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Part III

The Humanitarian Escalations of Last Resort and their Governance in the Field Operations

"Since wars begin in the minds of men it is in the minds of men that the defences of peace must be constructed".
From the Preamble of the UNESCO Constitution

6 The International Responses to Mass Atrocities in Africa and the Criminal Regime in the Sudan

Preliminary remarks

The main argument expressed in this part of this study is that without appropriate interaction strategies between complementary global regimes (based on balancing public powers through visible reforms, policy formulation and law-making processes) there would be limits in the creation of a global architecture dealing effectively with the escalations of war and crime. Such interaction strategies are required for democratic governance and for the preservation of the rule of law. The good governance of peace and justice not only depends from the implementation of mutual interests and mutual support applied on the ground between complementary mandates, but also from the developments of governance frameworks and their complementary character at structural, functional and normative levels. The role of the emerging regime of international criminal justice in the arrays of peace and security in Africa is still very weak for several reasons. The formulation of governance frameworks dealing with humanitarian escalations of war and crime is only at its initial stage of realization. The actors involved have to take ownership of their mutual responsibilities of cooperation, law enforcement and civilian protection in situations of mass atrocities. The purpose of this Part III is to introduce the case studies dealing with the humanitarian escalation of *last resort* and their governance in the field operations in the Sudan and in the Democratic Republic of Congo. It debates respectively: *a)* the current place of justice in the arrays of peace and security maintenance, *b)* the political issues around the first generation of international humanitarian escalations of mass atrocity crimes and the governance frameworks dealing with them, *c)* the role of international, regional and bilateral actors in the Sudan and in the Democratic Republic of Congo, and *d)* the management of the *intra*-state conflict in the Sudan and the lessons learned.

The last years of the century proved to be a period of dramatic transition for the sake of statehood and democratic governance in African States.[1] The *inter*-state ethnic conflicts had terrible consequences visible in the execution

1 See R. H. Jackson, C. G. Rosberg, "Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood", *World Politics*, Volume 35, Issue 1 (Oct. 1982), at 1-24. See also S. Levitsky, L. A. Way, *Competitive Authoritarianism: Hybrid Regimes After the Cold War,* 2010.

of mass atrocities.[2] In 1989 it seemed that the end of the Cold War heralded far brighter prospects for the African future but good hopes were soon seriously troubled.[3] The continent was devastated by internal conflicts and large scale humanitarian atrocities spreading in multiple countries. It was as if the *Iron Curtain* had been left open releasing the demonic forces of war and crime. Since then, an increasing number of emerging nations have undergone the turning drama of violent conflicts, mass atrocity crimes and the determination of warlords to retain political power at the expenses of civilians. These civil wars have claimed millions of lives, and still do. The list of the so-called *failed* States doubled consistently. In several situations of war and crime the domestic governance systems and institutions are not self-reliant during difficult political transitions, and are exposed to constant failure upholding human security measures. In the majority of such situations the State is replaced by criminal regimes violating fundamental individual rights. Empirical data of mass atrocities demonstrate serious impunity gaps and the powerless or unwillingness of domestic security systems to preserve law and order. The domestic, regional and international responsibilities upholding minimal standards of governance of war and crime are undoubtedly in transition. Although the paradigms of the responsibility to protect civilians in conflict zones and the use of international justice and accountability should be complementary in their governance, this is not the case in the humanitarian escalations of *last resort*. The delimitation between statehood, State sovereignty and the frameworks of international governance requires new policy formulations upholding human security measures. An international architecture of governance fostering human security is absolutely required. There is, however, a long way to go.

The dilemma of human security in the governance of complementary global regimes is still unresolved and waits for visible solutions from the political forces involved in such policy formulations. Besides, the conceptualization of human security upraised already an extensive debate in academic and policy circles. This study, however, does not attempt to solve it.[4] If on one side the reality of armed conflicts rendered international protection duties of civilians more complex, on the other there are institutionalized defenders of truth protecting individual rights. This is the vision offered by comple-

2 For an overview of African conflicts and serious humanitarian breaches currently occurring in several countries, see Human Rights Watch, *CAR/DRC: LRA Conducts Massive Adduction Campaign*, August 11, 2010, accessible at: http://www.hrw.org/en/news/2010/08/11/cardr-congo-lra-conducts-massive-abduction-campaign For the debate about international interventions and democracies see, W. M. Reisman, 'Humanitarian Intervention and Fledging Democracies', 18 *Fordham International Law Journal*, 1994-1995, at 794.

3 R. Kaplan, *The Coming Anarchy: Shattering the Dreams of the Post-Cold War*, 2000.

4 See R. Paris, "Human Security: Paradigm Shift or Hot Air?", *International Security,* Fall 2001, Vol. 26, No. 2, 87-102. See A. Pop, Article Review: Human Security: Paradigm Shift or Hot Air? 2006, accessible at: http://www.academia.edu/1098843/Article_Review_-_Human_Security_Paradigm_Shift_or_Hot_Air

mentary global regimes such as the UN and the Rome Statute institutions. In the context of the governance of international threats and crimes these regimes represent an opportunity to centralize individuals rather than exclusively prioritizing the interests of nation-states. Obviously, only a *supranational* capacity upholding universal norms would be the satisfactory way dealing with mass atrocity crimes and also fighting against other international threats and crimes. This is of course left to the outcome of political convergence of expectations in global politics, which still depend on the volatile dynamics and fluctuations characterizing international relations and the politics of mass atrocities. The governance debates regarding the breakdowns of domestic jurisdictions, or even worse, about the situations characterized by the complete absence and collapse of nations-states in conflict and post-conflict situations share the same common concerns. Namely, that the international responses in mass atrocities simply depend from fragmented legal and political frameworks based on cooperation requiring further implementation. This is either true in the context of the maintenance, management and restoration of international peace and security, or in the fight against the impunity of serious international crimes. Nevertheless, it is required to assess where feasible opportunities can be found in the humanitarian escalations of *last resort* with an integrated model of cooperation, law enforcement and civilian protection duties in conflict and post-conflict situations. The first section below introduces *a)* the place of justice in the arrays of peace and security as a tool of *last resort*, *b)* the assessment provided by way of case studies and *c)* the outline of the chapters pointing out the practice applied in situations of war and crime before the formulation of the recommendations would take place.

6.1 The place of Justice in the arrays of Peace and Security

Section outline

The analysis of multilateral perspectives indicates that since the creation of the United Nations system seventy years ago, much of the international law and diplomacy has been developed, shaped, implemented and enforced through the UN bodies and related international organizations dealing with peace and justice. Later, with the disintegration of the Soviet Bloc in the early 1990s it emerged a considerably revitalized political determination of the UN to promote a new era of global cooperation. However, the political trend to respond to the challenges of the increasingly interdependent global economy delayed the attention required in the extreme violence occurring in conflict zones and the mass atrocity crimes deriving from them. The international interventions in Africa, particularly in Rwanda and Sierra Leone, did not reduce the misery of civilians.[5] In order to give an idea of the place of

5 See R. Kaplan, *supra*. See also F. Grünfeld, A. Huijboom, *The Failure to Prevent Genocide in Rwanda: The Role of Bystanders,* 2007.

justice in the arrays of peace and security this part offers an overview of the conflict management and peace enforcement in the Sudan and the humanitarian escalation of the Security Council to the Court (Darfur). The regime of justice falling under the Rome Statute was generated in the first instance by the determination of civil society organizations advocating for international engagements in mass atrocities preserving fundamental individual rights. Such regime is still far from realizing the expectation of international humanitarian escalations based on the complementary character of global regimes working for sustainable peace. Therefore, the case studies advocate for systemic changes of governance frameworks in order for them to be complementary and maximize the results in conflict and post-conflicts situations.

The Rome Statute system has a limited jurisdiction and does not have police force. The referral of the situation in the Sudan from the Security Council confirms the limitations of its working methods with the Court. In theory, the judicial proceedings against criminal perpetrators not only represent a deterrent tool of international crimes, but most importantly provide the truth in regard to a specific situation requiring political engagement for humanitarian intervention enforcing the law. In the past, such important factor proved not to be reliable in the selection of situations compromising international peace and security. Now, at least, there is a specific tool which still requires a place in the arrays of peace and security for its maintenance and restoration, and also for a well-defined, well-supported and well-visible complementary and comprehensive role in the international operations deployed on the ground. As the case studies will demonstrate, this is not yet the case. The international capacities of law enforcement and the strategies of civilian protection in situations of war and crime require systemic changes at structural, normative and functional levels and an integrated approach of governance fostering human security. In this way the *retributive*, *protective* and *restitutive* aspects of justice and the fight against impunity will serve the quest of sustainable peace in communities affected by war and crime. The attempt of this part is to shed some light on the complementary responsibilities in the humanitarian escalations of mass atrocities, particularly about the so often referred 'African test' of humanitarian interventions under the flag of the responsibility to protect and the referrals of *last resort* addressed to the emerging regime of international criminal justice.[6]

6 See H. Breakey, "The Responsibility to Protect and the Protection of Civilians in Armed Conflicts: Review and Analysis", *Institute for Ethics, Governance and Law*, Griffith University, May, 2011, accessible at: http://www.griffith.edu.au

6.1.1 *The risk analysis of international responses*

In general this part examines the governance of international responses in fragile States where 'arrangements and agreements' of cooperation between relevant stakeholders are weak and need implementation. In particular, it emphasizes the necessity to establish 'narrowly focused' mandates and high standards of cooperation based on mutual interests between peace and justice. This trend of governance should be visible in both referral and non-referral activities of the Security Council to the Court. This part examines the dynamics in the case studies dealing with the peace enforcement operations of the Security Council and the judicial activity of the Court providing some recommendations for decision-makers. The first case study gives attention to the first generation of referrals coming from the Security Council to the Court exploring the operationalization of the R2P in the Sudan. The most obvious case for the first application of the new set of mechanisms and guidelines within the duty to protect civilians was Darfur, but we will see that both the Sudanese government and the international community have failed to take the necessary steps to protect civilians in the country. Instead, while the Security Council remained silent to the judicial outcomes addressed by the Court to the Sudanese warlords, the regime of the government in Khartoum and its *janjaweed* militias have conducted a systematic campaign of atrocities in Darfur. The most responsible perpetrators are still at large and there is a political impasse between global and regional actors, namely the UN, the ICC and the AU considering the political unrest and the violence spreading also in South Sudan. Obviously, such an impasse slows down the political *road map* required for an 'architecture' fostering peace, justice and security and the best ways humanitarian escalations should be governed in *intra*-state, and eventually in *inter*-state conflicts, upholding the responsibilities to protect civilians.

The Court's jurisdiction is complementary to that of the States that have ratified its Statute while its global mandate is complementary to the UN regime. The Court has no police force and no prisons. Thus, implementing and making effective the obligation of States and other international actors cooperating with the Court's activities has been the most important challenge in the initial period of its existence. Moreover, we have seen that the interaction with the Security Council is not characterized by any compulsory cooperation. Paragraph 7 of the Darfur referral by the Security Council to the Court, "*recognizes* that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations, and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily".[7] The same trend is confirmed with the refer-

7 See UN doc. S/RES/1593 (2005).

ral of the situation in Libya to the Court. An appropriate involvement of the Security Council with resources and law enforcement support does not seem to be the priority. Consensus on such support is expected in the UN General Assembly at least with regard to the referrals addressed to the Court by the Security Council. The *last resort* option of international criminal justice waits for political convergence and for a legal framework based on compulsory cooperation with or without the referrals coming from the Security Council.

6.1.2 The case studies assessment

In primis the case studies reveal several gaps in the international humanitarian escalations and their governance in the field operations. There are no doubts that the conventional (military) methods of conflict management are no longer effective, therefore the configurations of international mandates deployed on the ground require a new approach of governance. The place of justice in the arrays of international peace and security is compromised for several reasons. The governance of the emerging regime of international criminal justice in the context of sustainable peace in *intra-* and possibly *inter-*state civil wars requires further decision-making on the ways humanitarian escalations would be performed between complementary global actors. The case studies focus on the operations deployed on the ground and the current restrictions of complementarity, which in some ways reduces the impact of justice and its deterrent effect. In the DRC, for instance, the United Nations invested in multidimensional operations on the ground mandated by the Security Council to assist the country on the road to stability (MONUSCO). The Congolese government referred to the International Criminal Court the investigation and prosecution of serious breaches of international humanitarian law. In the Sudan, the Security Council referred the situation of Darfur to the Court after the shortcomings in peace agreements and peace enforcement.[8] It is clear that peace operations should support the Court *a)* since the referral, *b)* during its investigative activity, and *c)* after its judicial outcomes. In practice, this has not been the case. In the Sudan the law enforcement failed, including the expectations of civilian protection duties and humanitarian assistance. The criminal regime still in power in the country waits to be isolated with concrete international efforts. In the DRC the configurations of peace-keeping and peace-building mandates do not fulfill the requirements of the judicial activities of the Court, including the civilian protection duties of civilians. Hopefully, judicial proceedings will be performed

8 See P. Takirambudde, "UN: Darfur Resolution a Historic Failure", *Human Rights Watch*, September 18, 2004, accessible at: http://www.hrw.org/news/2004/09/17/un-darfur-resolution-historic-failure See also "Security Council must urgently take action to end impunity in Darfur – ICC Prosecutor", *UN News Centre*, 5 June 2013. See Statement of the Prosecutor of the ICC to the UNSC pursuant to UNSCR 1593 (2005), 05/06/2013, accessible at: http://www.icc-cpi.int/iccdocs/otp/ICC-OTP-UNSC-Dafur-05June2013-ENG.pdf

in situ, but such trend is not sufficiently detectable in the domestic judicial activity and victims and witnesses still cry for justice. In Mali the configuration of robust peacekeeping operations does not refer to any support to the quest of justice on the ground.[9] In Kenya there is confusion about legal obligations and political positions at domestic and regional levels. The political trend of the AU against the Rome Statute system is absolutely regrettable. In any case, the judicial activities of the Court cannot be compromised by any of its political standpoints.[10] The lack of cooperation with the Office of the Prosecutor by the government of Kenya and the withdraw of the charges of crimes against Kenyatta is deplorable. Justice for victims of the 2007-2008 post-election violence is still an urgent priority.[11]

The case studies indicate that peace and justice mandates are disconnected between them in both categories of referrals to the Court. In regard to Libya, the use of the language in the resolution of the Security Council referred to the responsibility to protect authorizing the military intervention, while extending further the mandate of international criminal justice falling under the Rome Statute. In Libya the national transitional council (NTC) will need to perform reliable domestic governance of both security and rule of law sectors taking care of civilian protection measures, while investigating and prosecuting serious breaches of international humanitarian law.[12] The consensus building in the Security Council to intervene in Syria totally failed. The dangerous domino effect of the *Arab Spring* characterizing the violence spreading in the entire region of the Middle East still raises serious security concerns. In Syria the international community remains silent and inactive to the commission of serious crimes of common concern. The Court is not able to get involved in Syria. It simply did not receive jurisdiction from the Security Council. In Syria no political convergence has been met in regard to the maintenance of peace, justice and security. The same political *iner-*

9 See UN doc. S/RES/2085 (2012). See M. Lankhorst, "Peacebuilding in Mali: Linking Justice, Security, and Reconciliation", *The Hague Institute for Global Justice*, Policy Brief 6, November 2013, accessible at: http://thehagueinstituteforglobaljustice.org

10 During the yearly speech at the UN General Assembly (31 October 2013) the ICC President Song emphasised that "the Court has the duty to observe the legal framework set by States" and asked the other stakeholders of the system to uphold the integrity of the Rome Statute, respecting the roles assigned to each entity under the Statute. He also stressed that "whereas the Assembly of States Parties can consider legislative issues and discuss political questions, the ICC must remain an independent, judicial institution". See *ICC Annual Report to the United Nations General Assembly*, 31 October 2013, accessible at: http://www.icc-cpi.int/iccdocs/presidency/Pres-statement-31-10-2013-Eng.pdf

11 See Amnesty International, "Kenya: Justice for victims of post-election violence still an urgent priority", 5 December 2014, accessible at: https://www.amnesty.org/en/articles/news/2014/12/icc-drops-charges-against-kenyan-president/

12 See *Sixth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1970 (2011)*, New York, 14 November 2013, accessible at: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/ProsecutorUNSCNov2013.aspx

tia characterizes the humanitarian crisis exploded in North Korea and the authoritarian nature of its regime, including the gravity, the scale and the nature of the violations committed in this country.[13] The unacceptable nature and magnitude of these crises demand a common position and joint international actions.[14]

If in theory the tools governing multiple situations of war and crime have the role to improve human security expectations centralizing individuals in international affairs, the practice shows serious concerns. There is a long way ahead for further accomplishments of international governance institutions of complementary character. Some of the obstacles, challenges and concerns, including the opportunities upholding multilateral solutions have already been discussed in the previous parts of this study. The case studies conclude this analytical journey which surely requires further research providing solutions to the enforcement of law, civilian protection duties and the models of capacity building in conflict and post-conflict situations characterized by serious violations of international law. The purpose of the case studies is to evaluate the multidimensional capacity of international responses and the efforts maximizing the results on the ground integrating peace, justice and security mandates. Their complementary character requires stronger political determinations strengthening partnerships globally, regionally and on the ground. In order to influence the domestic governance institutions and the accountability system against criminal perpetrators as an important aspect of civilian protection duties, flexible configurations between complementary mandates are strongly recommended in the short and middle terms. In the long term, political convergence should be found by the political forces empowering complementary global regimes on the ways their institutions, and the political processes deriving from them, could work together more effectively.

Justice and accountability are fundamental for lasting peace and security in conflict and post-conflict situations. The UN family of institutions, bodies, specialized agencies and donors should support the Court's mandate prioritizing: the *retributive* aspect of justice (investigations, prosecutions, arrest warrants and law enforcement); the *protective* aspect of justice, (relocation, demobilization of ex-soldiers, protection of witnesses of crimes and other civilian protection duties); and the *reparative* aspect of justice (participation of civilians in judicial proceedings, facilitating the reparative measures for the

13 See UN doc. A/HRC/25/63 (2014), Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea.

14 The Geneva II Conference on Syria (January 2014) is pursued by UN peace envoy to Syria Lakhdar Brahimi in cooperation with the United States and Russia. The aim of the conference is ending the civil war in the country. See UN Action Group for Syria, Final Communiqué, 30.06.2012, accessible at: http://www.un.org/News/dh/infocus/Syria/FinalCommuniqueActionGroupforSyria.pdf

victims of serious international crimes). Besides, the findings of justice should not be left half way deprived of law enforcement capacity, in particular after the failure of preventive diplomacy, peace negotiations and the commission of criminal acts. Once again, justice should receive support with every means in both referrals and non-referrals coming from the Security Council.

6.1.3 The outline of the chapters

In this part the first chapter points out the humanitarian escalations in mass atrocity and their governance in the field operations exploring the political dynamics of the first referral of the Security Council to the Court in the Sudan, and the political impact at regional level and also for the range of other actors involved. The second chapter deals with the multidimensional operations and the issue of cooperation including the gaps in the coordination, coherence and law enforcement in the DRC as the main obstacles to reach sustainable peace in the country. The third and last chapter provides the concluding assessment about the place the emerging regime of international criminal justice should receive in the arrays of peace and security mandates on the ground. The findings in the case studies underscore the necessity of a political *road map* fostering peace, justice and security with an integrated, democratic and comprehensive approach of governance. The main recommendation addressed to decision-makers on such issues is to redetermine the democratization process of global regimes of complementary character preserving further international law and order. This is considered the fundamental requirement to achieve results in the global fight against international threats, and be prepared to *respond*, *react* and *rebuild* in situations of war and crime in accordance with the challenges of the time and the features of our global society. The progress of democratic governance, or better say, the search of an international architecture fostering peace, justice and security obviously depends on *a)* the evolution of the international politics of mass atrocities, *b)* the cooperation between the actors dealing with humanitarian escalations in extreme situations of war and crime, and *c)* the institutional reforms and reviews of the working methods between them. The definition of complementary global regimes requires a political *road map* at domestic, regional and international levels by the stakeholders investing in them. Despite the critics from a relevant number of observers there seem to be new opportunities fostering peace, justice and security. These opportunities have to rely on the human security doctrine. The complementary character of global regimes deserves the attention from decision-makers in the short, middle and long terms in accordance with the human security doctrine. After all, the approach in accordance with the expectations of human security has the potential "to bring international law better into line with the requirements of today's world".[15]

15 G. Oberleitner, "Human Security: A Challenge to International Law?" in *Global Governance* 11 (2005), at 185–203.

This part underscores the importance of an interaction strategy between global regimes of complementary character against criminal regimes that destabilize peace and security and violate fundamental individual rights. It offers some observations regarding the international interventions in mass atrocities in Africa. In particular, it explores the challenges of such responses in the African continent and the emerging role of complementary global regimes. It considers the implementation and harmonization as fundamental prerequisites for the definition of the complementary character of such regimes, including the assessments of their legal frameworks based on: *complementarity* (with a particular focus on 'positive complementarity' and the referrals by States to the Court, including the steps that may be taken to encourage and facilitate genuine national judicial proceedings *in situ*); *cooperation* (including implementing legislation, judicial assistance, international actors and regional organizations); *peace and justice* (e.g. the role of the UN, particularly focusing on the law enforcement of the arrest warrants of the Court and the working methods with the Security Council); and the *impact on victims and affected communities* (including outreach, victim participation, reparations and the trust fund for victims).[16] In order to shed some light on the shortcomings of sustainable peace in several situations the next section points out *a)* the dynamics of the international engagements in mass atrocities, *b)* the formulation of humanitarian escalations and the governance frameworks dealing with them, and *c)* the prerequisites for their implementation and harmonization.

6.2 The International Humanitarian Escalations of Mass Atrocities

Section Outline

The idealistic approach in the debate of humanitarian escalations in mass atrocities emphasizes the fact that complementary global regimes should be able to retain either the challenges occurring in international politics, or the global policy formulation of humanitarian interventions and mutual accountability, using the rule of law as the most important principle of governance in humanitarian affairs. However, as we have previously discussed, the process of the internationalization of law focusing on the interplay between national, regional and international norms and based on the universalism principle of human rights is a 'work in progress' issue which requires political determination, persistence and time. The intervention in humanitarian matters in sovereign States needs further efforts in accordance with universal values and human rights preservation standards, as

16 See ICC-ASP docs., *Stocktaking of International Criminal Justice*, 2010, accessible at: http://www.icc-cpi.int/en_menus/asp/reviewconference/stocktaking/Pages/stocktaking.aspx

well as international governance institutions dealing with civilian protection measures. This is particularly true in this delicate phase of the existing global institutional frameworks which risk not to be further extended by know-how and resources due to the financial constraints and economic breakdowns of many States. The best option should be to benefit from the increased competence and responsibility of the tools already at disposition: the United Nations and the Rome Statute systems. The search of the basic requirements for a global architecture fostering peace, justice and security is fundamental. Such architecture has to be designed in a comprehensive and democratic way and based on the constitution of the world community. Further progress is to be seen in the institutional reforms, in the advancement of global democratization processes, and in the concrete efforts balancing powers between international governance institutions of complementary character. In other words, the applicable ways international global actors would best understand the complex needs of affected populations by war, violence and crime centralizing the rights of civilians. Such an approach, of course, requires political convergence of expectations. Some of the reasons why this is so difficult to realize are examined in this section.

This section examines the emerging regime of international justice as a tool to achieve sustainable peace in *intra-* and eventually *inter*-states civil wars. It attempts to define the new concept of humanitarian escalations between complementary global regimes involved in conflict and post-conflict situations and their governance. Such escalations are characterized by the authorizations of the Security Council to intervene in conflict zones with every means in order to maintain and restore peace and security and also to protect civilians. In the African continent and in particular in sub-Saharan Africa in the Great Lakes African region, including Sudan and Chad,[17] the Security Council attempted to leave and authorize the regional involvement in the humanitarian escalations of mass atrocities. This was the case in the Sudan, in the DRC and other situations left to the African Union to intervene with the option of hybrid solutions. In both cases the working methods in regard to the responsibility to protect civilians in conflict zones displayed several gaps of governance. In regard to justice the political consensus to extend the Court's jurisdiction has not been reached in several situations of war and crime, with the last one being Syria. The new element about the use of justice as deterrent tool of war and crime and towards the referrals activities of the Security Council to the Court would require, first of all, a place in the arrays of peace and security for law enforcement measures supporting the judicial institution with every means. Instead, the Court is left completely disconnected from the working methods of the Security Council and its involve-

17 See J. Giroux, D. Lanz, D. Sguaitamatti, "The Tormented Triangle: The Regionalization of Conflict in Sudan, Chad and Central African Republic", *Crisis States Working Papers No. 2*, 2009, at 17.

ment falling under the flag of humanitarian interventions. Furthermore, the Court is left quite isolated in regard to the protection, relocation and safety of civilians affected by war and crime. The results of the Court depend on such narrow international cooperation regime and on the legal obligations of its States Parties. The Security Council and the UN members should be supportive before, during, and after the humanitarian escalations so-called of *last resort* would occur. Besides, through the UN political institutions even non-States Parties to the Court should be pressured to cooperate.

6.2.1 The international engagements in mass atrocities

From a broad perspective the international engagements in mass atrocities implicated matters of conscience, sense of guilt and helplessness, combined with valuable ethical and universal aspirations to intervene in case of severe violations of international humanitarian law.[18] Despite the psychological, ethical and philosophical aspects, including the political reasons for the creation of the UN *ad hoc* tribunals in the past, a reliable motivation to create a governance system based on individual accountabilities was never part of the political determinations expressed by the permanent members of the Security Council, including many States governed by different legal traditions, and which took political distance from the emerging regime of international criminal justice falling under the Rome Statute. It is clear that the system of accountability proposed by the emerging regime of the Rome Statute needs further political campaign and advocacy from global actors and civil society. Such regime represents the opportunity to centralize the role of the victims of serious international crimes challenging the mentality of impunity of crimes recognised under customary international law. Obviously, the global political engagement of States Parties and non-Parties, international and regional organizations and civil society are absolutely necessary. The risks of political *impasse*, however, currently persist if we look at the distant political position taken from the African Union against the Rome Statute regime.[19]

The promise made by the international community of '*never again'* in regard to genocide has not been fully maintained. In the early 1990s the UN and the US intervention in Somalia for example, was supposed to be driven by humanitarian concerns, but the subsequent humiliation and improper with-

18 See L. E. Fletcher, "From Indifference to Engagement: Bystanders and International Criminal Justice", 26 *Mich. J. Int'l L.* 1013 (2004), accessible at: http://scholarship.law.berkeley.edu/facpubs/598

19 T. Murithi, "The African Union and the International Criminal Court: An Embattled Relationship?", *Institute for Justice and Reconciliation* (IJR), 2013, accessible at: http://www.africaportal.org/dspace/articles/african-union-and-international-criminal-court-embattled-relationship K. Kindiki, "The Normative and Institutional Framework of the African Union Relating to the Protection of Human Rights and the Maintenance of International Peace and Security: A Critical Appraisal", 3 *Afr. Hum. Rts. L.J.* 97 (2003).

drawal of those forces in 1994 quickly undercut what international engagement there was for intervention on humanitarian grounds. The demands of international humanitarian interventions were enormous and the resources inadequate.[20] Today, from the lessons learned in the situations in Libya, Syria and in the Sudan many have troubles to believe that there is something we can do in the face of the collapse of nation-states and the devastating consequences on civilians. The international responses to the genocide in Rwanda and the Balkans, most notably in Srebrenica, were characterized by weak political engagements. When such interventions did occur, as in Kosovo for instance, the international legal basis for it was even unclear.[21] The selectivity of such situations has been based on political interests. The risk was that such selectivity would become the practice of international responses anywhere else. As extensively discussed in the previous chapters, the support to address gross human rights violations emerged with the reinvigoration of multilateralism following the end of the Cold War. When a State would fail in its primary responsibilities towards its citizens the international community would also be responsible to intervene in extreme conflict situations. Since 2005, the norm of 'the responsibility to protect' civilians presented operational shortcomings on the ground, including unclear strategies of mandates' configuration of the Security Council supporting complementary actors fostering peace, justice and security, such as the Court. The test of the 'responsibility to protect' civilians by the international community, intervening in violent conflicts in Africa and the Middle East, has been partially left in the hands of the volatile character of global politics. Such responsibility is not legally defined and in the stage of policy formulation and still requiring implementation and harmonization. Therefore, it is required to spend a couple of words *a)* on the formulation of governance frameworks dealing with humanitarian escalations; *b)* on the role of complementary global regimes and the responsibilities of the States in such formulations; and *c)* on the prerequisites of their harmonization to optimize the results at domestic, regional and international levels. The international politics of mass atrocities and the governance frameworks at their disposition require with any doubt systemic changes.

6.2.2 The formulation of governance frameworks

At present the formulation of governance frameworks dealing with law enforcement and civilian protection duties in situations of mass atrocities is an idea not yet realized. It is clear that the current impasse in regard to the enforcement of law is troubled by the politics of double standards of

20 See J. Mayall, *The New Interventionism: 1991-1994. The UN experience in Cambodia, former Yugoslavia and Somalia*, at 94, transferred to digital printing in 2001.

21 See D. H. Joyner, "The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm" *EJIL* (2002), Vol. 13 No. 3, at 597, accessible at: http://ejil.oxfordjournals.org/content/13/3/597.full.pdf

the Security Council and by the shortcomings of States and regional organizations to *fully cooperate* with the Court. Despite the fact that two arrest warrants are outstanding against the President of the Sudan, Omar-Al Bashir, and despite the Court's orders and widespread calls of the international community to respect its obligations of cooperation with the Court, the visit of Omar-Al Bashir to many African States had taken place anyway since the Court's judicial orders. Furthermore, the Sudan, as a member of the UN, did not comply with the UN Resolution 1593 (2005) to arrest the perpetrators of serious violations of international humanitarian law. Obviously, the fact that the highest authorities in the country are responsible of the crimes requires an optimized use of the international tools currently at disposition. Such good use depends on the drift in global politics and on the willingness to preserve internationally law and order. The legal dichotomy between pluralism and constitutionalism, and the global regimes and institutional frameworks deriving from them, have to rely on their complementary role for their effectiveness. There is no other way to improve their good governance. This requires further efforts in regard to law enforcement, civilian protection duties and capacity-building models to be applied in conflict and post-conflict situations. It needs to be noted that in the Sudan the Security Council did not take the previous law enforcement position as in the situation in Sierra Leone. In the Charles Taylor's case before the Special Court for Sierra Leone, the Security Council, acting under Chapter VII of the UN Charter, unanimously passed the Resolution 1638 (2005) which empowered the United Nations Mission in Liberia (UNMIL) to arrest, detain, and transfer Taylor to the UN court in Sierra Leone in the event that he appeared in Liberia or in another African country. In the case of the Sudan the international politics of mass atrocities manifested the risk to undermine the credibility of a fair, impartial and independent international judiciary.[22] The problem is that both support and cooperation were not provided on very sensitive issues falling under the Rome Statute regime and the critics proliferate. Such trend confirms the complications characterizing the legal and political debates in regard to the emerging regime of international criminal justice, including the political convergence required for its place in the arrays of peace and security.[23]

The policy formulations of humanitarian interventions deserve some observations. After the Cold War the challenges of human security in Africa pressured the leadership for a political agenda sustained by the international

22 See W. A. Schabas, "The International Criminal Court and the Security Council Referral of the Darfur Situation", D. R. Black, P. D. Williams (eds.), *The International Politics of Mass Atrocities*, 2010, at 149.

23 M. G. Ituma, "The Crossroads of Politics and Law: The Unfinished Debate between the United States and the International Criminal Court", in *Africa Peace and Conflict Journal*, 5:2 (2012), at 79–82, accessible at: http://www.apcj.upeace.org/issues/APCJ_Vol_5_2_Final_Web.pdf

actors involved in the continent. The domestic criminal regimes and the dictatorships would come across legal frameworks and renewed political approaches by African leaders themselves, western governments, international organizations and civil society. Sovereignty would finally be seen as a defined responsibility of domestic governance institutions of the nation-states towards their citizens. If it is true that the 'non-intervention' policy of African States applied in mass atrocities situations during the Cold War turned out to be only on paper on civilian protection duties and victim rights in the post-cold war phase, such policy still requires an appropriate implementation visible in the practice of civilian protection applied on the ground.[24] Moreover, after an extensive analysis of the serious shortcomings in the field operations in the last couple of decades, eminent observers demonstrated to policy-makers the necessity to review old models of conflict management performed by the UN involved in security matters and sustainable peace in African countries.[25] Finally, with the Rome Statute the majority of the African States committed themselves to put an end to the mentality of impunity of serious crimes perpetrated before, during, and after the explosion of armed conflicts. However, immediately after its establishment the Court's involvement in large scale humanitarian atrocities with investigation and prosecution in African countries, resumed in political pressure over its presence, its priorities, and the controversial relation between peace, justice and security.

Since the start of the first generation of referrals received from the States and the Security Council in the Sudan and Libya, the Court made immediately clear its prosecutorial strategy, based on judicial and not political decisions, its policy over admissibility, interest of justice and gravity, according to its treaty, the Rome Statute, which is complementary to the UN Charter.[26] The confirmation of its complementary role to the United Nations derived from the fact that the Court did not hesitate to take over the situation in Darfur referred by the Security Council under Chapter VII of the UN Charter, extending the Court's jurisdiction to a non-State party such as the Sudan.[27] But before assessing further the ways such complementary roles have been

24 On the failure of the responsibility to protect in Darfur, see N. Grono, "The International Community's Failure To Protect", 105 *African Affairs* 421, 2006, at 622.

25 See T. Piiparinen, *The Transformation of UN Conflict Management. Producing Images of Genocide from Rwanda to Darfur and Beyond,* (2010).

26 For an overview of the Policies and Strategies see the Policy Papers and Prosecutorial Strategy accessible on the web portal of the International Criminal Court (OTP): http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/

27 UN doc. S/RES/1593 (2005) Referring the Situation in Darfur, Sudan to the Prosecutor of the International Criminal Court, Adopted by Vote of 11 in Favour, To None Against, with 4 Abstentions (Algeria, Brazil, China, United States). See also UN doc. S/RES/1970 (2011) on Libya. This resolution represents the first time the Security Council has voted unanimously for an ICC referral.

applied in the practice, it is required to recall some background governance issues, including the methods evolving around the international responses in mass atrocity crimes. The joint task force on peace and security between the African Union and the United Nations for instance, requires further efforts facilitating cooperation on humanitarian concerns and human security on the ground, including the opportunity to enforce the arrest warrants of the Court while isolating the criminal perpetrators from the top diplomacy circles.[28] A joint task force is also required and recommended between the AU and possibly with the involvement of the Assembly of the States Parties of the ICC (ASP) interacting with the UN political institutions. Such joint task force should have a specific role in regard to the AU decision-making, possibly merging international crimes in the jurisdiction of an *African Court* complementing the work of the ICC. The idea is that the ICC would represent a model of international criminal justice to be followed by any court or tribunal at domestic, regional and international levels. Moreover, the establishment of the *African Court* by the AU should demonstrate its feasibility complementing the ICC, and this, of course, remains to be seen.[29]

6.2.3 The role of complementary global regimes

In theory the role of complementary global regimes is to consolidate effective protection mechanisms of individuals in situations of war (*protective* justice), including a reliable sequence between peace negotiations and the judicial proceedings, or else, individual criminal accountability (*retributive* justice), and through reparation to the victims (*restitutive* justice). It is too soon to conclude if the mechanisms currently applied fostering peace, justice and security are capable to challenge domestic jurisdictions dealing with

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28 The African Union (AU), United Nations (UN) Joint Task Force (JTF) on Peace and Security held its sixth consultative meeting at the AU Headquarters, in Addis Ababa, on the margins of the 20th Ordinary Session of the AU Assembly of Heads of State and Government on 26 January 2013, the AU-UN-JTF Joint Communiqué is accessible at: http://www.peaceau.org/uploads/au-un-6th-jtf-meeting-26-01-2013.pdf

29 See M. du Plessis, "Implications of the AU decision to give the *African Court* jurisdiction over international crimes", in *Institute for Security Studies,* Paper No. 235, June 2012. It needs to be noted that the Protocol on the Statute of the African Court of Justice and Human Rights had merged the African Court on Human and Peoples Rights and the Court of Justice of the African Union into a single Court, *The African Court*, see the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights 15 May 2012, accessible at: http://www.peaceau.org/uploads/excl-731-xxi-e.pdf
See C. Jalloh, *The African Union and Its Discontents with the International Criminal Court*, Jurist, Forum, August 6, 2010, accessible at: http://jurist.org/forum/2010/08/the-african-union-and-the-icc-growing discontent.php See also AU doc. Assembly/AU/Dec.296(XV), *Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/DEC.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court Doc. Assembly/AU/10(XV).* Adopted by the Fifteenth Ordinary Session of the Assembly of the Union on 27 July 2010 in Kampala, Uganda.

the devastating actions of criminal regimes on individuals and entire communities. Nevertheless, a defined common strategy and institutional architecture optimizing the end results of democratic transformation, national reconstruction and good governance at domestic levels is required. These mechanisms largely include: constitutional reforms, investigations and prosecutions, reparations, reconciliation and peace building measures, memorialization and truth commissions. The approach is intended to be case-by-case and oriented to each particular conflict scenario. As several observers point out, if the emerging regime of international criminal justice delivers results not simply in terms of effective prosecution of a few leaders who could easily be replaced, but instead, "by promoting peace in a region where little else has succeeded over the last decades, the African enthusiasm that led to the establishment of the world's first permanent international criminal tribunal will probably revive, returning even more strongly than before".[30] This is of course true, but then again, it is not only a common responsibility of complementary global regimes and their political institutions, but primarily a responsibility of the nation-states themselves, including regional organizations. After all, the African States expressed their strong political will to be part of the Rome Statute, and some of them voluntarily referred their inability to investigate and prosecute international humanitarian crimes to the Court. There are no doubts about the gaps characterizing the emerging international architecture fostering peace, justice and security. These gaps derive from the absence of a political *road map* and the determination of States to govern war and crime with multilateral and universal tools. The primary responsibility to adjust constitutional parameters in accordance with universal norms *erga omnes* lies in the hands of the States, while the role of complementary global regimes is to provide capacity-building in domestic jurisdictions. As stated by Delmas-Marty the emerging regime of international criminal justice and the rule of criminal law in general, "might found an ethic of globalization and show how to organize interactions at different levels to achieve pluralist stabilisation".[31] In order to achieve this important objective the political convergence of expectations at global level is absolutely required.

It needs to be noted that during the Review Conference of the Rome Statute in Kampala the limited presence of States Parties and observer delegations in the assessment panels for the implementation of the treaty, was remarkable. There is no doubt that such educational segment of the Review Conference requires further work of researchers and practitioners. However, the attention was not prioritized on the side of the main representatives of the States Parties to probe and question the positive and negative aspects in the

30 See W. A. Schabas, *supra.*

31 See M. Delmas-Marty, 'Le droit pénal comme étique de la mondialisation', *Revue de science criminelle* 1, 2004. See also M. Delmas-Marty, *Ordering Pluralism. A Conceptual Framework for Understanding the Transnational Legal World,* 2009, at 109.

implementation of the Rome Statute. Accurate recommendations about the reform of the working relationship between the Security Council and the Court will need to be further addressed by relevant findings of academia and civil society organizations. The Review Conference only initiated the discussions between governmental delegations on implementation and harmonization. Hopefully, this debate will continue soon on several crucial issues such as complementing the role of peace and justice and the reform of the working methods between the Security Council and the Court. The political dialogue on these matters, between the decision-making of States either parties to the Rome Statute or only members of the UN, is fundamental. Such dialogue requires to be shaped at multilateral level neutralizing the unilateral interests of some powerful observers trying to shape the Court at their own benefit. In my view such trend needs to be completely neutralized opting for democratic reforms at national, regional and international levels in regard to the intervention in mass atrocities, individual criminal accountability of such serious crimes and the formulation of humanitarian escalations. The problem is the slow motion in realizing such reforms in the short term, while the political determinations and the actions taken in the middle and long terms have to be more concrete. Many issues have to find consensus in the UN General Assembly and in the Assembly of States Parties to the Rome Statute, however, it remains to be seen the outcome of it. Considering the challenges in the international politics of mass atrocities and the emerging architecture dealing with it, both of them deserve further discussion. These challenges represent the key issues in order to optimize the results of complementary global regimes and their interactions in conflict and post-conflict societies. Organizational improvements for a better interaction between the UN system and the Rome Statute institutions would bring more results of early warning and deterrence, while intervening for stability, reconstruction and good governance. The implementation of an interaction strategy in respect of the separation of powers would benefit the fight against the culture of impunity establishing the rule of law, while renewing the trust of citizens in governance institutions and public service. In any case, implementation and harmonization are both required and the next paragraph elucidates some of the reasons.

6.2.4 The prerequisites of implementation and harmonization

In order to maximize the results on the ground, compulsory cooperation is absolutely required between relevant stakeholders. This is clear in the situations in the Sudan and with the first referral to the Court from the Security Council in regard to Darfur. Such cooperation should be based on the principle of universality. The UN members should have mandatory obligations in case of Court's referrals especially after the refusal of the Sudan to cooperate. Besides, their cooperation should undermine the fragmentation and decentralization of international law and its institutions, and prepare the grounds for a global structure of governance. The new system falling under

the Rome Statute should be integrated with the old system of the United Nations in respect of its judicial independence. If we consider the gaps of support in the referral activity coming from the Security Council and also in the situations where the Court and the Security Council are both involved, such an integrated model of governance is not yet realized. It is clear that the relationship agreement between the United Nations and the Court, the Rome Statute provisions and other agreements and arrangements are not sufficient for the governance of war and crime in authoritarian regimes. An appropriate implementation is required in the immediate, middle and long terms to enhance the relationship and partnership between complementary global regimes maximizing the results in the field operations. The last resort option to fight against the impunity of serious crimes cannot be left disconnected by parallel working relationships and distant political engagements of civilian protection mechanisms at international, regional and domestic levels. Besides, the States and regional organizations should address political issues about peace and justice exclusively to the ASP, leaving the judicial proceedings entirely to the Court in accordance with the provisions of the Rome Statute and the principle of complementarity.

The priority is to solve the complexity of an *impasse* undermining the evolution to centralize individual rights in times of war, including the credibility of emerging regimes preserving universal purposes towards multilateral solutions. Until such issues are not resolved by the political organs enforcing complementary global regimes, it will be unrealistic, speculative and partial to refer to a global architecture fostering peace, justice and security. Another aspect of the international responses to the humanitarian escalations of *last resort* between political and judicial institutions is that they would not offer any preventive action of mass atrocities and this on the top of law enforcement and civilian protection gaps. The risk is that neither the cause nor the effect of war and crime in conflict and post-conflict situations would receive a reliable architecture to be dealt with. In order to give orientation with specific guidelines to regional and bilateral solutions the multilateral approaches in humanitarian escalations deserve further attention. Such escalations are characterized by the violence and severe violations of human rights and international humanitarian law and destabilize international peace and security. The next section looks at the global, regional and bilateral actors involved in mass atrocities in Africa and in the Sudan, including the impact of their policy formulations in regard to humanitarian interventions and civilian protection duties in the Sudan. Particularly, it underscores the discrepancies between the findings of international commission of inquiries, the failure of law enforcement and civilian protection duties, including the accountability mechanisms against the criminal leadership in the Sudan, which regrettably is still in power.

6.3 The International, Regional and Bilateral Actors in the Sudan

Section Outline

This section explores the role of the relevant actors involved in the Sudan. It points out the unresolved issue of the working methods between peace negotiations, peace enforcement and the accountability system of mass atrocities committed in the Sudan, despite the notorious status of the criminal regime in the country. The problems incurred in monitoring the elections in South Sudan and the clashes in Abyei prior the referendum, did not neutralize the controversial governance in the mediation efforts falling under the Comprehensive Peace Agreement between the UN and the Sudanese government. This represented a sensitive issue on top of the serious divergences between the configuration of the UN mandate and the credibility of the judicial decisions released by the Court, including the current political unrest and the violence spreading in South Sudan. South Sudan is a young and independent State which has to hold accountable the perpetrators of serious crimes committed against civilians. In regard to the working methods between peace and justice, the reports of the UN activities in the North Sudanese region confirm that UNMIS provided transportation to the Court's accused Ahmed Haroun who has been considered by the UN the 'key player' to provide good offices for the Comprehensive Peace Agreement.[32] Wasn't the accused supposed to be brought to justice instead?[33] When questioned about this controversial issue, for the UN, the "*Governor* Haroun was critical in its role to bring the Misseriya leaders in southern Kordofan to a peace meeting in Abyei to stop further clashes and killings. In accordance with the UNMIS mandate the UN will continue to provide the necessary support to those key players in their pursuits to find a peaceful solution".[34] This matter deserves a couple of words. First of all, the UN position here creates confusion as the legalistic approach in accordance with Article 16 of the Rome Statute about the *deferral* of investigation and prosecution is only applicable with a resolution adopted by the Security Council under Chapter VII of the UN Charter and prior investigations and prosecutions would be performed by the judicial institution.[35] Such provision is not applicable in

32 See M. R. Lee, 'UN in Sudan Didn't Ask Security Council As Flew War Criminal Haroun to Abyei', *Inner City Press*, 12 January 2011, accessible at: http://www.innercitypress.com/un2harun011211.html

33 See ICC-02/05-01/07 Pre-Trial Chamber I, Warrant of Arrest of Ahmad Harun, accessible at:: http://www.icc-cpi.int/iccdocs/doc/doc279813.PDF

34 See Questions and Answer during the UN Secretary-General Spokesperson's Daily Briefing, 12 January 2011, accessible at: http://www.un.org/News/briefings/docs/2011/db110112.doc.htm

35 Article 16 of the Rome Statute about the deferral of investigation or prosecution reads: No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

case of warlords expected to be brought to justice and without a lawful resolution of the Security Council. The following questions arise: are the Chapter VI of the UN Charter and the *soft* measures of mediation in peace processes applicable in such case? Obviously, human rights groups are critical about such controversial approach taken in the peace process. It compromises the possible accomplishments of justice. They argue that such an approach would only neutralize the truth established by the Court's judicial deliberations and they are absolutely right.[36]

The question is whether the global tools fostering peace and justice will actually work together to undermine the devastating consequences of international threats and crimes, including the credibility of their governance. The configuration of political mandates should take in consideration judicial decisions and support them. This is the only way the complementary character of international regimes could work. The option of law enforcement for the commission of mass atrocity crimes after the judicial outcomes of the Court is not settled by a reliable model of legal and political engagements. On the one hand, the law enforcement that should characterize the compliance and accountability of universal laws does not follow the *last resort* option of justice pointing out the most responsible perpetrators of serious crimes. On the other hand, when executive and judicial authorities intervene in *intra*-state conflicts the civilian protection duties are characterized by multidimensional operations on the ground not coordinated between each other. The problem of coordination would also aggravate the lack of preparedness, early warnings and preventive measures of mass atrocities on the ground. In any case, the inconsistency dealing with warlords and criminals in peace processes and further negotiations with them needs to be absolutely resolved. An efficient exchange of information and intelligence between peace and justice mandates is absolutely required. Before approaching the dynamics that characterized the conflict management in the Sudan, it is necessary to spend a couple of words about the political support required in mass atrocities, considering the failure of the promise of *never again* in regard to the genocide in Darfur and the international, regional and bilateral actors involved in the Sudan. The attention goes to the interventions under the flag of humanitarianism in Africa and the political support required in mass atrocities. The next paragraphs examine how global solidarity worked in

36 Ahmad Muhammad Harun is allegedly criminally responsible for 42 counts on the basis of his individual criminal responsibility under articles 25(3)(b) and 25(3)(d) of the Rome Statute, including: Twenty counts of crimes against humanity: murder (article7(1)(a)); persecution (article 7(1)(h)); forcible transfer of population(article 7(1)(d)); rape (article 7(1)(g)); inhumane acts (article 7(1)(k)); imprisonment or severe deprivation of liberty (article 7(1)(e)); and torture (article 7(1)(f)); and Twenty-two counts of war crimes: murder (article 8(2)(c)(i)); attacks against the civilian population (article 8(2)(e)(i)); destruction of property (article 8(2)(e)(xii)); rape (article 8(2)(e)(vi)); pillaging (article 8(2)(e)(v)); and outrage upon personal dignity (article 8(2)(c)(ii)).

Darfur, considering the inconsistencies of legal and political engangements in mass atrocities.

6.3.1 The Failure of the Promise of 'Never Again' in Darfur

With regard to the situation in Darfur although there was a consensus that ethnic groups had been targeted and that crimes against humanity had therefore occurred, there have been discussions about whether genocide took really place. In May 2006, the International Commission of Inquiry on Darfur organized by the United Nations (UNCOI) "concluded that the government of Sudan has *not* pursued a policy of genocide".[37] According to its conclusions "international offences such as the crimes against humanity and war crimes that have been committed in Darfur may be more serious and heinous than genocide".[38] Scholars and practitioners have questioned the methodology of the commission neglecting the genocide in Darfur. The report of the UN Commission of Inquiry on Darfur concluded before the referral to the ICC that there was "insufficient evidence of *genocidal* intent". The serious critics referred to the reasoning of the commissioners and the failure to conduct forensic investigations at all sites of reported mass ethnic murders. In addition, "the UNCOI badly confused the issues of motive and intent, deployed evidence in a conspicuously contradictory fashion, and misrepresented the consequences of *genocidal* violence and displacement of civilians in Darfur".[39]

The US government, non-governmental organizations (NGOs) and individual world leaders have chosen to use the word 'genocide' for what was taking place in Darfur and according to the definition of genocide. The international legal definition of the crime of genocide is found in Articles II and III of the 1948 Convention on the Prevention and Punishment of Genocide.

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37 The International Commission of Inquiry on Darfur was established pursuant to United Nations Security Council resolution 1564 (2004), adopted on 18 September 2004. The resolution, passed under Chapter VII of the United Nations Charter, requested the Secretary-General rapidly to set up the Commission. In October 2004 the Secretary-General appointed a five member body (Mr. Antonio Cassese, from Italy; Mr. Mohammed Fayek, from Egypt; Ms Hina Jilani, from Pakistan; Mr. Dumisa Ntsebeza, from South Africa, and Ms Theresa Striggner-Scott, from Ghana), and designated Mr. Cassese as its Chairman. The Secretary-General decided that the Commission's staff should be provided by the Office of the High Commissioner for Human Rights. Ms Mona Rishmawi was appointed Executive Director of the Commission and head of its staff. The Commission assembled in Geneva and began its work on 25 October 2004. The Secretary-General requested the Commission to report to him within three months, i.e. by 25 January 2005.

38 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, United Nations International Commission of Inquiry on Darfur, 18 September 2004, accessible at: http://www.un.org/News/dh/sudan/com_inq_darfur.pdf

39 For a critical overview see E. Reeves, *Report of the International Commission of Inquiry on Darfur: A critical analysis (Part I an II),* 2006, accessible at: www.sudanreeves.org

Article II describes two elements of the crime of genocide: 1) the mental element, meaning the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such", and 2) the physical element which includes five acts described in sections *a, b, c, d* and *e*. A crime must include both elements to be called "genocide". Article III described five punishable forms of the crime of genocide: genocide, conspiracy, incitement, attempt and complicity.[40] In any case, despite the critics to the UNCOI, the right channels to investigate and prosecute such crimes, working on the findings to establish genocide among other crimes, which it did, was the International Criminal Court.[41] The independent judicial outcomes performed by the Court, however, extensively delayed. Following the referral from the UN Security Council in 2005, the Prosecutor received the information previously archived by the UN International Commission of Inquiry on Darfur (UNCOI). In addition, the Office of the Prosecutor requested information from a variety of sources, leading to the collection of thousands of documents. The Office also interviewed over 50 independent experts. After extensive preliminary analysis the Prosecutor concluded that the statutory requirements for initiating an investigation were satisfied. In 2010 the Appeals Chamber rendered its judgment on the Prosecutor's appeal, reversing, by unanimous decision, Pre-Trial Chamber I's decision of 4 March, 2009, to the extent that Pre-Trial Chamber I decided not to issue a warrant of arrest in respect to the charge of genocide. The Appeals Chamber directed the Pre-Trial Chamber to decide whether or not the arrest warrant should be extended to cover the charge of genocide.

The arrest warrant of Al Bashir lists seven counts on the basis of his individual criminal responsibility under Article 25(3)(a) of the Rome Statute as an indirect (co)perpetrator including: five counts of crimes against humanity: murder, Article 7(1)(a); extermination, Article 7(1)(b); forcible transfer, Article 7(1)(d); torture, Article 7(1)(f); and rape, Article 7(1)(g); two counts of war crimes: intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities, Article 8(2)(e)(i); and pillaging, Article 8(2)(e)(v). Three counts of genocide: genocide by killing (article 6-a), genocide by causing serious bodily or mental harm (article 6-b) and genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction (article 6-c). There are four cases of the Court in Darfur. The judges have issued arrest warrants *a)* against Ahmad Harun and Ali Kushayb, for crimes against humanity and war crimes; *b)* against Omar Al-Bashir for genocide,

40 See W. A. Schabas, "Convention for the Prevention and Punishment of the Crime of Genocide", 2008, *United Nations Audiovisual Library of International Law*, the electronic version is accessible at: http://untreaty.un.org/cod/avl/ha/cppcg/cppcg.html

41 The UNCOI recommended the Security Council to refer the crimes to the ICC in application of Chapter VII of the UN Charter to re-establish peace. See P. Alston, 'The Darfur Commission as a Model for Future Responses to Crisis Situations', Vol. 3 *Journal of International Criminal Justice*, Issue 3 July 2005, at 539.

crimes against humanity and war crimes; and *c)* summonses to appear for rebel leaders Abdallah Banda, Saleh Jerbo and Abu Garda for war crimes. On the 2nd of December 2011, the Prosecutor requested the Pre-Trial Chamber I to issue an arrest warrant against the current Sudanese Defense Minister Abdelrahim Mohamed Hussein for crimes against humanity and war crimes committed in Darfur from August 2003 to March 2004.[42]

6.3.2 What kind of law enforcement strategy?

The critics about the Court's investigation and prosecution in the Darfur case did not take long. As far as the critics are constructive they deserve to be mentioned and digested. In fact, eminent scholars and practitioners argued that "if the Court's investigations were serious about prosecuting Al Bashir, the office of the Prosecutor should have issued a sealed request and asked the judges to issue a sealed arrest warrant to be made public only once Al Bashir traveled abroad, instead of publicly requesting the warrant, allowing him to avoid his arrest simply by remaining in the Sudan, or allowing him to prepare his political campaign with African States Parties to the Rome Statute against the Court" and based on the assumptions of new colonialism in the continent.[43] Furthermore, for some observers, the indictment only to Sudan's president excluding the other members of the political and military leadership that together with him planned, ordered, and organized the massive crimes in Darfur, was considered partial and still controversial for several reasons. In any case any mistake in such prosecutorial strategy "may harden the Sudanese government's position, endanger the survival of the peacekeeping forces in Darfur, and even induce Al Bashir to take revenge by stopping or making even more difficult the flow of international humanitarian assistance for the two million displaced persons in Darfur".[44] On the top of that, as further emphasized by Cassese, such prosecutorial strategies "might further alienate the Great Powers (China, Russia, and the United States) and the African Union which are hostile to the ICC".[45]

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42 See ICC-02/05-01/09, Case *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* accessible at: http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/ See ICC-OTP-20111202-PR750, *ICC Prosecutor Presents New Case in Darfur,* accessible at: http://www.icc-cpi.int/NR/exeres/D6519D05-76EC-4EFC-AE37-E02FBD346D7A.htm

43 See A. Cassese, *Flawed International Justice for Sudan*, 2008, accessible at: www.project-syndicate.org See also A. Abdelrahman, "Bashir's Last Part of Genocide Plan", *Sudan Tribune,* August 8, 2010, accessible at: http://www.sudantribune.com/spip.php?article35892 See also K. H. Mohmmad, "Sudan, Chad Offered the ICC as a Precious Advance of Goodwill Between Them", *Sudan Vision*, August 8, 2010, accessible at: http://www.sudanvisiondaily.com

44 See A. Cassese, *supra*.

45 See A. Cassese, *supra*.

The compulsive behavior by the alleged criminal perpetrators after the Court's indictments became soon evident. The President of Sudan Al Bashir warned again aid agencies in South Darfur that the camps were under the full authority of his government and that any of the parties involved on the ground, whether from UNAMID, the AU or NGOs, would be expelled if they disrespected the government authority. The Sudanese government announced the expulsions of the humanitarian agencies shortly after the Court issued an arrest warrant for President Al Bashir for war crimes and crimes against humanity, and only later genocide in Darfur. Civil society organizations called on the government to reinstate immediately the license to operate and to facilitate all humanitarian agencies providing assistance in the Sudan but without success.[46] Such scenario took shape under the eyes of the US and other superpowers of the Security Council, which were not engaged to take any action fulfilling the hope of police and law enforcement after the arrest warrants issued by the international judicial authority.[47] This, of course, confirmed that the emerging regime of international criminal justice falling under the Rome Statute would function without any police enforcement.

6.3.3 The international, regional and bilateral actors

The practice examined in the Sudan demonstrates that the maintenance and restoration of peace, justice and security come along closer in the policy debates by means of controversial issues.[48] At multilateral level, international organizations both make international law and are governed by it, but a consistent legal framework of interactions between complementary governance institutions is scarce.[49] At bilateral level, the policy of governments on retributions and sanctions has been extremely important in regard to genocide and mass atrocities committed in the Sudan. Most notably in passing the Darfur Peace and Accountability Act of 2006, the US government codified specific economic and legal sanctions on the Sudanese government as a result of its findings of genocide.[50] The sanctions continue to underscore the US efforts to end the suffering of the millions of Sudanese affected by the crisis in Darfur. The US also organized a multinational team of inves-

46 See Human Rights Watch, *Sudan: Expelling Aid Agencies Harms Victims,* March 5, 2009, accessible at: http://www.hrw.org/node/81326

47 See XI Report of the Prosecutor of the International Criminal Court to the Security Council Pursuant to UNSC 1593 (2005), 17 June 2010, accessible at: http://www.icc-cpi.int/NR/rdonlyres/A250ECCD-D9E5-433B-90BB-76C068ED58A3/282160/11thUNSCReportENG1.pdf

48 See the reference of the debate over the 'Rule of Law and the International Criminal Court' in the statements released by Member States of the Security Council (29 June 2010). UN doc. S/PRST/2010/11.

49 For an extensive overview of international organizations see M. P. Scharf, *The Law of International Organizations*, 2007, accessible at: http://www.cap-press.com/pdf/1608.pdf

50 For an overview of the sanctions see 'The United States-Sudan Relations', *Embassy of the US Karthoum-Sudan*, accessible at: http://sudan.usembassy.gov/ussudan_relations.html

tigators, the so called 'Darfur Atrocities Documentation Team' (ADT). The task received by this team of experts was to collect data from the refugees in Chad coming from the Darfur region of Sudan in order to enable the US to determine whether the mass violence being directed against African tribes (Fur, Massaleit, and Zaghawa) constituted undeniably genocide.[51]

Moreover, looking back also at the policy formulation of some other relevant States and international actors a Commission for Africa also known as the 'Blair Commission for Africa' was established by the UK government to examine and provide impetus for stability and development in Africa. The Commission's report acknowledged that "much more must be done to prevent conflict in Africa if development in the continent is to be provided and accelerate". The report called for practical means to implement 'agreed criteria for humanitarian intervention and the use of force drawing on the principles of the 'responsibility to protect' human life which some years later was simply discharged to the African Union (AU) in the Sudan.[52] The same policy trend of the US, the UK and France and further political distance taken by Russia and China characterized, of course, the actions taken by the Security Council in the Sudan and the reduction of level of diplomatic representations advocating for a unified action. The Security Council Committee established pursuant to Resolution 1591 (2005) was established to oversee the relevant sanctions measures and to undertake the tasks set out by the Security Council in sub-paragraph 3 (a) of the same resolution. The Security Council first imposed an arms embargo on all non-governmental entities and individuals, including the *Janjaweed*, operating the States of North Darfur, South Darfur, and West Darfur with the adoption of Resolution 1556 (2004). The regime of sanctions was modified and strengthened with the Resolution 1591 (2005), which expanded the scope of the arms embargo and imposed additional measures including a travel ban and freeze of assets of individuals designated by the Committee.[53]

51 For an overview of the ADT project see S. Totten, E. Markusen, *Genocide in Darfur: Investigating the Atrocities in the Sudan*, 2006.

52 The Commission for Africa, *Our Common Interest: Report of the Commission for Africa*, 2006 accessible at: http://allafrica.com/sustainable/resources/view/00010595.pdf

53 The Security Council Committee established pursuant to resolution 1591 (2005) concerning the Sudan which sanctions measures currently in effect are summarized in the table accessible at: http://www.un.org/sc/committees/1591/ For an overview of the peacekeeping deployments in Darfur see UN doc. S/RES/1672 (2006); UN doc. S/RES/1706 (2006).

Since 2006 the reports of the Court addressed to both the UN General Assembly and Security Council contained detailed information on the criminal findings in Darfur.[54] Furthermore, the lack of cooperation by Khartoum and by the international community was constantly emphasized by the Court's officials when addressing the UN political institutions. The EU, NATO, and the US as important key international players also remained silent after such reports on specific criminal findings. As indicated by Grono of the International Crisis Group "the EU approach has been largely to stand behind the African Union (AU). The EU has made it clear that it considers the AU as the lead international player in Darfur and that the EU's role is primarily to support "an African solution to an African problem" by partly funding the AU mission in the Sudan. Shortly after such political engagement coming from the EU, its support consistently decreased as the EU also pressured for a UN transfer to the AU mission. With regard to the NATO, it was initially a strategic competitor of the EU in Darfur. However, NATO has only been providing expertise and logistics without putting troops on the ground in any significant numbers. Between 2005 and 2007 NATO helped the AU expanding its peacekeeping mission in Darfur by providing airlift for the transport of additional peacekeepers into the region and by training AU personnel. The support provided by NATO however, did not imply the provision of military troops but only logistics. The NATO support ended when AMIS was transferred to the United Nations/African Union Mission in Darfur (UNAMID). One year later NATO has expressed its readiness to consider any requests for support to the new UN-AU hybrid peacekeeping force, made up of peacekeepers and civilian police officers, but without showing a consistent engagement on the ground.[55] We all know how different the approach of such global actors was in the situation in Libya considering the military operations deployed against the regime.[56]

In regard to the situation in Darfur it needs to be noted that the US abstained and did not use its veto power in the Security Council on the referral to the Court. For some observers this could be seen as a new direction of the US policy regarding the emerging regime of international criminal justice established by the Rome Statute and its previous distant political

54 See *XI Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSC 1593 (2005)* accessible at: http://www.icc-cpi.int/NR/rdonlyres/A250ECCD-D9E5-433B-90BB-76C068ED58A3/282160/11thUNSCReportENG1.pdf
For the chronology of the *Court Reports and Statements* see the electronic version of the documents accessible at: http://www.icc-cpi.int/Menus/ICC/Reports+on+activities/Court+Reports+and+Statements/

55 See Press Release, *NATO Supporting AU's Mission*, 1 February 2008, accessible at: http://www.nato.int/cps/en/natolive/news_8306.htm?selectedLocale=en

56 See UN doc. S/RES/1973 (2011).

position.[57] Despite different policy interpretations a concrete engagement by the Obama administration is still to be politically and legally verified. An important aspect from the analysis of its policy is that the US was not prepared to commit its troops on the ground in the Sudan but only pressuring for an African solution through the African Union (AU). China is the largest importer of oil from the Sudan and was ready to block any deployment of troops in Darfur. In general terms, China and Russia are quite distant from the UN engagement in civil wars for humanitarian reasons. Both governments may well fear possible international judicial interventions on their own territories deriving from serious human rights breaches. Besides, in 2008 the UN Security Council statement calling for the Sudanese government to comply with the Court by handing over two men suspected of war crimes in Darfur, has been scrapped due to the opposition from China and Russia.[58] The Arab League, and most of its member States, was opposed to a Western-led intervention in Africa, and strongly protective of one military intervention of its own. The last and most important actor remains the African Union (AU) which in a way undermined the outcomes of the emerging regime of international criminal justice neglecting a permanent institutional liaison with the Court on African grounds.[59]

The AU was operating in Darfur with the consent of the government of Sudan and was reluctant to push too hard. The AU feared of being further marginalized by the Sudanese authorities in its economic relations. The AU had also been desperately trying to prove that it could resolve one of Africa's most destructive conflicts even when all the evidence demonstrated that it

57 In November 2009, the US participated as an observer to the eighth session of the Assembly of States Parties (ASP) in The Hague with a delegation comprised by State and Defense Department officials and headed by the Ambassador at large for War Crimes, Steven Rapp. One year later the US has been an observer at the Review Conference of the Rome Statute in Kampala. According to the statement of Harold Hongju Koh, Legal Advisor of the US Department of State "the outcome in Kampala demonstrates again principled engagement that can protect and advance our interests, it can help the States Parties to find better solutions, and make for a better Court, better protection of our interests, and a better relationship going forward between the US and the ICC". For a policy overview of the US 'engagement strategy' with the Court see the speeches of Harold Hongju Koh Legal Advisor U.S. Department of State and Stephen J. Rapp Ambassador-at-Large for War Crimes Issues, "US Engagement With The International Criminal Court and The Outcome Of The Recently Concluded Review Conference", June 15 2010, accessible at: http://www.state.gov/s/wci/us_releases/remarks/143178.htm

58 UN doc. S/PV.5905 (2008), the electronic version of the document is accessible at: http://daccess-dds-ny.un.org/doc/UNDOC/PRO/N08/367/43/PDF/N0836743.pdf?OpenElement See K. Glassborow, 'China, Russa quash ICC efforts to press Sudan over Darfur crimes', *Sudan Tribune,* 12 January 2008, accessible at: http://www.sudantribune.com/spip.php?article25544

59 See T. Murithi, "The African Union and the International Criminal Court: An Embattled Relationship?" Institute for Justice and Reconciliation (IJR) *Policy Brief,* Number 8, March 2013, accessible at: http://www.ijr.org.za/publications/pdfs/IJR%20Policy%20Brief%20No%208%20Tim%20Miruthi.pdf

could not do it". These motivations, as further emphasized by Grono, confirm that "the international community shies away from effective intervention" in Darfur. Instead, the international community should have focused its efforts to solve at least the priority of humanitarian aid "thereby addressing the effects but not the causes of mass atrocities in Darfur".[60] From the documents of recorded interviews performed by International Crisis Group is remarkable to emphasize what a senior UN official noted about the UN humanitarian intervention under the flag of the responsibility to protect: "we are only keeping people alive with our humanitarian assistance until they are massacred".[61] This was indeed the reality for the refugees in Darfur. The obvious conclusion is that despite the humanitarian interventions in mass atrocities by international, regional and bilateral actors an architecture dealing with the causes of war and crime is still under construction.

6.3.4 Conclusions

The governance institutions of complementary character should initiate effective strategies of interactions particularly around country-specific situations where the States are not fulfilling their treaty obligations on cooperation, as in the case of the Sudan. The accountability of criminal perpetrators should be the priority in peace processes. After all, an effective architecture fostering peace, justice and security requires to keep alive the political dialogue between regional and international realities, while marginalizing criminal domestic regimes. The international community did not respond properly to early warnings of threats and crimes in Darfur. In such situations the establishment of mechanisms of early warnings should have been the priority. There are no doubts that these are required steps in the configuration of the mandates of the Security Council. As pointed out in the next section the hybrid solutions of peace enforcement and the *last resort* options of justice in Darfur did not work. The struggle is to find mechanisms to prevent war and crime and maximize the results on the ground. This struggle however, still focuses on the effect more than having a real impact on the causes of such conflicts. Besides, the democratization process between political, executive and judicial global mandates are still waiting to be digested. The AU reaction is a clear reflection of such divergence. The lead international actors and the leadership at regional level addressed serious issues. Darfur has been a test case for the AU and for the international community as a whole, and their shortcomings have being cruelly exposed. The situation in Darfur represented the failure to speak and act with one voice and one arm on peace, justice and security.

60 See N. Grono, "Briefing Darfur: The International Community Failure To Protect", 105/421 *African Affairs*, 2006, at 628.

61 See N. Grono, *supra*.

The lesson learned is that the international norm or the 'right' to intervene under the flag of the responsibility to protect civilians should be explicitly based on law enforcement and civilian protection duties under the paradigm of international criminal justice and accountability. In less than a decade the responsibility to protect civilians in situations of war and crime became the centrepiece of the efforts to reform the UN. Since 2005 the doctrine of the responsibility to protect was embraced by the key quarters of the international community, notably the UN Secretariat, the EU and the AU. It culminated with the endorsement of the UN General Assembly at the World Summit stating that: "each individual State has the responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement through appropriate and necessary means. The international community through the United Nations has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity". This is now widely accepted as providing the criteria for international responses to armed conflict and large scale atrocities.[62] It remains to be seen which are the main requirements applied in the mandate configurations on the ground and the support provided to international criminal justice in the context of the responsibility to protect civilians. The current struggle is to find possible ways civilian protection duties would be implemented and harmonized through the configuration of complementary mandates on the ground enabling peace and justice to complement with each other.

The fight against the impunity of serious crimes is undermined not only by political standpoints but also by legal issues such as the implications of the AU decision to give the *African Court* jurisdiction of international crimes. We have seen how the *ratio* of Article 16 of the Rome Statute results to be problematic on peace and justice priorities causing the political *impasse* in the AU. Article 16 demonstrates the gaps in the governance of peace and justice. The Court does not obtain any cooperation but only a deep-rooted political deadlock coming from the African States as parties to the treaty. The Assembly of the States Parties to the Rome Statute has an important role in such context. Such sensitive issues deserve a strong involvement by the political body and not by the judicial organ of the Rome Statute, such as the Court. In order to solve urgent issues in the quest for peace, justice and security in Africa, the UN and the Rome Statute regimes need the implementation of agreements and arrangements between peace enforcement and *retributive* justice, including civilian protection measures, and thus, implementing measures of *protective* and *restitutive* justice in a comprehensive manner. The preventive diplomacy and the competence of complementary governance

62 UN doc. A/RES/60/1, 24 October 2005, articles 138 and 139, accessible at: http://unpan1.un.org/intradoc/groups/public/documents/un/unpan021752.pdf

institutions of early warnings is an important requirement. In order to offer a comprehensive overview of the unresolved issues, the next section debates both the conflict management and the civilian protection duties in the Sudan claimed by civil society organizations. It further underscores the need of a political *road map* defining the complementary character of global regimes fostering peace, justice and security with an integrated model of governance. The international community should either prevent or respond immediately to the commission of mass atrocity crimes. The good timing of humanitarian interventions would safe many more human lives. In other words, locating possibilities to transform bureaucratic constraints is the direct responsibility of international governance institutions of complementary character.[63]

6.4 The Management of the intra-State Conflict in the Sudan

Section Outline

The intent of this section is to offer some comprehensive views of the conflict management in the Sudan using the UN political mediation, peace agreements, negotiations and peace operations. It debates about the configurations of both peacekeeping operations and civilian protection duties of the United Nations and the African Union (AU). Despite the *last resort* involvement of the Court in the severe violations committed against civilians in Darfur and referred from the Security Council, the situation did not reach any stage of peace building and sustainable solutions for civilians. As anticipated in the previous section, with the UNAMID mandate deployed on the ground there should have been a clear duty of peacekeeping troops to enforce the Court's arrest warrants irrespective of the consent of the Sudanese government. This was absolutely not the case. On top of that, with the Resolution 1996 (2011), the Security Council determined that the situation in South Sudan also constitutes a threat to international peace and security in the region.[64] The Security Council established the mission in South Sudan (UNMISS) to consolidate peace and security.[65] Unfortunately, the management of the conflict did not provide sustainable solutions for peace and civilian protection in North and South Sudan. There is currently further escalation of violence against civilians. This section emphasizes the evolution of the UN peacekeeping mandate and the UN-AU hybrid solutions which

63 See T. Piiparinen, "Bureaucratic Mechanisms", *The Transformation of UN Conflict Management*, 2010, at 118. See also H. Wiseman, "The UN and International Peacekeeping: A Comparative Analysis", in UNITAR (eds.), *The UN and the Maintenance of International Peace and Security*, 1987 at 263.

64 UN doc. S/RES/1996 (2011).

65 On 9 July 2011 South Sudan became the newest country in the world. The birth of the Republic of South Sudan is the culmination of a six-year peace process. The mandate of UNMIS ended following the completion of the interim period set up by the Government of Sudan and SPLM during the signing of the Comprehensive Peace Agreement (CPA) in 2005.

did not undermine the urgent and undoubtedly legitimate concerns of civil society organizations about civilians. This section provides some guidelines for the relevant actors involved in multiple situations to reach sustainable peace. The arrays of peace and security should hold accountable the most responsible of the crimes. The emerging regime of international criminal justice as an important tool to protect civilians in situations of war and crime should have received support with every means after the referral of jurisdiction in the situation in Darfur. Regrettably, this was not the case.

6.4.1 The background of the UN-AU conflict management

As previously anticipated, the conflict management and the peace enforcement by the UN have been fragmented in the Sudan prior the *last resort* option to refer to justice in Darfur. This is only one aspect characterizing the international humanitarian intervention performed on the ground. Immediately after the failure of the peace negotiations with the Sudanese authorities, the configuration of the UN mandate on the ground was characterized by the political intent to handover the violence in Darfur to the African Union. A brief background of the conflicts in the Sudan is necessary in order to have an understanding of the African Union mission (AMIS), including *a)* the evident intolerance of the Sudanese government allowing the initial deployment of the AU mission in Darfur, *b)* the shortcomings of the UN-AU hybrid mission (UNAMID), and later the unacceptable government's closure of corridors for humanitarian assistance and *c)* its continuous attacks on peacekeepers.[66]

The political background in the country demonstrates that for decades, from 1983 to 2005 and since its independence, the government of the Sudan, the Sudan People's Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), as the main rebel movements in the South of Sudan, fought in a civil war over resources, power, religion, including self-determination.[67] The country has been divided along the lines of Arab-Muslims in the North, and Africans in the South. Even though the North has enjoyed relative economic, social and political development, the South of the country has been constantly marginalized. Southern rebellion began in the 50s. Before the independence in 1956, the conflict erupted as a result of fears that independence would not only result in northern domination but could also mark the return to the Arab enslavement of the Africans in the south.[68]

66 See J. Flint, A. de Waal, *Darfur: A short history of a long war,* (2005). See also, A. de Waal, ed., *War in Darfur and the Search for Peace* (2007).

67 For more on the history of the conflict in Darfur, see A. de Waal, 'Who are the Darfurians? Arab and African Identities, Violence and External Engagement', *African Affairs*, 104/415, 2005, at 181.

68 See F. Deng, 'Sudan at the Crossroads', MIT Centre for International Studies, *Audit of the Conventional Wisdom Series*, 07-05, March 2007, accessible at: http://web.mit.edu/CIS/pdf/Audit_03_07_Deng.pdf

The war ended in 1972 with the signing of the Addis Ababa peace agreement and resumed again in 1983 when the agreement was broken by the central government. In the course of that period until now, more than two million people have died, four million displaced internally, and thousands of civilians have fled the country as refugees in Chad, and in the Kalma camp for internally displaced persons, or so called IDPs in Nyala, in the south of Darfur.[69]

The attempts for stability in the country by major regional and international actors such as the Inter-Governmental Authority on Development (IGAD), the Organization of African Unity (OAU) at the time, and shortly later, the hybrid solution offered by the AU and the United Nations (UNAMID), achieved little success. In regard to the peace process several agreements were signed between the government and the various factions. These agreements centred on the principles of governance, the transitional process and the structures of government, as well as on the right of self-determination for the people of South Sudan, currently a new State. Other agreements were taking place on security arrangements including wealth- and power-sharing. Finally, the Comprehensive Peace Agreement (CPA), which is a blend of six agreements, was signed in January 2005 which paved the way for the establishment of the UN Advance Mission in Sudan (UNAMIS) to oversee the implementation of the peace agreement in its entirety in accordance with the Resolution 1547 (2004). UNAMIS was mandated to facilitate contacts with the parties concerned and to prepare for the introduction of an envisaged UN peace support operation. The Secretary-General appointed Jan Pronk as his Special Representative for the Sudan and head of UNAMIS, who led the UN peacemaking support to the IGAD-mediated talks on the North-South conflict, as well as to the African Union-mediated talks on the conflict in Darfur.[70]

6.4.2 Failed UN handover of peacekeeping operations

Several shortcomings characterized the UN mission in Darfur. The interest of international engagement became visibly weak if we look at the deployments of multinational forces by the UNMIS. The configuration strategy of the Security Council of its peace enforcement mandate was to handover the situation in Darfur even prematurely, to the African Union (AMIS). Soon it became clear that the lack of international engagement in Darfur displayed the configuration of the UN-AU hybrid option (UNAMID) combined with the failure of the peace agreements of the Sudanese authorities. On the top of that, the sequence of the Security Council's mandates in the Sudan has been characterized by the following negative elements: *a)* the political and diplomatic failure pressuring the Sudanese authorities to stop the violence;

69 A. M.S. Bah, I. Johnstone, 'Peacekeeping in Sudan: The Dynamics of Protection, Partnerships and Inclusive Politics', *Centre on International Cooperation*, Occasional Paper, 2007.

70 See UN. Doc. S/RES/1547 (2004).

b) the weak multilateral engagement followed by hybrid solutions between the African Union and the United Nations, while the Security Council would pressure the AU for the feasibility to take over the main peacekeeping operations in Darfur; and *c)* the serious shortcomings of civilian protection duties in such multidimensional operations.

In order to emphasize the failure of protecting civilians during peace enforcement operations the analysis of the mandates' configuration of the UN Security Council is required. UNAMIS or so defined 'advance mission' had a political and diplomatic purpose monitoring the peace agreements, while UNMIS was expected to be operational on the ground in Darfur with scarce deployments of peacekeepers. As a response to the escalating crisis in Darfur, the Security Council, with its Resolution 1556 (2004) assigned some additional tasks to the United Nations Mission in Sudan (UNMIS) relating to Darfur.[71] At the same time, the United Nations and a group of non-governmental organizations advocating in the region launched a massive humanitarian operation in Darfur, constantly expanding activities to respond to the needs of an increasing number of people displaced by the violence. As a result of these developments the UN Special Representative and UNAMIS were deeply engaged in Darfur, particularly in supporting the African Union and its mission in the Sudan by, among other things, participating in the Abuja peace talks and establishing a United Nations assistance cell in Addis Ababa which supported deployment and management of the African Union Mission in the Sudan (AMIS).

Having determined that the situation in Sudan continued to constitute a threat to international peace and security, the Security Council decided to establish the United Nations Mission in the Sudan (UNMIS).[72] The Security Council with its Resolution 1706 (2006) decided to expand the UNMIS mandate to include its deployment to Darfur without prejudice of the existing mandate and operations. The Security Council invited the consent of the Sudanese Government of National Unity, called on Member States to ensure expeditious deployment and requested the Secretary-General to ensure additional capabilities to enable UNMIS to deploy in Darfur. The Security Council decided that the mandate of UNMIS would be to support implementation of the peace deployments and the N'djamena Agreement on Humanitarian Ceasefire of the conflict in Darfur by performing a number of specific tasks. The Security Council decided that UNMIS would be strengthened by up to 17,300 military personnel and by an appropriate civilian component including up to 3,300 civilian police personnel and up to 16 Formed Police Units.

71 For an overview see the UNMIS mandate and its challenges, accessible on the UN portal of Peacekeeping operations at: http://www.un.org/en/peacekeeping/missions/unmis/mandate.shtml

72 UN doc. S/RES/1590 (2005).

By further terms of the text of its resolutions the Security Council requested the Secretary-General to consult jointly with the African Union on a plan and timetable for a transition from AMIS, visibly failing and not equipped to contrast the widespread violence in Darfur, to a United Nations operation in Darfur (UNMIS). In the following steps, however, UNMIS was not able to deploy to Darfur due to the government of the Sudan's steadfast opposition to a peacekeeping operation undertaken solely by the United Nations as envisaged in Security Council Resolution 1706 (2006). The UN then embarked on an alternative approach to try to stabilize the region through the phased strengthening of AMIS, before transfer of authority to a joint AU/UN peacekeeping operation. Following prolonged and intensive negotiations with the government of the Sudan and significant international pressure, the government accepted the peacekeeping operation in Darfur. As soon as such operations were guaranteed from the Sudanese government, the Security Council with its Resolution 1769 (2006) authorized the establishment of the United Nations-African Union Hybrid Operation in Darfur (UNAMID). On its part, UNMIS continued to support the implementation of the Comprehensive Peace Agreement (CPA) providing good offices and political support to the parties, monitoring and verifying their security arrangements and offering assistance in a number of areas, including governance, recovery and development. The mission had focused on the commitments between the parties, including *a)* the redeployment of forces, *b)* the resolution of the dispute over the oil-rich Abyei region, and *c)* the preparations for national elections in 2010 and the referenda in 2011, which decided the political stand of self-determination of South Sudan.

The analysis of the mandate's configuration of UNAMID and UNMIS indicates, however, that no electoral assistance had been planned with serious consequences on the result of the presidential elections. The Sudan presidential and parliamentary elections were held in the Sudan from 11 April to 15 April 2010 (extended from the original end date of 13 April 2010) to elect the President and the National Assembly of the Sudan. The election brought to the end the transitional period which began when the decades-long second Sudanese civil war ended in 2005. Early results on 20 April 2010 showed that President Omar Al Bashir's party National Congress was well ahead the opposition. On 26 April 2010, full results were announced and Al Bashir was confirmed as the winner by having received 68.24% of the votes.[73] Such result in the political transition of the country was characterized by the non-cooperation of the international community to follow up on the judicial indictments of the Court against President Al Bashir and few other Sudanese top leaders responsible of genocide, crimes against humanity and crimes of war.

73 See IRIN, *Sudan: Elections in a volatile climate*, humanitarian news and analysis, 19 February 2010, accessible at: http://www.irinnews.org/report.aspx?ReportID=88167

Despite the international presence into the country the criminal regime was re-established and would not cooperate with any of the international governance institutions, including civil society organizations. The humanitarian crisis would take larger proportions.

6.4.3 Darfur and the failure of the responsibility to protect

On paper, the civil war in the South Sudan concluded with the signing of the Comprehensive Peace Agreement (CPA) in 2005. Despite such an agreement, which was pressured by the international community and led by the US, the conflict continued in the Darfur region. According to the Secretary-General, "a stable Sudan requires a peaceful Darfur".[74] In this regard, it was essential that the work of the United Nations and the African Union in the Sudan had to be complementary. The simple question was: *how*? In the meantime, the AU was pressuring the Security Council to defer the situation in the Sudan and was consistently against the Court's decisions about President Al Bashir. Moreover, the practice of the conflict management applied on the ground in Darfur undermined the effectiveness of the AU hybrid mission and the UN operational peacekeeping role with the mandate to protect civilians for several reasons.[75]

As previously anticipated, in addition to the African Union Mission in the Sudan (AMIS) there was an African Union (AU) peacekeeping force operating primarily in the country's western region of Darfur with the aim of performing peacekeeping operations related to the Darfur conflict. Originally founded in 2004, with a force of 150 troops, by mid-2005 its numbers were increased to about 7,000.[76] Under the United Nations Security Council Resolution 1564/2004, AMIS was to "closely and continuously liaise and coordinate at all levels" its work with the United Nations Mission in Sudan (UNMIS).[77] AMIS was the only external military force in Darfur until UNAMID was established. As previously said, it was not able to effectively contain the violence in Darfur. A more sizable, better equipped UN peacekeeping force was originally proposed in 2006, but due to Sudanese government opposition, it was not implemented at that time. AMIS' mandate was extended repeatedly throughout 2006, while the situation in Darfur contin-

74 See UN doc. S/2006/591, 28 July 2006, Report of the Secretary-General on Darfur.

75 See A. de Waal, "Darfur and the failure of the responsibility to protect", 83 *International Affairs* 6 (2007), at 1039–1054. See Human Rights Watch, *They Shot at Us as We Fled: Government Attacks on Civilians in West Darfur,* 2008, accessible at: http://www.hrw.org See also, Human Rights Watch, *No One To Intervene: Gaps in Civilian Protection in Southern Sudan*, 2009, accessible at: http://www.hrw.org

76 See AU doc. Assembly/AU/Dec.68 (2005), *Decision on the Situation in the Darfur Region of Sudan,* (2005), accessible at: http://www.africa-union.org/DARFUR/homedar.htm

77 UN doc. SC/RES/1590 (2005). UN doc. SC/9649 Security Council Extends UNMIS mandate until 30 April 2010. See also UN doc. SC/RES/1870 (2009).

ued to escalate. After terrible shortcomings to stop the violence in Darfur, AMIS was finally replaced by UNAMID in 2007.[78]

In May 2007, the African Union officially declared that AMIS was on the point to collapse. In previous months seven Nigerian peacekeepers had been killed, while lack of funding had caused soldiers' salaries to go unpaid for several months. The internal chaos in the country and its serious consequences would be externally visible to the still inactive international actors. Both Rwanda and Senegal warned that they would withdraw their forces if the UN members did not live up to their commitments of funding and supplies. On the top of that, the financial assistance promised over the last decade by the Americans and the Europeans to AMIS was not provided. In 2007, the United Nations Security Council finally approved the mandate of UNAMID with Resolution 1769 (2007) which was to take over operations from AMIS.[79] AMIS was finally merged into UNAMID but civilian protection did not characterize the configuration of peace enforcement operations on the ground. As emphasized by de Waal, "the pursuit of the responsibility to protect in Darfur has not achieved its goal". Contrary to the position taken by the most ardent advocates of the responsibility to protect, de Waal argues that "this failure owes much to the inadequate conceptualization of protection duties of civilians. The inflated expectation that physical protection by international troops is indeed possible, within the limits of the military strength envisaged, including the confused advocacy around the issue, has created the premises for its failure in Darfur. It is possible that more concerted international pressure could have brought a bigger and better-equipped international force to Darfur much earlier. That would, in itself, have been a positive development. But the expectation that such a force could have 'saved' Darfur is erroneous".[80] According to the chronology and evidence of all steps in such tentative handover from the UN to the AU, and back to the UN mission in Darfur (UNAMID) the shortcomings on the ground are clearly visible. Once again early warnings were not followed and applied in such mandate's configurations. The lessons learnt by the global actors of complementary character should be clear. Hopefully, there would be a gradual expansion in the interpretation of the Security Council of what constitutes a threat to the peace, breach of the peace, or act of aggression and the commission of mass atrocity crimes. In Darfur the promise of *'never again'* in regard to genocide has not been maintained.

78 On 31 March 2006 the mandate of AMIS would have run out, with the African Union force already on the ground to be incorporated into a UN peacekeeping mission. Nevertheless, during a March 10, 2006 meeting of the African Union's Peace and Security Council, the Council decided to expand the mission for six months until 30 September 2006. On August 31, after United Nations Security Council Resolution 1706 failed to see the implementation of its proposed UN peacekeeping force of 20,000 due to opposition from the government of Sudan, on October 2 the AU extended AMIS' mandate further, until December 31, 2006, and then again until June 30, 2007.

79 UN doc. SC/9089 (2007).

80 See A. de Waal, *supra.*

6.5 The Lessons learned

This case study arguing about peace, justice and security in the Sudan demonstrates that the recognition of the doctrine of the responsibility to protect civilians in situations of war and crime requires further multilateral efforts. The implementation of such doctrine is proving to be a real test for the international politics of interventions in mass atrocities. Such politics are strictly related to the old promise of designing a democratic reform of the governance system of peace and security and their maintenance, management and restoration.[81] The same considerations are valid for the complementary regime of the Rome Statute preserving the interests of justice. Besides, complementary global regimes must guard their mission "to ensure that they are not subverted, or perceived to have been subverted, as a pawn for great power use, to merely target weak and or defeated adversaries in less influential regions of the world".[82] This is not the case considering the findings in the case study which underscore: *a)* the failure of the peace processes between the Sudanese government and the UN; *b)* the lack of cooperation by the Sudanese government with the international efforts; and *c)* the extreme violence perpetrated against civilians in the country, despite the judicial outcomes of the Court. The global political engegements to protect civilians failed in North Sudan including the criminal accountability of its leadership.

6.5.1 Solving the gaps in the working methods

In this chapter dealing with the criminal regime in North Sudan several issues arise between the 'interests of peace' having exclusively a political nature and the 'interests of justice' characterized by a legal and jurisdictional character. In the triggering mechanisms falling under Article 16 for instance, the Rome Statute does not exclude the constant deception of political processes undermining the judicial and neutral role of the Court. Moreover, the last resort option of international criminal justice does not receive any kind of mandatory engagements by the UN political and executive premises and its members. This became clear with the referral of the situation in Darfur from the Security Council to the Court, right after the failure of hybrid operations of peacekeeping forces provided by the United Nations and the African Union which were supposed to protect civilians, while working with all possible means on sustainable peace. Many African States, as relevant parties to the Rome Statute, reveal serious inconsistency of compliance in their legal obligations deriving from the treaty. At regional level the AU recalls political standpoints waiting to be resolved in the UN

81 See P. Hilpold, 'The Duty To Protect and the Reform of the United Nations. A New Step in the Development of International Law?', 10 *Max Planck Yearbook of United Nations Law*, 2006, at 35.

82 See C. C. Jalloh, *Regionalizing International Criminal Law?*, 2009, Working Paper 2009-20, accessible at: http://ssrn.com/abstract=1431130

premises and related to the membership and permanent representation of African States in the Security Council. Their pressure to obtain clarification on the *deferral* activity from the Security Council does not receive any political follow up at the expenses of the Court as a judicial and not political institution. It is clear that the compromised regime of the permanent members of the Security Council resumed in Article 16 of the Rome Statute is not working and creates controversial politicization. The ASP needs to keep abreast on such sensitive political issues. If at provisional level Article 16 of the Rome Statute has not been used by the Security Council it still creates political shortcomings in the AU undermining the important meaning of justice and accountability.

Besides, it would also be appropriate to develop a set of criteria for the methods applied by the Security Council to make a *referral* to the Court: *a)* using the reports of human rights violations in a particular situations monitored by the UNHRC, *b)* understanding the relation between the commission of core crimes under international law and the existence of threats to international peace and security, and *c)* using preliminary information about the commission of core crimes susch as the outcomes of the preliminary situation analysis of the Prosecutor. The development of such set of criteria would help the decision-making of the Security Council to offer law enforcement capacities, and would also provide civil society and other stakeholders with a set of principles that they could also apply in order to put pressure on the Security Council to make referrals to the Court.[83] The referral of the situation in the Sudan should have been characterized by law enforcement capacity considering the criminal regime in the country. In that way, the deterrent effect of peace and justice would have increased sustainable solutions. Unfortunately, with the Rome Statute and the establishment of the Court there is no further progress of law enforcement measures. The Court still functions without police. The practice indicates several shortcomings in the fight against the impunity of domestic criminal regimes violating fundamental individual rights. This is the case in the Sudan and the criminal leadership still in power in the country, which is politically advocating with all its partners against the Rome Statute system.[84]

83 See H. Mistry, "Developing consistency", in *The UN Security Council and the International Criminal Court*, International Law Meeting Summary with Parliamentarians for Global Action, Chatham House, 16 March 2012, at 4, accessible at: http://www.pgaction.org/pdf/activity/Chatham-ICC-SC.pdf

84 A group led by the AU chair with representatives from Africa's five regions pressures the Security Council to defer proceedings against Kenya's leadership and the Sudanese president, Omar Hassan al Bashir, who faces charges of genocide. See African Union (AU) Decision on Africa's Relationship with the ICC, African Union Ext/Assembly/AU/Dec.1 (Oct.2013). The AU decision is accessible at: http://summits.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20_E_0.pdf

The situation in Darfur indicates primarily the failure of early warnings. On top of that, the international intervention required law enforcement and civilian protection mandates deployed on the ground immediately after the failure of the peace process initiated by the UN, avoiding any manipulation from the domestic criminal regime in power in the country. The problem is still the weak political determination to fight against the impunity regime in North Sudan. For the States partners of such criminal regime the priority has been given to their own economic interests characterizing their relationship with the Sudanese leadership and its resources at the expenses of civilians. In conclusion, it is clear that for a reliable architecture fostering peace, justice and security the enforcement of public international authorities and the definition of their complementary character should be appropriately reviewed in both documents: the UN Charter and the Rome Statute. Such an effort in combination with a political *road map* based on an integrated approach of governance would influence further the design of reliable architecture dealing with conflict and post-conflict situations, and with the fight against international threats and crimes destabilizing peace and security.

The solutions in the short and middle terms have to be found in an integrated approach of governance of peace, justice and security operations on the ground. In the long term a political *road map* is necessary in order to deal with situations where criminal leaders are still in power and civilians are victimized. Such political *road map* would strengthen the credibility of global regimes fostering peace, justice and security and their complementary character. In conclusion of this case study it is clear that the consensus of systemic reforms, if reached, would preserve further the international legal order strengthening its legal and political institutions. Such process of building political consensus on substantive reforms represents the main challenge for complementary global regimes. We have clearly seen that the practical dilemma on the ground indicates an insufficient implementation and harmonization of the interactions between such complementary mandates involved in the same field operations, such as in the Sudan. These gaps reflect the standards of cooperation applied on the ground which are inconsistent and not sufficient to maximize the results to *prevent*, *react* and *rebuild* in situations of war and crime. Substantive reforms are required between governance frameworks particularly in the working relationship between the Security Council and the International Criminal Court.