of international governance institutions of complementary nature in the absence of appropriate interactions. It emphasises the particularities of context between the governance of international humanitarian interventions, civilian protection duties and the possible definition of global justice. In order to accomplish results a political *road map* fostering peace, justice and security in collapsed societies is required. The case studies demonstrate that international peace, justice and security are absolutely interdependent and cannot work in parallel with conflicting priorities. This is particularly true looking at the practice applied in the configuration of international mandates on the ground in the case studies selected. In order to implement the links between *a)* investigating and prosecuting serious violations of international humanitarian law, *b)* improving human security and *c)* offering sustainable peace in conflict and post-conflict situations, the relationship between the Rome Statute institutions and the United Nations needs implementation on the following clusters in the immediate, middle and long term: a) *structural*: interactions between policy decision-makers on several clusters of governance, deployments in the field of multinational police forces, inter-institutional liaisons *in situ*, political configurations and knowledge sharing on protection mechanisms of victims and witnesses (relocation, reparation and rehabilitation); b) *normative*: legislative harmonization, cooperation agreements of binding character, common projects of legal and security assistance to domestic governance institutions; c) *functional*: working methods, reporting activity and resource sharing of civilian protection duties.

This work concludes emphasizing the interactions required between the Court and its institutional partners in the UN system. In order to develop a global vision of humanitarian protection duties the networks with the UN specialized agencies are very important. The institutional partners identified are among others: the Children's Rights & Emergency Relief Organization (UNICEF), the United Nations High Commissioner for Refugees (UNHCR), the United Nations Office for Drugs and Crimes (UNODC), and the United Nations High Commissioner for Human Rights (UNHCHR). Furthermore, important interactions are expected to improve the relationship between

the Assembly of States Parties to the Rome Statute, the key UN departments and specialized agencies dealing with the rule of law issues, NGOs providing rule of law assistance and working on ICC issues, the UN development agencies and the Trust Fund for Victims (TFV), the United Nations Human Rights Council (HRC) recommending the Security Council to refer situations to the Court. The relationship agreement between the ICC and the UN, the memorandum of understanding with MONUC in the DRC falling under such agreement (later renamed MONUSCO); the New York liaison office of the Court with the UN as institutional link, the focal points and working groups and the reporting activity of the Court with the UN political institutions, represent only the initial stage of governance systems and further definition of their complementary nature. The political organs of both organizations will have to meet in the middle somewhere. The Assembly of the States Parties needs to build up mechanisms of assistance and capacity-building providing models of governance in domestic judicial systems. This is valid for the rest of the security sectors in domestic institutions sharing knowledge and preparing fragile States to reform police, army and judiciary under the UN flag, while monitoring the relevant development programs and donors. This approach of governance would require common projects of UN character including dissemination and awareness of the activities of the Court which are not only *retributive* but also *protective* and *restitutive.* In this way the ratification campaign of the Rome Statute would surely benefit from such integrated approach of governance strenghtening the relationship between peace, justice and security for the sake of individuals.

8.3 Conclusions

This study argues for the paradigm shift of international law and international public institutions as the global tools for the protection of individuals in situations of war and crime. This concept is relatively new in both doctrines. International mandates have to be as close as possible to individual citizens.[20] This is the common target expressed in both the Rome Statute and the UN Charter and the reason for their necessary harmonization at normative, structural and functional levels. From an institutional perspective the Court cooperates already with the UN in many different areas, including the exchange of information and logistical support. The Court reports to the UN each year on its activities, and some meetings of the Court's governing body,

20 See J. Dugard, 'The Future of International Law: A Human Rights Perspective. With Some Comments on the Leiden School of International Law', (2007) LJIL 20, 729 at 739. For an overview of the debate over the protection of the individual under international law, the 2007 special issue of the *Leiden Journal of International Law* is presented as a tribute to John Dugard and his contribution to international law. See T. Skouteris, A. Vermeer-Kunzli, 'Editor's Introduction: John Dugard and the Protection of the Individual in International Law', (2007) LJIL 20, 741 at 744.

the Assembly of States Parties (ASP), are held in the UN facilities. The relationship between the Court and the UN is governed by a relationship agreement between the International Criminal Court and the United Nations which will need further implementation on cooperation issues.[21] Despite such institutional liaisons the first generation of referrals addressed to the Court by the Security Council (Sudan, Libya) did not receive appropriate support from the UN institutional apparatus, including the important role of the General Assembly on the issue of resource sharing. The first Review Conference of the Rome Statute considered some amendments to the Rome Statute as the treaty made specific reference to review the list of crimes within the Court's jurisdiction.[22] The main recommendation addressed to the decision-makers in this study is to find consensus on the harmonization of the treaty law, with provisions implementing the relationship between complementary mandates, respectively in the UN Charter and in the Rome Statute.

This is particularly true considering the increasing number of nation-states which leaders retain power during internal political transitions at the expenses of civilians. These leaders claim their positions from 'democratic' outcomes of general elections as in the situation in Kenya or Ivory Coast, where the unrest between political factions resumed in post-electoral violence requiring the involvement of the Court, and this on the top of ethnic, religious and power related conflicts. The main responsible should face international criminal justice. These situations are very complex as indeed in the Sudan. The leaders in this country retain domestic power whether the international community proved the commission of serious international crimes against their own people. In the DRC the political élite should focus on good governance of security sectors (army, police and judiciary) and perform judicial activity *in situ*. The criminal perpetrators abusing civilians should be isolated, captured and put to trial. The victims cry for justice. The

21 See the Negotiated Relationship Agreement between the International Criminal Court and the United Nations http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1_English.pdf For some literature on Cooperation Agreements and Enforcement see, G. A. Knoops, *Surrendering to International Criminal Courts: Contemporary Practice and Procedures*, (2002). V. P. Oosterveld and J. M. McManus, 'The Cooperation of States with the International Criminal Court', (March 2002) 25 *Fordham International law Journal* 3, at 767. Han-Ru Zhou, 'The Enforcement of Arrest Warrants by International Forces: from the ICTY to the ICC', 2006 *Journal of International Criminal Justice* 4, no. 2, 202 at 218. H. Zsolt, 'The Making of the Basic Principles of the Headquarter Agreement', (March 2002) 25 *Fordham International Law Journal* 3, 625 at 637.

22 Any amendments to the Rome Statute require the agreement of two thirds of member countries to be adopted and the ratification of 87.5% for the amendment to come into force. However, amendments relating to the definition of crimes apply only to those member countries that ratify the amendment. After the adoption of the 2010 Kampala Amendments the crime of aggression is adopted on the basis of Article 121.5 of the Rome Statute. See for an overview, R. E. Fife, 'Review Conference: scenarios and options', 2006-11-21, accessible at http://www.icc-cpi.int/library/asp/ICC-ASP-5-INF2_English.pdf

governance of the emerging regime of international criminal justice in the context of peace and security during *intra*-state conflicts is characterized by several overlaps. The mandate configurations of the UN political organs and the multidimensional operations in the field where the Court is involved are not yet designed to provide authority, engagement and support to international judicial decisions. This emerged repetitively *in situ* in the Sudan, in Uganda, in Kenya and in the DRC, just to name a few situations reported in this study. Unfortunately, such trend might be repeated again. The risk is that violence remains the norm during political transitions of domestic regimes characterized by massive crimes. At present, the Court's arrests warrants are outstanding against eight suspects, including four alleged commanders of the LRA in the situation in Uganda. They are still free for years by now and this has devastating consequences on civilians. In regard to the Sudan, the Court informed several times the Security Council and the Assembly of States Parties about the non-cooperation in the arrest and surrender of Omar Al Bashir (Sudan) who is still travelling in several African States (DRC, Malawi, South Africa), but without success.

These are only some of the reasons why the Court's existence cannot be considered as the panacea for the "*malum mundus*". Furthermore, there are still no mechanisms in place for the deterrence of unilateral intervention policy of the nation-states in the affairs of sovereign States for humanitarian reasons falling under the flag of the responsibility to protect civilians. Peace and justice are still characterized by tensions in the short and middle terms and judicial decisions of *last resort* are not followed. It is expected that the UN would support the judicial mandate of the Court with appropriate configurations of its peace enforcement mandates at least in situations referred to the Court by the Security Council. The view expressed in this study is that support should be provided in all situations where peace operations are deployed on the ground. In Darfur the Court received jurisdiction from the Security Council without any guarantee of enforcement assistance and basic resources. On top of that the Court did not receive any operational or political support. Such parameters of governance deserve discussions also in the current practice applied in the Democratic Republic of Congo and in other situations where such international complementary institutions are both involved. This study underscores the importance of the humanitarian escalations of *last resort* between complementary international mandates and their governance in the field operations. It argues about the notion that the Court would be part of the maintenance and restoration of peace and security as *last resort* option rather than being purely based on the paradigm of international justice and accountability. The majority of the situations where complementary governance institutions are involved swift from weak stability falling back easily into the conflict. Therefore, they should be prepared to complement and support with each other defining their mutual interests at all levels (political, legal, structural and operational). This requires the political committment from decision-makers.

This study offers an analysis of the interactions required in accordance with the ideal of global justice in the international society. In other words, it examines the ways international regimes of complementary and universal nature may preserve the international order in accordance with the challenges of the post-cold war era. In order to guarantee law enforcement and individual protection mechanisms on the ground, the formulation of policy and law needs to give priority to applicable measures of human security. This study argues that there is a moral and legal case for intervention on humanitarian grounds where crimes internationally recognized have been committed, but that at such, military intervention and the authorization of the use of force under the flag of the responsibility to protect need to be shared in a context of balancing powers, if not such frameworks would be constantly compromised in the absence of a reliable accountability system, including the negative consequences on civilians. It is hoped that the embryonic regime of international criminal justice would have a deterrent function in the commission of crimes during political transitions in African countries and in other regions of the world.[23] At this moment in time, however, its enforcement is still more of a vision considering the weak interaction between the relevant international actors and their legal and political engagements. In such context there is also the necessity to develop more coherent theories of global governance in accordance with the current challenges of the time and the current intersection between politics and law on such sensitive issues.[24]

In summary, this study provides verification on the following global issues which require urgent solutions:

a) Is there any progress in the democratization of an international 'system'?
At international level the requests of democratization are related to the reform of the permanent membership of the UN Security Council and its veto powers; on the protection of civilians and peace enforcements mandates; on the proposals for global peoples assemblies giving voice to civil society in the UN General Assembly on matters of international mutual concern; and also with regard to the provisions of the Rome Statute centralizing the victims' role in judicial proceedings with participation, protection and reparation, including the dialogue between such global institutions and regional and non-governmental organizations. Such open dialogue with regional inter-governmental organizations and civil society symbolizes the emerging regime of international criminal justice and needs to be kept alive. After all, it has been the strength of the advocacy of both civil society and regional organizations that brought the Rome Statute to become a reality.

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23 See A. Cassese, "International Criminal justice: Is it Needed in the Present World Community?" in G. Kreijen *et al* (eds), *State, Sovereignty, and International Governance*, 2002, Part II, Practical Manifestations.

24 See K. Dingwerth, P. Pattberg, 'Global Governance as a Perspective on World Politics', in 12 *Global Governance*, 2006, at 194.

In general, the idea of international democracy was centred on a broader participation in decision-making by under-represented States, regional political realities and civil society which is still struggling for concrete accomplishments. An important aspect of such democratization efforts is to focus on the interaction of complementary global regimes and the ways they contribute to the progress of an 'open' global society. This interaction is important to build up a democratic global system of governance fostering peace, justice and security in accordance with the principle of their inter-dependence. The preservation of peace, justice and security is not worthy if it functions within conflicting regimes. Considering the theory and the practice of humanitarian escalations and serious human rights breaches, this study argues the necessity of global strategies preserving law and order in conflict and post-conflict societies. It addresses structural, normative and functional challenges in the intersection between complementary international regimes. It offers an overview of the international legal and political order dealing with international threats and crimes. It explores the complementary role of international criminal justice at both domestic and international levels in the quest of sustainable peace and human security in conflict and post-conflict societies.

In other words, the interaction of complementary global regimes is also important to define further constitutional measures in the new order, including human security mechanisms applicable in conflict and post-conflict situations such as protection, relocation and rehabilitation of victims and witnesses including reparation measures, which deserve to be associated to development programs in domestic governance systems, once judicial proceedings have been performed.

b) The promotion of global interactions and democratic governance

This study wants to shed some light on what global interactions between complementary regimes would entail for the maintenance of peace, justice and security, from legal, political and institutional perspectives. Normative, structural and functional analysis of the emerging regime of international justice reveals that an appropriate interaction between the Rome Statute institutions and the United Nations system is still in progress. Recommendations are necessary for policy makers on normative and institutional reforms for further progress of democratic global governance institutions, preserving peace, justice and security in conflict and post-conflict societies. The purpose of this study is to stimulate the debate on such interaction through an assessment of international governance institutions, including recommendations of democratic adjustments preserving international relations, international law and order. There is the necessity of a global engagement in the democratization process preserving peace, justice and security in affected communities by war and crime. Only through such democratization process decision makers would enable complementary global mandates to rehabilitate dysfunctional domestic institutions in case of humanitarian escalations and serious violations of international law.

Following a referral by the Security Council to the Court the use of resources should be also supported by an appropriate law enforcement strategy. Attention is also needed on the political and legal relationship between the UN institutions and the ASP-ICC (Assembly of the States Parties and International Criminal Court), implementing further the project of universal jurisdiction. Considering the main organizational, operational and institutional issues, the attention in this study focuses on the current status of global governance in criminal matters in the absence of powers of enforcing compliance, or *supranational* organization. The 'triggering mechanisms' need attention according to the promotion of '*checks and balances*' of public powers in the international legal order. In the context of finding effective mechanisms of governance between the ICC and the UN the controversy has been whether the Security Council, the International Court of Justice or the General Assembly would declare the criminal responsibility of a State, with the Court determining the criminal individual responsibility of perpetrators. The Security Council received a specific legal and political role within the regime of international criminal justice falling under the Rome Statute, which deserves some reflections after the first decade of its existence.

c) Are there further definitions of international crimes of common concern?
The governance model proposed in this study between the United Nations and the Rome Statute institutions (the Assembly of States Parties, the International Criminal Court and the Trust Fund for Victims) supports the fight against international threats and crimes and the rehabilitation of affected communities, promoting study groups on the definition of crimes, including legal and institutional matters. The purpose of this research is also to stimulate the debate on international crime definitions (terrorism, corruption, trafficking of drugs and weapons of mass destruction). The first involvement of the Court to end the impunity of humanitarian crimes which are harming civilians considers rape and other grave sexual violence against women and children as a war crime. The treaty law considers up to six grave violations against children in situations of armed conflict which are characterizing the Court's charges in the DRC and Uganda (killing or maiming of children; recruitment or use of children as soldiers; attacks against schools or hospitals; denial of humanitarian access for children; abduction of children; rape and other grave sexual abuse of children).[25]

With regard to the universality principle of the Court's jurisdiction and war crimes, my view is that the Rome Statute should rectify the crime settlement over the use of arms of mass destruction and the use of nuclear weapons not sufficiently mentioned in the provisions of the Rome Statute, and which are also related to the extension of war crimes, and the definition of the crime

25 See ICC-02/04-01/05, Situation in Uganda and related Cases, *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen.* See ICC-01/04-01/06, Situation in Democratic Republic of the Congo, *The Prosecutor v. Thomas Lubanga Dyilo.*

of aggression and leadership crimes. But would this help to set the US and other powerful States to come on board of the Rome Statute system? This will depend by the trend in global politics and from the UN-ASP promotion of the universality of the Court's jurisdiction. The amendment proposals of the Rome Statute addressed by the States Parties to the ASP and their policy positions expressed during the first review conference in Kampala recall the necessity of further debate. For some observers, the danger is that the Rome Statute would always encounter limits according to the political consensus to be reached by the States Parties, especially on issues strictly related to their legislation and approximation mechanisms. The ASP inputs on cooperation and the UN expertise with regard to the international threats are the keys to overcome the political obstacles of further jurisdictional improvements of the Rome Statute. Another problem is to safeguard the independent role of the Court in the contemporary international order characterized by the executive priorities of the Security Council. This is in fact related to the issue of the crime of aggression which focuses on the use of force, on the Security Council's powers and the interaction with the Court. The crime of aggression was mentioned in the founding treaty even if political consensus over its definition was never reached at UN level and later in the ASP-ICC. The nuclear issue was left completely outside the Statute's provisions, as well as terrorism and drug trafficking. The developments since the establishment in Rome of the treaty and its first review conference in Kampala have been extensively debated and indicate the lacuna of such regime dealing with crimes characterizing *inter*-state conflicts.

d) Approach

This study explores the emerging regime of international criminal justice and its governance which is by definition complementary to the duty of the United Nations. In order to assess contemporary models of international responses in conflict and post-conflict societies this study examines the broadening conceptions of governance in the absence of a *supranational* body. It considers the growing nexus between the studies of governance offering mechanisms of sustainable peace, justice and security in fragile and so-called 'failed' States. It reflects on the evolution or devolution of democratic processes of interactions between complementary global institutions fostering civilian protection duties which cannot be looked separately in situations where international peace and security are both at risk. It offers an assessment of the models proposed by international governance institutions getting closer to individuals during and after armed conflicts, while exploring the ability of the international society in the definition of threats and crimes, getting closer to the idealistic approach of a world government engaged in both *intra*-state and *inter*-state conflicts in accordance with a universal constitution.

The international legal order is based on the respect for the personality, sovereignty, and independence of States, and "the faithful fulfillment of obligations derived from treaties and other sources of international law". Human

rights and international humanitarian law are either the archetype of internal affairs or a matter of international concern, especially in the area where "the faithful fulfillment of obligations derived from treaties and other sources", impacts daily on the relations between the State and individuals under its jurisdiction.[26] As cited by Cassese, "human rights have by now become a *bonum commune humanitatis*, a core of values of great significance for the whole of humankind. It is logical and consistent to grant the courts of all States the power and also the duty to prosecute, to bring to trial, and to punish persons allegedly responsible for unbearable breaches of those values and norms. National courts would operate not on behalf of their own authorities but in the name and on behalf of the whole international community".[27] An effective model of international governance of justice monitors at domestic level the faithful fulfillment of obligations derived from the treaties.[28] The majority of the situations where the Court is involved display the requirement of capacity-building to domestic governance systems, including the political support at regional level among other specific needs to protect individuals in situations of war and crime.

In the absence of *supranational* organization appropriate governance between the competent international mandates defending fundamental rights in conflict and post-conflict societies is indispensable in order to rehabilitate communities after war and crime. An effective model of international governance is necessary in order to maximize results during *peace-building* operations and post-conflict justice. This model of governance of justice would destabilize criminal regimes that represent the main cause of *intra*-state civil wars, avoiding the risks for these communities of going back to the regime of war, shortly after the UN intervention. Both mandates (ICC-UN) allow fragile States to

26 See F. Kalshoven, "State Sovereignty versus International Concern in Some Recent Cases of the Inter-American Court of Human Rights", in G. Kreijen 'et al' (eds.), *State, Sovereignty and International Governance*, (2004), at 259.

27 See A. Cassese, *The International Criminal Court: An End to Impunity?* Crimes of War Project, 2003, accessible at: http://www.didierbigo.com/students/readings/IPS2011/13/cassese2003.pdf Considering another perspective, which complements the empirical approach in post-conflict societies in order to examine the necessity of international investigations and prosecutions and the impact of international Courts on domestic criminal proceedings, it is important to consider the current interaction between national and international Courts, involved in prosecuting individuals in mass atrocity situations, in combination with an analysis of the problems presented by the limited response of the international community to mass atrocity situations. This approach of justice governance entails original case studies, and comparisons of their interactions between the different legal systems, domestic, regional, and international, and makes recommendations for optimizing the complementary nature of international and national Courts. This is the purpose of the research project, *Impact of International Courts on Domestic Criminal Procedures in Mass Atrocity Cases*. See DOMAC (2008) research project funded under the Seventh Framework Programme for EU Research (FP7), accessible at: www.domac.is

28 For a legal analysis of the Court's relationship with domestic jurisdiction see C. Stahn and G. Sluiter, *The Emerging Practice of the International Criminal Court*, (2009), at 208.

rebuild their own executive, legislative and judicial powers. Moreover, in the long term this model of governance would influence the project of universal jurisdiction and the judicial empowerment of competence allocation vis-à-vis the executive power of the Security Council. At strategic level, as shown by the legal reports of the Secretary-General, in order to maximize results in the peace operations: "international security, rule of law and justice must go hand in hand". The problem is to solve the dilemma of judicial empowerment towards a well-defined enforcement strategy with the executive powers of the Security Council *(checks and balances)* supporting the *ex-ante* nature of the Court and its involvement in ongoing conflicts.

In the model of governance proposed, the escalation of human rights violations threatening international peace and security should be followed by a mechanism of *horizontal* nature: *judicial referral* (Security Council – International Criminal Court) and *law enforcement referral* (International Criminal Court – Security Council), in order to maximize results in the field on a case-by-case basis in the situations referred to the Court.[29] The United Nations and the Rome Statute institutions have a universal mandate. In fact the definition of universal organizations applies for both systems. There is the necessity of building consensus, consolidating the responsibility to protect individuals with the determination of ending the impunity of international crimes, towards an appropriate interaction between these organizations. The right of intervention of the international community (in case the State is unwilling or unable to protect civilians – *responsibility to protect*) must follow up on the judicial decisions of the International Criminal Court (when the State is unwilling or unable of starting judicial proceedings – *complementarity*). The model of governance proposed in this study refers to the enforcement on a case-by-case basis: *a)* maximizing the results in the Security Council operations and referral activity to the Court; and *b)* ending the impunity of serious international crimes with the Court's presence in the conflict and post-conflict phase. In conclusion, the responsibility to protect deserves some progress in order to serve the main activities of the Court.

e) Motivation

The motivation in this study is to verify whether there is a genuine political determination of harmonization between the United Nations and the International Criminal Court in solving some of the tensions between peace and justice, cooperation and complementarity, including the long term impact of their presence in the field operations on victims and affected communities. The intent of this study is to verify whether these complementary global entities are just left by means of parallel and distant working relationships, reflecting an improper hierarchy between political and judicial international authorities, which would only create undesired frictions and disputes, or if

29 The *vertical referrals*: nation-states – International Criminal Court and *proprio motu* powers in accordance with Article 15 of the Rome Statute.

they work together with unity of intents, providing assistance and cooperation in the field operations of one another, improving the capacity-building of regional and domestic systems. Further consensus will be necessary for democratic reforms which would allow the implementation of international cooperation standards, including international and shared responsibilities of cooperation between complementary global regimes and regional and domestic systems. An overview of the shortcomings occurring during humanitarian escalations of *last resort*, from peace processes to transitional justice, and their impact on the ground, have been approached in the case studies dealing with conflict and post-conflict situations in African countries, where the United Nations and the Rome Statute institutions are both currently involved. The policy debates and the legislation of the UN institutions, regional organizations and Rome Statute institutions have been extensively examined.

The motivation for this research also refers to the new steps in the law-making process and the treaty law to implement the defence of human rights; to enhance further the fight against international crimes; and to put an end to the impunity regime of serious human rights offences. This research offers a model implementing the governance of justice, at a time where the completion strategies of the International Criminal Tribunals for Rwanda and the Former Yugoslavia are well under way, while the operation of a new mixed tribunal by the Security Council (Special Tribunal for Lebanon) brings new concerns of fragmented and multilevel jurisdictions.[30] The International Criminal Court was created as a demonstration by the international community's commitment to put an end to impunity of serious crimes internationally recognized establishing new policies based on justice and the rule of law.[31] The Court's presence provides high judicial standards for other

30 In this context is important to consider the adoption of the Security Council Resolution 1757 (2007) 30 May 2007 (UN doc. S/RES/1757) over the establishment of the Special Tribunal for Lebanon, the so-called Hariri Tribunal. This "hybrid" international court is mandated to try those suspected of assassinating former Lebanese Prime Minister Rafik Hariri, who was murdered in February 2005. Several human rights organizations such as Human Rights Watch had argued that the tribunal should have been given jurisdiction over 14 other attacks perpetrated in Lebanon since October 1, 2004, that it is to be a "tribunal of an international character based on the highest international standards of criminal justice" and that several issues need to be addressed during the negotiations between the United Nations and the Lebanese government in order to ensure that the "highest international standards of criminal justice" are attained. The tribunal marks the first time that an UN-based international criminal court will be trying a "terrorist" crime committed against a specific person. See HRW, *Establishing the Hariri Tribunal, Letter to the Secretary-General Kofi Annan*, 2006 (April), accessible at http://hrw.org/english/docs/2006/05/01/lebano13297.htm

31 See UN doc. A/63/323, Fourth Report of the International Criminal Court to the United Nations for 2007/08, Address to the United Nations General Assembly Judge Philippe Kirsch, President of the International Criminal Court, 30 October 2008, accessible at: http://www.icc-cpi.int/Menus/ICC/Reports+on+activities/Court+Reports+and+Statements/Court+Reports+and+Statements.htm

courts and tribunals, while its *ex-ante* role of permanent tribunal is unique and requires global support.

This study defends the necessity of applying the doctrine of *checks and balances* in the international legal order between universal organizations and vis-à-vis the States, consolidating complementary regimes dealing with serious human rights breaches. It debates the necessity for the judicial power to operate in the context of a global law enforcement strategy and a compulsory cooperation regime. It offers a model of governance between the humanitarian intervention under the UN umbrella and the field operations to gather information and evidence of international crimes by the investigative channels of the Court. It considers the judicial proceedings of post-conflict justice (rehabilitation and reparation) as necessary operational steps of nation building and reconstruction. The existence of a permanent and independent international organization with jurisdiction over individuals accused of committing serious international crimes, in particular, genocide, crimes against humanity and war crimes, signifies the establishment of a judicial power independent from power politics, from the *selective justice* performed by the Security Council and from the unilateral national security policy of its members. There is an important impetus to analyse the interaction of complementary international mandates in the context of *complementarity* with the States. Studies and reports on these global issues are extremely important, considering the solutions to be found in the current transition of international relations, characterized by the crisis in international democracy, and by the disintegration of the nation-state even in Western societies with a difficult momentum of political unrests, shifts of power, civil wars and serious violations against the dignity of individual lives. From a legal perspective further research will be necessary in order to define the criminal responsibility of corporations and other non-state actors, giving new insight to the application of accountability and universal reach of crimes by a permanent International Criminal Court.

f) Country-specific situations

The political breakdowns and the failure of newly established nation-states is evident in civil wars which create situations where domestic institutions are deprived of their capabilities, triggering a constant crisis of basic governance parameters. In the majority of these situations, characterized by economic decline and dependent upon natural resources, domestic authorities become unable to control violence on their own, or persist in the unwillingness to investigate or prosecute international crimes of serious concern. Such breakdowns of nation-states are well recorded in Africa, where their inability to initiate judicial proceedings after and during violent conflicts proves the necessity of institutional-capacity building at international level. Since the establishment of the Court there have been State referrals from the governments of the Democratic Republic of Congo, Uganda, Central African

Republic,[32] Ivory Coast,[33] Mali and and the Union of the Comoros, two referrals from the Security Council regarding the situation in Darfur and Libya. In 2010 Pre-Trial Chamber II granted the Prosecutor's request to open an investigation *proprio motu* in the situation in Kenya, which is a State Party to the Rome Statute since 2005.[34] It needs to be noted that the Kenyan parliament did not agree on the establishment of a special criminal tribunal of their own to take care of the crimes committed during the political transition in the country. The Kenyan parliament voted twice negatively to have a special criminal tribunal looking into the criminal responsibility for the 2007-2008 post-election violence. There was no other option for the ICC intervention.[35] The Office of the Prosecutor has also received thousands communications since July 2002 about multiple country-situations and performs daily preliminary examinations.[36]

The obvious consequence in the majority of conflict and post-conflict societies is the presence of authoritarian criminal regimes which have serious repercussions on individual lives and which are left to international interventions of last resort. Considering the UN intervention in the DRC conflict, or so-called the 'Kivu Conflict' which was generated by an explosive mix of power-hungry militias and ethnic tensions, fuelled by a violent tug of war for control over mineral resources. The conflict is taking place between the Congolese armed forces (FARDC) and the Rwandan Hutu militia group, the Democratic Forces for the Liberation of Rwanda (FDLR) in the mountainous provinces of North and South Kivu. After a dramatic shift in political alliances, in January 2009 the DRC and Rwanda launched joint military operations in eastern Congo against the FDLR, some of whose leaders had participated in the Rwandan genocide, and which had targeted Congolese civilians in these areas over the previous 15 years. Peace and security has been compromised in the African Great Lakes region including the regime of impunity of mass atrocity crimes.

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32 See ICC-OTP-20140924-PR1043, 24 September 2014, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a second investigation in the Central African Republic*. See also Situation in the Central African Republic II, Article 53(1) Report, 24 September 2014.

33 Ivory Coast had accepted the jurisdiction of the ICC on 18 April 2003. On both 14 December 2010 and 3 May 2011, the Presidency of the country reconfirmed the acceptance of the Court's jurisdiction. On 15 February 2013 Ivory Coast deposited its instrument of ratification and became State Party to the Rome Statute.

34 ICC-01/09, 31 March 2010, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, accessible at: http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf

35 See G. M. Musila, "Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions", *IJTJ* (2009) 3 (3), at 445-464.

36 For an up-to-date overview see ICC portal, Communications and Preliminary Examinations, accessible at: http://www.icc-cpi.int ICC » Structure of the Court » Office of the Prosecutor » Preliminary Examinations.

Seventy years since the end of WWII and the creation of the United Nations the events in the DRC remind us that the system of collective security based around the UN is still unable to save the lives of innocent civilians caught up in armed conflict. Even worse, the United Nations itself is facing accusations of complicity in violations of international law. MONUC was given the mandate to support and participate in military operations with the Congolese armed forces against the FDLR in December 2008, as long as such operations were conducted in accordance with the laws of war. But according to human rights activists MONUC disregarded crucial elements of formal legal advice given by the UN Office of Legal Affairs (OLA) in 2009 and did not establish conditions for respecting international humanitarian law, as required by its mandate, even before it began to support the operations on the ground.[37]

Serious concerns emerge from the empirical research findings of such interventions in conflict prevention and conflict management and which do not seem to be prepared to act on the causes and on the effects of humanitarian atrocities. "There are many tasks which UN peacekeeping forces should not be asked to undertake and many places they should not go. But when the UN does send its forces to uphold the peace, they should be prepared to confront the persistent forces of war and violence with the ability and determination to defeat them." This important guideline was part of the comprehensive review of the whole question of peacekeeping operations in all their aspects in the UN.[38] The Brahimi Report offered an in-depth critique about the conduct of UN operations and made specific recommendations for a change. Only "by making such changes", the Panel argued, "would the UN be able to meet the critical 21st century peacekeeping and peacebuilding issues presented by its member States" The Brahimi Report was drafted during the May-June 2000 peacekeeper hostage crisis in Sierra Leone, with that crisis very much in mind. Experience in the 1990s had also amply demonstrated that undersized and under-equipped forces with weak or unclear mandates could neither deter political factions nor contain the well-armed gangs that arise in the power and legitimacy vacuums following civil wars. Such was the case, for example, in Angola, Somalia, Bosnia and Rwanda between 1991 and 1994.

In the comprehensive UN review of the whole question of peacekeeping operations in all their aspects and inter-institutional communication between the president of the UN General Assembly and the president of

37 See Human Rights Watch, "MONUC and Civilian Protection" in *You Will Be Punished. Attacks on Civilians in Eastern Congo,* Report of Human Rights Watch (HRW), December 2009, pp. 134-153, accessible at: http://www.hrw.org/sites/default/files/reports/drc-1209web_1.pdf

38 See A/55/305, S/2000/809, *Report of the Panel on United Nations Peace Operations,* known as the "Brahimi Report" after the Panel chair, UN Under-Secretary-General Lakhdar Brahimi, August 2000.

the Security Council, the paragraph 62 reads "Peacekeepers (military troops or police) who witness violence against civilians should be presumed to be authorized to stop it, within their means, in support of basic United Nations principles and, as stated in the report of the Independent Inquiry on Rwanda, with 'the perception and the expectation of protection created by the UN operational presence".[39] Military ethics experts took the Panel to task for the "presumed to be authorized" language, arguing that, if protecting civilians is not part of an operation's mandate, then the Panel has potentially invited soldiers who witness atrocities to violate lawful national orders not to intervene. But they also note that *force majeure* "in the sense of a collision of duties," where "the necessity of choice is inevitable," may offer a path by which peacekeepers, in specific emergency circumstances, may act outside their mandate, drawing on the ethical imperative to protect civilians that is implied or imposed by international humanitarian law.[40] The International Criminal Court, however, is still kept out of any forces to be deployed on the ground.

The mission in the DRC illustrates the difficulties that characterize such an approach,[41] and suggests that the United Nations and its member States do not yet have the expertise and commitment to deal effectively with complex humanitarian emergencies.[42] In 2004, the government of DRC referred the situation of crimes within the jurisdiction of the International Criminal Court allegedly committed anywhere on its territory, since the entry into force of the Rome Statute, on 1 July 2002. The DRC government asked the

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39 'Brahimi report', UN Doc. A/55/305, para. 62.

40 The distinction drawn is between an implicit, blanket authority to act and an emergency imperative that is justified case by case. See T. Van Baarda and F. Van Iersel, 'The Uneasy Relationship between Conscience and Military Law: The Brahimi Report's Unresolved Dilemma', (2002) 9 *International Peacekeeping* 3, 25 at 50.

41 Experts in peacekeeping and peacemaking in Africa discussing the history of UN efforts since post cold war era in DRC, Sierra Leone conclude that the UN is still struggling to find a case by case approach in such humanitarian disasters. See A. Bariagader, 'United Nations Peace Operations in Africa: A Cookie-Cutter Approach?', 2006 *Journal of Third World Studies* 23, 2, 11 at 29. In DRC, the UN Security Council Resolution 1843, UN doc. S/Res/1843 (2008), November 20, 2008, increased the number of troops from nearly 17,000 troops to just fewer than 20,000 though not all of the new troops have yet arrived. As of August 2009, 18,638 uniformed personnel were physically deployed, including 16,844 troops, 705 military observers, and 1,089 police. The mission also includes 1006 international civilian personnel, 2,539 local civilian staff and 615 United Nations Volunteers. See MONUC facts and figures, accessible at: http://www.un.org/Depts/dpko/missions/monuc/facts.html

42 According to empirical case studies performed by African experts on the DRC, the massive conflict lasting from 1996 to 2003 that drew in seven African countries and led to about three million deaths, the greatest number of fatalities in any war since World War II, started as a direct consequence of the Rwandan genocide in 1994. See G. Prunier, *From Genocide to Continental War: The "Congolese" Conflict and the Crisis of Contemporary Africa* published in the US as *Africa's World War: Congo, the Rwandan Genocide, and the Making of Continental Catastrophe*, (2009).

Prosecutor of the Court to investigate in order to determine whether one or more persons should be charged with such crimes, and the authorities committed to cooperate with the Court. In January 2009 the first trial of the Court started against the most accountable Congolese 'warlords' with some of them still at large (Sylvestre Mudacumura). In the Sudan it is even worse. The political élite responsible of mass atrocities in Darfur are still in charge of the leadership in the country. President Al-Bashir travels all over in Africa. Such trend has divided the international community and many African States are not cooperating in accordance with their legal obligations falling under the Rome Statute.

g) From rejection to political support

This study has also the scope to address the Court's political rejection considering the American position and also by other permanent members of the Security Council, such as Russia and China. The United States signed under the Clinton administration and then rejected the Court under the Bush administration. For a while it even became its public enemy together with other powerful States which followed their own strategic intervention policy, delivering a governance model of justice sometimes even outside the multilateral premises of the UN. The Obama Administration has stated its intent to cooperate with the International Criminal Court. In response to a question from the Senate Foreign Relations Committee, former Secretary of State Clinton remarked that the US will end its 'hostility' towards the Court. In addition, Susan Rice, US Ambassador to the United Nations, in her first address to the Security Council, expressed the US support for the Court's investigation in the Sudan. These statements coupled with the removal of the sanctions and the realization of the negative impact of the Bilateral Immunity Agreements (BIAs), represent a positive shift for those who believe in the US cooperation with the Court and which may lead to greater participation with it. The Obama Administration however, has made no formal policy decision yet on the ICC membership, neither on the status of the Bilateral Immunity Agreements (BIAs).[43]

The expectations on the Court's role seem very high notwithstanding its opposition if we consider the limited resources given by the Assembly of States Parties (ASP), the political and governing body of the ICC, and the lack of support by the Security Council following the Darfur referral. The debate ended on March 31, 2005 with the Security Council finally approv-

43 See "The United States and the International Criminal Court", *Wikipedia* the free encyclopedia, accessible at: http://en.wikipedia.org/wiki/United_States_and_the_International_Criminal_Court See also L. Di Cicco, "The Non-Renewal of the 'Nethercutt Amendment' and its Impact on the Bilateral Immunity Agreement (BIA) Campaign", April 30 2009, accessible at: http://www.amicc.org/docs/Nethercutt2009.pdf For an overview of the hearing of the US Senate Foreign Relations Committee see J. Kerry, "*Toward a Comprehensive Strategy for Sudan*" 2009, accessible at: http://kerry.senate.gov/cfm/record.cfm?id=316485

ing the *Resolution 1593* granting the ICC jurisdiction to investigate ongoing atrocities in Darfur. The Resolution passed by a vote of 11-0, with four countries abstaining. This was an extraordinary result considering the complex politics involved. Algeria and the United States cited their preference for an African tribunal as the reason for their failure to support the referral. But the reluctance of the US was compounded by their ideological opposition to the ICC itself. The fact that they did not exercise the veto was due in part to the inclusion in the Resolution of a provision exempting nationals of States not Parties to the ICC Statute who are involved in peacekeeping from the jurisdiction of the Court. At the other end of the scale of views, Brazil withheld its vote precisely to object the compromised language introduced by the US. China justified its failure to support the resolution by saying that a political process for peace should be prioritized over the quest for justice.[44] Yet it did not cast a veto, but abstained.

Taking in consideration the international relations issues, this study approaches the support received by the European Union and NGO coalitions as important channels to solve the controversial positions with other regional organizations, such as the Arab League and the African Union. The analysis focuses on the peace enforcement configurations of the Security Council on the ground, where the Court is also involved with investigations and prosecutions, including the escalations of *last resort* addressed to the emerging regime of international criminal justice. The argument is the lack of support to the Court, including a detached interaction between complementary global regimes, alongside the policy formulation of global humanitarianism and civilian protection duties in conflict and post-conflict situations.

44 See, UN doc. S/RES/1593 (2005).