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AND THE PURSUIT OF HUMAN SECURITY

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The interaction between
the United Nations and
the International Criminal Court

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The Governance of Complementary Global Regimes and the Pursuit of Human Security. The interaction between the United Nations and the International Criminal Court

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PREFACE

In 1998 the State Parties to the Rome Statute established a treaty-based organization of universal character dealing with humanitarian crimes of international concern committed against civilians in conflict and post-conflict situations. The Rome Statute institutions are complementary to the United Nations system but independent from such an established international regime, whose aims are to facilitate the cooperation in the field of international security, international law and human rights. The emerging regime of international criminal justice constitutes arguably the most significant reform of international law, but there is still a long way ahead for systemic changes in the governance of humanitarian affairs centralizing individual rights in intra-state conflict and post-conflict situations. It remains to be seen how the concept of human security would have an impact *a)* on the transition of international law and international security; *b)* on the measures applied on the ground by complementary international mandates; *c)* on the role of the Security Council, State sovereignty and the international governance of humanitarian escalations; and *d)* on the creation of new norms and the place of non-state actors in international law. Moreover, it is also important to assess the evolution of universal jurisdiction, including the policy formulations of global threats and further definitions of serious crimes of common concern such as the crime of aggression, including their controversial governance and the application of double standards in the selection of inter-state conflict situations resulting from acts of aggression. Another aspect requiring attention is to avoid the use of the emerging regime of international criminal justice as an instrument of coercive diplomacy in the context of peace and security maintenance by those permanent members of the UN Security Council (China, Russia and the US), which so far rejected the Rome Statute partnership, but still use it occasionally when this favors their own political interests. In other words, we will look at the ingredients required and the recipe wished, if any, while advocating for democratic governance systems based on the principles of *global justice* and the role of public international law and its institutions consolidating human security. In this study the intersection between politics, law and institutions complementary in their nature, receives an accurate analysis proposing integrated governance models of peace, justice and security to be applied globally.

The multidisciplinary approach of important fields such as law and globalization, the politics of justice and international law, including the developments in the

field of human security, are absolutely required when exploring the construction of a global society. Much more important than is to preserve what remains of the concept of the nation-state, its sovereignty and governance, in the turmoil of regimes and sub-regimes led by criminal groups and conflicting political factions. The undemocratic and violent political transitions and the complete absence of law and order characterize the disintegration of many domestic systems unwilling or unable to carry out genuinely their duties towards their citizens. The shorter distance between the concept of the nation-state, its domestic governance systems, and the international community monitoring internal affairs during civil wars, becomes for many stakeholders problematic, but it still represents an important opportunity to preserve fundamental individual rights. The efforts to safeguard universal values on the side with individuals and communities devastated by war and crime through governance structures fostering international peace, justice and security are absolutely worth it. The advocacy of human security measures, including monitoring, reporting and fact finding activities to reveal severe violations of international humanitarian law, represents a paradigm shift challenging international relations. Such an advocacy is contrary to state-centric security policy including governance models keeping the impunity regime of international crimes unchanged in several situations.

In general terms human security measures prioritize the needs of individuals and communities as important guarantors of sustainable peace, development and stability. Unfortunately, in multiple and inter-linked situations, the failure of preventive strategies of mass atrocity crimes severely compromised the safety of civilians, including their fundamental individual rights. In several countries, such as in Libya, Syria, Sudan, Democratic Republic of Congo, Uganda, Kenya, Central African Republic, Ivory Coast and Mali, civilians have severely paid the consequences of such failure. The costs of human lives after the humanitarian disaster in Rwanda, Sierra Leone, Somalia and Cambodia are well known and indicate serious problems dealing with the causes and effects of war and crime. Besides, the sometimes claimed *right* of humanitarian intervention of the international community is challenged now and qualified by the responsibility to protect civilians in situations of mass atrocity crimes. Such an international norm represents an unfinished business in global politics and is considered by many far from capable of preserving the rule of international law. The current practice of governing the international order deserves analysis between the *liberal* vision of normative frameworks in the view of pluralism and its theories, and a *supranational* capacity from the perspective of constitutionalism. The preservation of the rule of law as a principle of governance in a world of multilevel jurisdictions requires discussions, as well as the advocacy of global values in international relations, such as multilateralism, collective responsibility, global solidarity and

mutual accountability.¹ As clearly described by Delmas-Marty, “complementarity does not separate national from international criminal jurisdiction, nor does it put them in conflict with each other...”² The grey-zones of the complementarity principle, however, clearly arise in the governance of justice functioning outside the arrays of peace and security maintenance in conflict and post-conflict situations. This study deals with the impact, challenges and possible solutions in such governance. It proposes other options rather than the use of military means or military coalitions when intervening in situations of war and crime.

This study offers an overview of the challenges occurring in the emerging regime of international criminal justice as a tool of sustainable peace. It illustrates the impact of such regime in international relations focusing on the obstacles and concerns of its governance in the context of the maintenance and restoration of international peace and security. It advocates for an appropriate interaction strategy between the United Nations and the Rome Statute institutions as a matter of international mutual concern and for the sake of human security. The responsibility to protect cannot be considered as the evolution of human security. Further progress is required in the frameworks of governance dealing with it. In accordance with this study the political compromise reached in Rome contains the same controversial issues not yet resolved in the international legal and political order. The review conference of the Rome Statute in Kampala (Uganda) confirmed the challenges for such emerging regime to find a place in the arrays of peace and security. The political selectivity of the Security Council responding to mass atrocity crimes, the political criteria to reach the resolutions of international criminal justice, and the application of double standards when dealing with them, are the main factors undermining the credibility of the so-called “narrowed” international responses during intra-state conflicts. Some would even consider the use of international legal processes to replace or complement acts of war mandated by the Security Council. With the Rome Statute, such limitations confronting the pursuit of peace and justice are not completely alleviated. In accordance with a broad and idealistic interpretation of the Rome Statute, however, the governance of international criminal justice could be defined as the response to safeguard individuals and communities in extreme conflict situations through the rule of law, multilateralism, collective responsibility, global solidarity

¹ For an overview of the debate and the extensive literature on the issue of legal pluralism and globalization see R. Michaels, ‘Global Legal Pluralism’, Duke Law School Faculty Scholarship Series, Paper 185, 2009, accessible at: http://lsr.nellco.org/duke_fs/185 See also A. S. Sweet, ‘Constitutionalism, Legal Pluralism, and International Regimes’, Yale Law School Faculty Scholarship Series, Paper 1295, 2009, accessible at: http://digitalcommons.law.yale.edu/fss_papers/1295.

² See M. Delmas-Marty, “Interactions between National and International Criminal Law in the Preliminary Phase of Trial at the ICC”, *Oxford Journal of International Criminal Justice*, Volume 4, Issue 1, March 2006, at 2–11.

and accountability, fighting against the regime of impunity of serious crimes at local, regional and international levels.

Since 1945 the discourse around the international legal order has been dominated by the political role of the United Nations and its institutions. It needs to be noted that while the UN has been the object of significant criticism, it has nevertheless played a remarkable role both in the progressive development and codification of international law. The Preamble of the UN Charter reads in part: “We the peoples of the United Nations determined to save succeeding generations from the scourge of war [...] and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom [...]”. Although the Preamble is an integral part of the UN Charter, it does not set out any of the rights or obligations for its member States. Rather, its purpose is to serve as an interpretative guide for the provisions of the UN Charter through the highlighting of some of the core motives of the founders enforcing the organization.³ In 2005 the member States of the UN General Assembly embraced the responsibility to protect civilians in paragraphs 138–139 of the Outcome Document of the so-called World Summit. In the historic gathering of world leaders in New York for the High-level Plenary Meeting of the General Assembly, the heads of States and governments reached consensus on the formulation of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. When States are ‘manifestly failing’ to protect their population from mass atrocity crimes and peaceful means are inadequate, the international community would take collective action in a ‘timely and decisive manner’ through the Security Council and in accordance with the UN Charter and with the cooperation of regional organizations as appropriate.⁴ The emerging regime of international justice and leadership accountabilities, the preservation of human rights and international inquiries and the rehabilitation of victimized civilians are important tools to establish the truth and create the premises to *protect*, *react* and *rebuild* in situations of war and crime. The good governance of such tools contributes to sustainable peace. Obviously, such an important shift in the international politics of mass atrocities deserves attention at the present and in the years to come. The governance of global regimes of complementary character and the dilemma of human security are concepts requiring analysis and debate.

³ For an illuminating overview of such an approach see the Report of the Rapporteur of Commission I/1 UNICO VI, 1945, at 446–7, Doc. 944 I/1/34(1). See also L. Gross, ‘The Charter of the United Nations and the Lodge Reservations’, 41 AJIL 3, 1947, at 531.

⁴ UN General Assembly, Sixtieth Session, 2005 World Summit Outcome, UN Doc. A/RES/60/1, 2005, para. 138 and 139.

STUDY OUTLOOK

This study explores the governance of global regimes fostering peace, justice and security in extreme situations of war and crime. It examines the quest of *complementarity* between international frameworks of governance and the dilemma of human security measures applied in the practice on the ground in conflict and post-conflict situations. It debates the challenges, obstacles and concerns in the governance of peace operations, law enforcement and civilian protection duties. It argues about the meaning of international humanitarian escalations of *last resort* under the flag of civilian protection duties. It debates the requirement of a political *road map* centralizing civilian protection duties in collapsed societies. It examines the governance of international mandates in the field operations not being appropriately integrated between them, and which obviously lose part of their effectiveness. The analysis of the humanitarian escalations of *last resort* between complementary global regimes and their impact in the field operations is central for new policy orientations. The presence of both the United Nations and the International Criminal Court; the configuration of international mandates on the ground; the deployment of peace enforcement operations; the investigations and prosecutions of mass atrocity crimes are interdependent resources. They deserve accurate risk assessments for the sake of civilians in multiple situations. These global tools have the potential to improve human security expectations in situations of war and crime. There is, however, a long way ahead. After a decade of the Court's existence and activity the practice demonstrates the needs for integration, harmonization and consolidation between global regimes of complementary character.

The preliminary part of this study addresses serious concerns in the institutional and normative decentralization characterizing the emerging regime of justice falling under the Rome Statute. It also emphasises the theories of 'statehood', 'sovereignty' and 'governance' and the urgent requirement of political convergence on sensitive issues. The introduction argues that due to the absence of a *supranational* organization for an implementation of the emerging regime of justice at domestic, regional and international levels the harmonization between so defined multilateral, global, universal, complementary international governance institutions involved in conflict and post-conflict situations is fundamental. The global interactions based on the rule of law, multilateralism, collective responsibility, global solidarity and mutual accountability wait to be translated in governance mechanisms at disposition of the international community, finding

remedies for a consistent evolution of international relations in the post-cold war. In order to reach democratic standards in such interactions the independence and authority of justice is a basic requirement for human security. It should be time for the nation-states to choose between maintaining the Charter of the United Nations as drafted after WWII, or to consider radical changes regulating human security issues. The main challenge which unfortunately will remain unanswered is whether consensus can be found on a *road map* fostering peace, justice and security dealing with the criminal accountability of States and individuals during armed conflicts. The aspects of *protective*, *retributive* and *restitutive* justice require further application at domestic, regional and international levels. In order to verify the current evolution or devolution of these aspects, the first part of this study debates the quest of *complementarity* and the dilemma of human security in conflict and post-conflict situations. The second part elucidates some of the challenges, obstacles and concerns in the governance of complementary global regimes and the necessity of political convergence. The third part deals with the humanitarian escalations of last resort and their governance in the field operations and offers the concluding assessment deriving from the case studies selected.

The introduction of this study clarifies the statement of the problem, the research questions, the purpose of the research and the methodology used. It debates on the nature of the current architecture of governance and the limits of complementary global regimes dealing with international threats and crimes. It is of fundamental importance to question the impact of international humanitarian escalations and the role of the United Nations and the International Criminal Court responding to mass atrocities and crime prevention, firstly verifying theories, principles, current practice, and secondly, finalizing recommendations useful to maximize the results with defined mechanisms upholding the human security doctrine. The principles and theories upholding the expectations of human security characterize the journey of this study. However, this work does not solve the grey-zones still prevailing in the conceptualization of human security. This concept requires policy implementations and governance models between global regimes of complementary character. The theoretical uncertainties in the concept of human security could be solved by concrete actions in the governance of complementary global regimes. For such governance it is important to remind the background information of the causes of war and crime which have devastating consequences on nation-states, regional and international organizations, communities and individuals. The complementary character of the UN and the Rome Statute institutions should be based on the human security doctrine. In order to clarify the meaning of this concept the study examines the Rome Statute institutional framework and the interaction background between the United Nations and the International Criminal Court, answering questions related to the interdependence of peace, justice and security in the field operations, and the necessity to improve

measures of human security such as protection, relocation, reparation and rehabilitation of civilians victimized by serious crimes of common concern. This study demonstrates that further efforts are required by decision-makers for the conceptualization of human security and its expectations. Political convergence is further required about jurisdictional extensions and complementarity for the governance of international threats and crimes destabilizing peace and security.

There is a significant amount of evidence to suggest that both internal instability and State fragility significantly increase the commission of atrocity crimes such as genocide, war crimes and crimes against humanity, including the flight of refugees spreading from single to multiple States, causing regional and large scale instability. However, the policy approach about international humanitarian interventions in fragile States are fragmented, decentralized and the priorities not harmonized with early warning and early action. Obviously, the current international legal frameworks reflect such discrepancies and need to be challenged with political convergence. Besides, the global governance of war and crime requires reliable models, systems and institutions updated to the challenges of the time. The judicial outcomes pointing out crimes and perpetrators are not used for the configuration of international mandates of law enforcement on the ground. The accountability system of international crimes does not receive sufficient support in order to strengthen its deterrent effect in conflict and post-conflict situations. In situations of conflict breaking out since the end of the bipolar world order, which left unresolved the main causes in the majority of such conflicts, civilians have been the greatest victims of warfare. In particular women and children, who are often the targets in times of violence and have been severely used as a weapon of war. In such context, law enforcement and civilian protection duties wait to receive a place in the fight against the impunity of international crimes and within the arrays of peace and security maintenance keeping alive the links of reconstruction and development.

The country-situations in Sub-Saharan Africa, Middle East and East Asia are impressive examples where ethno-political conflicts show dramatic statistics. In the African Great Lakes Region for instance, the political crisis and the continuing violence between different factions involved in political transitions, the establishment of a war economy and militarized regimes and the impunity of serious crimes of common concern are the only realities identified through reliable empirical data. The analysis of such data demonstrates that global regimes are not yet entirely able to cure the causes of warfare. However, they can have an impact at least on the effects in the short and middle terms, while developing the capacity to act on the causes in the long term. In order to accomplish such a model of governance an expansion of *complementarity* between established and emerging global regimes is absolutely required for the sake of the human security doctrine. The UN deployment of robust peacekeeping in the field operations for

instance, should perform civilian protection duties hosting and complementing the investigative activities of the International Criminal Court in both referrals and non-referrals activities of the Security Council. The States non-parties to the Rome Statute should be bound and be engaged through their UN membership. In the current reality of humanitarian escalations the regime of international criminal justice falling under the Rome Statute functions without any power of police and law enforcement on its own, but depends from the cooperation from its States Parties and relevant stakeholders, such as the United Nations. Therefore, global strategies are absolutely required to *prevent*, *react* and *rebuild* situations of war and crime in accordance with the rule of law, multilateralism, collective responsibility, global solidarity and mutual accountability. This study approaches the politics of international law and the views of future law, or *de lege ferenda*, as opposed to *de lege lata*, or the law as it currently exists. It examines the controversial debate between the consolidation of global values in the constitution of the world community against pluralistic legal frameworks based on decentralized laws and institutions far from offering sustainable peace in situations of war and crime.

This study focuses on the longstanding debate to manage, maintain and restore peace and justice centralizing the protection of civilians in situations of war and crime. It advocates for solutions in the shortcomings of interaction between complementary global regimes fighting against the impunity of crimes of international concern, while offering sustainable peace in extremely violent conflict zones, before, during and after civil wars. It emphasizes the priority of implementing measures of human security in conflict and post-conflict situations with an integrated approach of governance of peace and justice. It clarifies the concept of global justice and its *retributive*, *protective* and *restitutive* aspects which are undermined by the shortcomings of political engagements, international responsibilities and constitutional adjustments reflecting international, regional and national realities. This study explores the nexus between law and politics in the emerging regime of justice debating models of governance to secure the rule of law in a system of multilevel jurisdictions. It emphasizes the international political convergence required, and still missed, and the role of international law promoting the consolidation between complementary global regimes based on cooperation. It proposes an insight of international criminal justice and the role of public international law to promote it. It debates feasible solutions on structural, normative and operational issues implementing the governance of justice in conflict and post-conflict societies in accordance with the human security doctrine. The purpose of this study is to verify the progress of public international law and its multilateral premises dealing with war and crime according to the challenges of the time. It offers an extensive analysis of the paradigms in the making of complementary international governance institutions fostering human security in multiple situations, providing some direction on the way to formulate *de lege ferenda*.

The rise of the Rome Statute system represented a shift from State-centric political positions to the claims coming from civil society organizations. However, it still struggles to find its place in the system for the maintenance or restoration of international peace and security. The establishment of a permanent International Criminal Court was pressured by civil society to decision-makers in order to centralize the role of the victims during judicial proceedings fighting against the impunity of serious crimes. The political compromise that has been reached so far in regard to the Court's position in peace and security mandates still characterizes its limits. The governance of international criminal justice requires risk assessments which cannot be limited only to the Court's activities. Such governance requires global considerations on the ways international regimes would become complementary. The main considerations are listed and examined in this work. From a broader perspective this study clarifies the main challenges and opportunities of regulatory frameworks fostering human security. The interaction between complementary global regimes is seen as an important tool in order to build up the basic premises of *global justice* for the advancement of sustainable peace, human development and for the protection of human rights. It is fundamental to define preventive measures between global regimes of complementary character before mass atrocity crimes would occur. It is important to reflect on reliable response mechanisms applicable during the humanitarian escalations of *last resort* characterized by extreme violence and violations falling under international law, including measures applicable in the context of rehabilitation, reparation and humanitarian assistance to the victims of war and crime.

The human security doctrine which has developed in the last couple of decades deserves further application of its concept even with the difficulties incurred in our globalized world.⁵ The rule of international law would profit from such an approach evolving in the centralization of individuals.⁶ It is important to measure the standards of complementary interactions between the relevant actors centralizing individuals in global matters. The member States of multilateral treaties have still the *protective* responsibility towards civilians in their own territories and jurisdictions, while the international community is in charge of preventing, reacting, and rebuilding situations of war and crime. Models of capacity-building are required in the absence of the nation-state and its disintegration, including the nation-state formation moved by political oppositions based on violence and controversial domestic governance such as corruption, autocracy and armed conflicts and the constant risk that the

⁵ For an overview of the debate and literature on human security see T. Owen, "Human Security – Conflict, Critique and Consensus: Colloquium Remarks and a Proposal for a Threshold-Based Definition", *Security Dialogue*, September 2004, vol. 35, no. 3, at 373–387.

⁶ See G. Oberleitner, "Human Security: A Challenge to International Law?", *Global Governance*, Vol. 11, No. 2 (Apr.–June 2005), at 185–203.

perpetrators of serious crimes would offend the dignity of human lives. Besides, that the basic rights of civilians would be violated, or they would be taken as the hostage during violent political transitions, and with the range of crimes committed by the perpetrators simply remaining unpunished. The governance of peace, justice and security is examined in the three parts of this study providing an assessment of law enforcement, civilian protection and other urgent issues waiting for solutions. This study attempts to define the meaning of complementary global regimes in accordance with the UN Charter and the Rome Statute. The progress of international law and its institutions centralizing fundamental individual rights requires with no doubts further political convergence and advocacy. The many and real challenges to reach sustainable peace in situations of war and crime demonstrate the necessity of a political *road map* to define, design and manage global regimes of complementary character. In this study the search and formulation of political convergence on these issues is considered a very good opportunity for decision-makers.

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LIST OF ABBREVIATIONS

ADT	Darfur Atrocities Documentation Team
AJIL	American Journal of International Law
AMIS	African Union Mission in Sudan
ASIL	American Society of International Law
ASP	Assembly of States Parties to the Rome Statute
ASP Res.	Assembly of States Parties to the Rome Statute Resolution
AU	African Union
AU Dec.	African Union Decision
AUPD	African Union Panel on Darfur
AUO	African Union Organization
BYIL	British Yearbook of International Law
CARICOM	Caribbean Community and Common Market
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CIA	Central Intelligence Agency
CICC	Coalition for an International Criminal Court
CPA	Comprehensive Peace Agreement in the Sudan
CPPCG	Convention on the Prevention and Punishment of the Crime of Genocide
EJIL	European Journal of International Law
EU	European Union
ESIR	English School of International Relations
GA Res.	General Assembly Resolution
HRQ	Human Rights Quarterly
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRtoP	International Coalition for the Responsibility to Protect
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ICG	International Convention on Genocide
IHL	International Humanitarian Law
ILC	International Law Commission

IMTFE	International Military Tribunal for the Far East
IRF	International Refugee Law
IR	International Relations
ISAF	International Security Assistance Force in Afghanistan
JPR	Journal of Peace Research
LAS	League of Arab States
LJIL	Leiden Journal of International Law
LRA	Ugandan Rebel Lord's Resistance Army
NILR	Netherlands International Law Review
MINURCAT	United Nations Mission in the Central African Republic and Chad
MoU	Memorandum of understanding
MONUC	United Nations Organization Mission in the Democratic Republic of Congo
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of Congo
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organization
ONUC	United Nations Operation in the Congo
POC	Protection of Civilians
PRIO	Peace Research Institute Oslo
RtoP	Responsibility to protect
R2P	Responsibility to protect
SC Res.	Security Council Resolution
SCSR	Special Court for Sierra Leone
SIPRI	Stockholm International Peace Research Institute
STL	Special Tribunal for Lebanon
SWGCA	Special Working Group on the Crime of Aggression
SRSR	Special Representative of the Secretary-General
SSR	Security Sector Reform
TAL	Transitional Administrative Law
TI	Transcend International
TRI	Transcend Research Institute
UN	United Nations
UNAMID	African Union/UN Hybrid operation in Darfur
UNCOI	United Nations Commission of Inquiry
UNDP	United Nations Development Programme
UNDPKO	United Nations Department of Peacekeeping Operations
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
UNMIS	United Nations Mission in the Sudan
UNMIC	United Nations Interim Administration Mission in Kosovo
UNOCHR	United Nations Office of the Commissioner of Human Rights
UNSC	United Nations Security Council

UNSG	United Nations Secretary-General
TFV	Trust Fund for Victims
VRS	Army of the Republika Srpska
WW	World War
YIHL	Yearbook of International Humanitarian Law

“I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human. It is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes”.

Hugo Grotius, *On the Law of War and Peace*, 1625

