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The Governance of Complementary Global Regimes Dealing With War and Crime: The Interaction Between the United Nations and the International Criminal Court

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The establishment of an international judicial institution responsible to verify on a case-by-case basis when serious humanitarian crimes would fall within the competence of domestic judicial authorities, and when an international judiciary would be required is a visible accomplishment advocated for years. The important paradigm shift refers to governing the transitional challenges characterizing massive humanitarian escalations in conflict and post-conflict situations between the responsibility to protect civilians and the fight against the impunity of international crimes. In the current legislation of the UN the civilian protection duties are associated to the maintenance of peace and security and to the right of intervention in the domestic affairs of sovereign States for humanitarian reasons, extending further the reach of a criminal jurisdiction to punish the perpetrators. This has been the case in Darfur, Sudan, and Libya. Both these situations have been referred by the UN Security Council to the International Criminal Court (ICC). From an empirical perspective, it is still not demonstrated whether international criminal justice would have an impact on the maintenance and restoration of international peace and security, while its complementary role with global political regimes is in transition and deserves attention. The questions arising are as follow: how to rely on international criminal justice for the preservation, maintenance, and restoration of peace and security in extreme conflict zones, without solving the governance gaps during mass atrocity escalations characterized by jurisdictional referrals? Is this realistic considering the traditional concept of international security relying on old models of militarization, such as in the case of Libya? Are there political and strategic reasons for a postponement of accountability during such humanitarian interventions? In short, what kind of public authority is desired for the emerging regime of international criminal justice, and how would such tool function in the complexity of international governance?

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The Preliminary Remarks

This article represents the outcome of questions addressed on specific topics, which answers are only possible towards an appropriate multidisciplinary approach in the fields of international law and international

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relations, including global governance and international organizations. It debates the progress achieved and achievable by the formulation of global humanitarian policy and by the legal frameworks deriving from it, which contribute both to the formation of the international society responding to global threats and crimes. It provides a broad assessment measuring how far we still are from achieving methods of human security between established international regimes and emerging sub-regimes, which interaction is the only way to further cultivate the idea of *global justice* based on their complementary nature. It offers an analysis of the humanitarian escalations of *last resort* and their impact on the ground, emphasizing the necessity to solve the interaction gaps between complementary global regimes dealing with mass atrocities, despite several obstacles and constraints. It discusses the international tools currently at disposition by the world community for the governance of justice in the context of human security and sustainable peace, dealing with *intra* and eventually *inter*-state civil wars caused by autocratic, totalitarian, and criminal regimes, such as in the Sudan, in Libya, eventually in Syria, and so forth. The current dynamics of humanitarian *solidarism* and the trends of *interventionism* as the main aspects of the global policy responding to threats and crimes, require both of them discussion. The challenges characterizing the current international responses to internal armed conflicts and mass atrocity crimes are summarized in the following questions: What is the meaning of complementary global regimes and their impact in transition societies afflicted by war and crime? What kind of governance characterizes their complementary roles in the field operations? Who is in charge of human security measures centralizing the protection of civilians in conflict zones? Are these protection measures depending on interaction strategies between complementary global regimes, or would further treaties and institutions fostering them be required?

The General Overview

The broad overview of the definition of multilevel jurisdictions, including the establishment of judicial institutions enforced by political organs after the scourge of two world wars is absolutely important to measure the progress already achieved at global level fighting against the impunity of international crimes. The International Criminal Court today is a major international institution securing justice for victims when it cannot be delivered at the national level. Investigations and prosecutions in multiple country-situations concern shocking allegations such as genocide, mass murder, rape, torture, and the use of child soldiers.[1] The prosecutor is currently conducting preliminary examination in a number of situations including Afghanistan, Georgia, Guinea, Colombia, Honduras, Korea, and Nigeria, while dealing with investigations and prosecutions about the violence and the crimes committed during difficult political transitions, such as in Kenya, Ivory Coast, Uganda, Sudan, Republic Democratic of Congo, Libya, and Mali.[2] On top of this the ICC issued warrants of arrest for two individuals in the context of the situation in Ukraine: Mr. Vladimir Vladimirovich Putin and Ms. Maria Alekseyevna Lvova-Belovafor for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation (under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute).[3]

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[1] The category of mass atrocity crimes refers to the commission of genocide, crimes of war, crimes against humanity and crime of aggression. Their definitions can be found at: http://www.preventorprotect.org/overview/definitions.html See also Part 2 of the ICC Rome Statute, Jurisdiction, Admissibility and Applicable Law, accessible at: https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf

[2] See ICC situations and cases accessible at: https://www.icc-cpi.int/cases

[3] See ICC Press Release, Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova, 17 March 2023 accessible at: https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-

The Court however, does not have jurisdiction on individuals responsible in case of aggression during *inter*-state conflicts. Such jurisdictional pillar received postponement and waits for further international consensus and resources. In order to verify the reasons of such an impasse it is required to look in the past. The main theory promoted in this article is that on the one hand, for an understanding of the effects deriving from the political determinations enforcing international governance institutions, it is required to look at the causes placed in the past by the decision-making. On the other hand, if we want to understand the effects that might appear in the future, it is required to focus on the causes currently laid down by the decision-making. The question is whether the international governance institutions deriving from such political process would be able to simultaneously have an impact on the causes and effects of war and crime.[4] The main concern is if there would be human security measures during humanitarian escalations of *last resort* between complementary global regimes fostering peace and justice. So said, in which direction would evolve the policies of global "humanitarianism", global "solidarity", collective "responsibility", and mutual "accountability"?

It needs to be noted that multilateral treaties provide the basic architecture of international regimes relying on international cooperation to fight against war and crime. This is the case of the UN Charter and the Rome Statute.[5] These regimes established international governance institutions, normative capacity, and multilevel jurisdictions to influence State behaviour and individual accountabilities while also promoting the concept of human security in international society. Nevertheless, their effectiveness and public authority dealing with global threats and crimes persist to be problematic for several reasons. If we only consider the minimal resources allocated to them, the expectations to respond to the current challenges are very high. First, these international regimes have to rely on the support and cooperation of governments. Second, in order to maximize the results in conflict and post-conflict situations the interaction between them is central for democratic governance, but not less problematic.[6]

The political determination to establish an independent, permanent, universal, International Criminal Court in "relationship" with the United Nations system, "with jurisdiction over the most serious crimes of concern to the international community as a whole", was settled in the preamble of the Rome Statute. The preamble of the treaty recognizes the link between peace and justice, stating that "grave crimes threaten the peace, security, and well-being of the world" and affirming that States Parties are "determined to put an end to the impunity for the perpetrators of these crimes and thus, contribute to the prevention of such crimes". Considering the practice of the last decade, the pursuit of peace and justice in conflict and post-conflict societies presents some controversial challenges. Several problems occur in the coordination of efforts of independent political and judicial mandates, particularly between the configuration strategies of international peacemakers and peacekeepers, and the interests of victims and witnesses of international crimes on relocation, protection, and reparation in the context of human security.[7]

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[4] For a sophisticated analysis of the shifts in the global legal order see, M. Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World*, Hart Publishing, 2009.

[5] See the ICC Rome Statute defined as a *work in progress* treaty bringing international criminal justice dealing with individual perpetrators out of the UN accessible at: http://untreaty.un.org/cod/icc/statute/99_corr/cstatute.htm

[6] T. Weiss, R. Thakur, *Global Governance and the UN: An Unfinished Journey*, United Nations Intellectual History Project Series, 2010.

[7] A. J. Bellamy, P. D. Williams, "The new politics of protection? Côte d'Ivoire, Libya and the Responsibility to Protect", *International Affairs*, 87:4 (2011) 825–850. T. Weiss, *Military-Civilians Interactions. Humanitarian Crisis and the Responsibility to Protect*, Rowman & Littlefield Publishers, 2005.

Even if peace and justice complement each other in the long term, in the short term tensions have arisen between efforts to secure peace, and efforts to ensure accountability of international crimes.[8] In theory, the principle of the interdependence between peace, justice, and security at global level should focus on strengthening relationships and partnerships between complementary international mandates, such as the Rome Statute institutions and the United Nations system, particularly considering the main characteristic of the emerging regime of international criminal justice, based on cooperation networks at domestic, regional, and global levels. In practice, the interdependence between peace, justice, and security is compromised by the obstacles on balancing powers at international level. In my view this is particularly true looking at the interaction between political, executive, and judicial mandates and the international governance that derives from such compromise. At structural level, any of the Rome Statute institutions is part of the United Nations system, however their mandates are complementary. What does this mean? These global governance institutions are involved respectively on international threats, peace, and crime control, but their partnership is not sufficiently defined, while the Court's jurisdiction is limited to the most serious crimes of international concern. The legal relationship between the Court and the United Nations is governed by the relationship agreement. Any amendment of such agreement shall be approved by the UN General Assembly and by the Assembly of States Parties (ASP) in accordance with article 2 of the Rome Statute. Several basic principles, such as discretion and confidentiality, preside over the cooperation between the Court and the United Nations, which is also based on specific arrangements regulating such poor interaction in the field missions.[9]

The Concept of Complementarity and the Dilemma of Human Security

The ways global actors interact with each other improve their respective competence and responsibility based on their complementary character. This is also valid for the governance of serious humanitarian crisis, which are all related to the destabilization and disintegration of nation-states waiting for capacity-building in their own domestic reality to fight against war and crime. Although there are no doubts that the multilateral dimension is necessary to centralize the security of individuals at global scale, the interaction between complementary global regimes depends on the complex intersection between war and peace, and politics and law in the "new" world order. Such interaction depends on the political determination of the international community to "prevent", "react", and "rebuild" mass atrocities in accordance with the principle of universality and the rule of law. The ideal would be the establishment of a system of governance monitoring humanitarian interventions and civilian protection duties, focusing on the prevention, response, and reconstruction of mass atrocity situations. Despite the existence of a treaty-based jurisdiction dealing with serious crimes of common concern and an emerging regime of international criminal justice complementary to the UN system, such an ideal is far to be realized. The fragmentation of legal frameworks based on cooperation and their liberal view based on pluralism is still the norm.

Soon after the establishment of the Rome Statute system it became clear that the fight against the impunity of crimes of common concern, and the limited jurisdiction dealing with it, is not a sufficient prerequisite for human security expectations. In other words, the nature of the interactions between complementary global regimes deserves clarification. In particular, the ways the emerging regime of international criminal justice would

[8] Y. Shany, *Assessing the Effectiveness of International Courts*, Oxford University Press, 2013.
[9] A. M. Slaughter, *A New World Order*, Princeton University Press, 2004.

find its place in the arrays of peace and security maintenance towards the configuration of law enforcement mandates in the field operations, civilian protection duties, relocation and rehabilitation of communities, and domestic reforms of security governance, or rule of law sectors (army, police, and judiciary), require all of them particular attention by the decision-making. The impact of international governance institutions on criminal behaviour of States and individuals in situations of war and crime has been extensively dealt by valuable observers, while the complementary interaction between them is still open for debate. In spite of their small sized character and the very few resources allocated outside the constellation of the UN entities, the institutions established under the Rome Statute regime have the potential to re-propose new approaches for the preservation of the international legal and political order. Such influence depends on several factors, and the most important of them deserve to be restated and require discussions. There are no doubts of the potential for the UN to play a key role in the strengthening of national justice systems by increasing the importance of the Rome Statute in the rule of law programming and development aid, including the security sector reforms of shattered domestic systems. The establishment by the UN Human Rights Council (UNHRC) of inquiry commissions in the situations where the International Criminal Court (ICC) is investigating would also benefit the collection of information and evidence for its judicial activities. Another important role for the UN would be the configuration of mandates on the ground supporting the activities of the Court as a prerequisite of an architecture fostering peace and justice in the context of human security. The current challenge is to provide real protection and halt the enduring violence in multiple situations of war and crime, while following judicial decisions enforcing the rule of law. The ideal would be that judicial decisions would not be neutralized by political approaches, but instead supported by legal and political responsibilities. But is this really the case?

Flawed Civilian Protection Duties Applied on the Ground

An extension of capacity-building in conflict and post-conflict situations towards law enforcement and civilian protection measures is required. The simple question is: *how?* An initial step for the regime of international criminal justice would be to receive immediate support in the field operations by the political configurations of the peace enforcement and peace building mandates of the UN Security Council. The responsibility to protect civilians in conflict zones with “all necessary measures” and the new language used for the right of humanitarian intervention (RtoP or R2P) are characterized by flawed decision-making based on the interests and alliances within political organs, and not upon an established legal procedure of binding character as a prerequisite of democratic governance. The same limitation applies to the humanitarian escalations referred to a treaty-based organization dealing with crimes internationally recognized, which jurisdiction struggles to hold accountable non-states actors without reliable law enforcement measures. Besides, the support and cooperation falling under the referrals to international criminal justice precludes any binding character of political organs including their responsibility. The same limits apply in the configuration of mandates on the ground, where the configuration of peace enforcement would not take in consideration appropriately the international judicial activities and its outcomes. In other words, are we simply dealing with the arrays of “symbolic politics” of law enforcement, or can we refer to a “paradigm in the making” of governance systems dealing with sensitive human security matters?

We are aware that in the context of global order, international regimes simply deal with the governance without a government, depending on their provisions, policy formulation, and the cooperation with their stakeholders and partners. The lasting struggle for the legal doctrine delineating domestic and international

responsibilities in situations of war and crime brought some results but there is still a long way ahead. Further progress depends on the jurisprudence of legal institutions and on the determination to enforce the rule of law and the standards of human rights at domestic and international levels. The dilemma is the governance of political transitions that are internal to collapsed nation-states and their failure vis-à-vis the security of individuals during civil wars.[10] In situations of war and crime, the engagement in military actions by States and global actors would appear legal but not fully legitimate, while promising unrealistic civilian protection duties during humanitarian interventions. The same concern is valid for the governance of conflicts between States, or *inter*-state conflicts, as in the case of the commission of the crime of aggression. Such governance also represents a controversial "paradigm in the making" for complementary global regimes if we only consider the triggering mechanisms between the UN Security Council and the International Criminal Court respectively dealing with the accountability of States and individuals, which received further postponement by the political forces putting them in place and enforcing them.

The current challenges in the international legal order between statehood, sovereignty, and international governance deserve discussion, including the transition of international security and the use of military force. National security systems based on oppressive security are no longer tolerated by their own citizens. In situations of war characterized by humanitarian violations the security sectors are a source of widespread insecurity by themselves. In several countries in Africa and in the Arab world for instance, the political transitions are characterized by the ambition to accomplish civil States and democratic governance. The civilian revolutions against dictatorial regimes require a deep understanding of the local actors in order to provide appropriate support and civilian protection measures, while fighting against the impunity of serious crimes. The international (military) responses focusing on old methods of security, whereas in large-scale humanitarian crisis the security systems have collapsed, or are simply in the hands of autocratic and dictatorial regimes or have always been inexistent, are controversial and not sustainable in the search of democratic order and stability.[11] The current military engagements characterizing the international responses in internal armed conflicts undermine the credibility of multilateral treaties fostering stability and the rule of law, including the international governance institutions deriving from them.

The main issue is that the prevention of serious humanitarian breaches and the protection of civilians during difficult political transitions are currently applied towards international security measures of militarization. There are serious doubts that such an approach is a reliable preventive measure able to challenge the mentality of war and violence during armed conflicts of non-international character. Moreover, does global solidarity mean that military coalitions have the potential to challenge the ideology of despotism and terrorism? The controversial policy issue is also related to the governance of terrorism and the use of weapons of mass destruction, including other serious global threats which have been left aside from any multilateral system. The fight against terrorism or "war on terror" against the invisible enemy characterized the "fiction" of ideology in the security policy of the US, with Osama Bin Laden wanted death or alive which has been repeated in the Libyan situation. Such approaches have undermined universal values shared by the world community. Torture, imprisonment, liquidations, and other methods used by secret intelligence have violated the basic requirements of human rights law creating further extremisms and international fracture. The problem is that terrorism, as an international

[10] S. Al-Bulushi, A. Branch, *In Search of Justice: The ICC and Power Politics*, 2010, at 4, accessible at: www.almasryalyoum.com
[11] D. Archibugi, 'The Rule of Law and Democracy', in *European Journal of International Relations*, 2004, Vol. 10(3), at 462.

security threat, including its legal definition as international crime, is only at its initial stage of being considered in multilateral governance systems.

The Meaning of Complementary Global Regimes

In contrast with the traditional meaning of domestic governance of nation-states, which refers to decision-making defining expectations, granting public powers, or verifying performance in domestic governing activities, we are well aware that the term *global governance* denotes the regulation of international relations between independent and sovereign States in the absence of a supranational authority. There is generally agreement between the different schools of governance that the extreme challenges taking place in societies in transition, combined with the shortcomings of domestic jurisdictions, require solid rather than symbolic international governance institutions based on the principles of integrity and universality. The mission of such institutions of universal character is to preserve norms and values internationally recognized for the sake of individual rights, while implementing strategies on matters of mutual concern and public good under the premises of "effective" multilateralism. The last decades have been characterized by several shortcomings of multilateral options. The systemic crisis of governance institutions became more complex with the economic and financial break downs that occurred at domestic and global levels. Nevertheless, while new opportunities arise for the governance systems of threats and crimes, on which the States may rely in case of serious domestic shortcomings, we are still far from the realization of any supranational system, which current interaction is only based on the early formation of mutual interests, including agreements and arrangements of cooperation based on secondary law, e.g. the relationship agreement between the United Nations and the International Criminal Court.

In any case, the fact that there is not a world government, but rather multilateral settings to debate issues and determine collective course of actions, it does not mean that the international community is not responsible to improve democratic legitimacy of international governance institutions. On the contrary, such legitimacy depends on democratization processes balancing powers between complementary public authorities, while also defining their policies and their legal responsibilities. In order to explore the current standpoint of such democratic processes this article approaches the controversial long-running debates: (a) on peace and justice priorities; (b) on the law enforcement and cooperation dilemmas; (c) on the human rights defence and implementation of human security measures; (d) on the preservation of the rule of law at domestic and global levels; (e) on the political determinations of implementing interactions in conflict and post-conflict situations where complementary global actors are currently involved, in other words, the nature of the responsibilities of cooperation those complementary governance institutions might share in the middle and long terms, and which require further debate in international political *fora* on the nature, identification, prevention, and prosecution of mass atrocity crimes.

The search of a definition of complementary global regimes would be the concrete efforts for further progress of a universal constitution of the world community. This article emphasizes the necessity to define the meaning of global complementary regimes fostering peace, justice, and security towards constitutional measures. It debates the global humanitarian policy of interventions and the preparedness of international governance institutions dealing with mass atrocity crimes and aggression, including their public authority, delimitation of competence and responsibility. It contributes to the contemporary visions for the preservation of the international legal and political order, including the capacity-building of the international community governing *intra* and *inter*-state conflicts on the ground, much more than as distant observers, or with militarized international

responses. The policy formulation of interaction strategies between multilateral premises of universal character, dealing with international threats and crimes deserves debate for several reasons. A constitutional strategy at international level has the potential to influence national constitutions and vice versa. Such a strategy would neutralize the risks of undemocratic positions compromising judicial decisions and the important role of justice, which simply deserves a place in the arrays of international peace and security. On the other hand, the visibility of such a strategy would harmonize universal values in the different legal systems and traditions of the world community. The efforts should focus on keeping pace of the dialogue with local communities and civil society, including regional intergovernmental organizations. The constant interaction between multilateral political actors enforcing international governance institutions is fundamental. In any case, the main responsibility remains in the hands of modern nation-states approaching such important issues in their constitutions and legal systems, while challenging the international legal order and vice versa.

In a few words, the international responsibilities to "prevent", "react", and "rebuild" in situations of war and crime need implementations. In the emerging governance of complementary global regimes two main factors require new orientations: the current shift in international relations after post-cold war characterized by a different nature of political transitions, regime clashes and warfare, and the necessity for global governance institutions to interact with each other on consensus and strategy building, including resource sharing, exchange of expertise, and lessons learned. The practice applied on the ground in conflict and post-conflict situations during the so-called humanitarian escalations of *last resort* deriving from violent political transitions, shows that the principles of responsibility and accountability wait for configuration and implementation of civilian protection duties, including law enforcement engagements in accordance with the judicial outcomes of an independent international judiciary. The dilemma is whether modern nation-states are willing to adjust their constitutional parameters to universal values, preserving the legal and political order based on national and international responsibilities, challenging the *status quo* of international relations, not exclusively based on their own economic or strategic interests of political realism, which as we know, prioritizes national interest and security, over ideology, moral concerns, and political and social reconstructions. Another important aspect is to revisit the premises of the global architecture dealing with war and crimes which seem to be paralysed by the full rejection of the rule of law considering the new settlement of global militarisation and the failure of peaceful diplomacy among superpowers (US, China, Russia, and Europe).

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