THE ROLE OF RULE OF LAW AND JUSTICE IN THE WAR-TORN REGION OF DARFUR FOR A SUSTAINABLE PEACE PROCESS IN SUDAN

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1. INTRODUCTION: BACKGROUND OF THE CONFLICT AND EMERGING REALITIES

The humanitarian and human rights breaches in the worn-torn region of Darfur are considered a high-profile issue in the international agenda of peace and security not only because its appealing statistic of systematic violations – more than 200,000 people are estimated to have died and more than 2 millions displaced[1] – but also due to its complex interlinked issues, since the deterioration of the conflict in 2003. Gross human rights violations have taken place: unlawful attacks on civilians leading to massive and forced displacement of tribes and ethnic cleansing; rapes and other forms of sexual violence; denial of access to humanitarian assistance; abductions, killings, recruitment of child soldiers; arbitrary arrest, torture, ill-treatment; many of them qualified not only as 'grave breaches' of the Geneva Conventions of 1949 and its 1977 Protocols but also as 'war crimes'[2] and 'crimes against humanity.'[3]

Today, violence has increased and the situation has transformed from a highly destructive armed conflict between rebels and the government[4] – trough allied paramilitia *janjaweed* – into a violent scramble for power and resources involving governments forces (including the National Congress Party – NCP – which limited an opposition to emerge while resettling key allies on cleared land, accelerating expropriation of land from its traditional owners), pro-militias, various rebels and former rebel factions and bandits. Also, deterioration of the Arab and non-Arab relations, the rise in the Arab-Arab conflict as well as a potential Arab insurgency are at stake. In addition, a latent spill-over effects into not only neighboring countries as Chad, Central African Republic and Libya has taken place, but also the spillover into Kordofan, inside Sudan, has also started, mitigating the situation and spreading the conflict inside the territory, alarming a possible new civil war. In between, since the beginning of 2007, more then 240,000 people have been newly displaced and re-displaced[5], sexual assaults and targeting of humanitarian agencies continues to happen.

Moreover, the Darfur Peace Agreement (DPA), signed on May 5th 2006, does not encompass all parties of the hostilities, which is of great concern, since forcing the agreement's implementation could increase violence and non-signatories rebel movements have further splintered. Making matters worse, even the DPA signatories, especially the Sudan Liberation Army (SLA) have failure to implement the agreement, being responsible for attacks on civilians, on Internally Displaced Persons (IDPs) camps, on peace forces of the African Mission in Sudan (AMIS) and on humanitarian relief workers. As a consequence, the violent rates in IDPs camps has increased, with residents manipulated by different rebels while the government implement a forcible return to unsecure areas.

Notwithstanding, since its independence in 1956, Sudan has gone throughout years of civil war between the North and the South due to economic, social and political breakdown. Impunity, corruption, lack of legitimacy of the State with lack of southern representation led to rebel movements for a democratic Sudan, with different platforms, concentrated mainly in the SPLM (Sudan People's Liberation Movement), spreading its conflict to the darfurians.[6] In fact, the close linkage

between the Darfur conflict and the North-South peace process is crucial to a holistic understanding of the historic roots of the problem. *"If the Darfur conflict had not occurred, the North-South peace process would not have taken place. Thus, the future of the Comprehensive Peace Agreement (CPA) depends on bringing peace to Darfur"*[7] If any approach to peace building and fully implementation of the CPA is to be done in Sudan, it has to consider the stability of the Darfur region at the first place.

In Fact, Darfur is an epicentre of three overlapping conflicts: the Darfur rebel movement and the government and its paramilitias; the fighting between Chad and Sudan in hosting and supporting the other's rebellions; and localized conflicts, centred on land tensions between sedentary and nomadic tribes.

Furthermore, the international community has closed its eyes over the atrocities committed in Darfur and the international media has also portraying it as a merely conflict between Arabs and Africans. In the first place, Darfur Community is a complex society that integrates followers of Arab religion and native African tribes, nomads, farmers, etc, each one with different cultures and costumes. Past UN actions and the regional and international response has been settled, as the peacekeeping mission of the African Union (AMIS), in 2004 after the signing of the CPA; Resolution 1547 of the UN Security Council (UNSC) that established the UN Mission in Sudan (UNMIS), among many others. But they were in a whole a failure to address the issue properly, especially the peacekeeping forces were not effective, regarding primarily its implementation and the failure of disarmament since small arms proliferations still on the ground. Also, attempts of embargos and sanctions were vetoed by China, one of the main destinies of the Sudanese oil; and the Arab League playing a passive role in addressing the issue.

In addition, the failure of the government of Sudan in bringing perpetrator of abuses to *justice* is to be considered in the first place. Faced with international pressure, the government has attempted to create an impression of prosecution by setting up a number of powerless committees and commissions as a substitute for the judicial system and as a mean of evading the *rule of law,* per example, the Rape Committee, which does not work properly. In a region where impunity prevails, there is a vital need for accountability. However, in Darfur, a more secure environment still *condition sine qua non* to address its reconstruction in a foreseeable future.

A political settlement is needed in order to foster peace and stability in the region. The strategy on the jointly AU/UN mission – UNAMID[8] –, the first hybrid peace mission to be drown, must cope with this emerging reality; which differs from when the DPA was signed. In this sense, it is crucial to encompass a *political solution* and a broader and inclusive participation (including not only women and IDPs, but also Arab and non-Arab tribes, addressing all voices involved in the conflict), in order to address the root causes and focus on a victim/civilian approach for the further peace talks while settling the Darfur-Darfur Dialogue and Consultation (DDD-C), established in the DPA. Core issues that were left to the DDD-C, not addressed in the DPA, must be discussed if a sustainable peace is to be achieved, among them: land tenure and use, the security sector reform, the administrative structure reform and the enabling of a sustainable and safe return and reintegration of the displaced.

This section has focused mainly on the current statement of the problem as well as some historical background for a better understanding of the rule of law and justice approach (including transitional justice) that is the aim of the present essay. Far from being conclusive, this approach to the problem is an important tool for a sustainable peace process in an ongoing conflict region that has suffered for so long.

2. THE PRINCIPLE OF THE RESPONSIBILITY TO PROTECT AND THE DARFUR CONFLICT

The killing, destruction and forcible displacement of a certain minority group are a historical reality as well as the failure of the world to do much about it. The support of the state on the mass killings and displacement in western Sudan is not different. The continuing of the use of ethnic cleansing as a national security strategy by certain states and the avoidance of the international community to respond in cases where they do not think their interest are at stake still a reality. Also, their capacity to act is limited and *ad hoc*, combining poor planning and deliberate political choices. Indeed, genocide is a historical fact and still a present danger, as it was on the failure to intervene in Rwanda and the frustration over inaction to stop the mass killing in Darfur, not typified by the international community as genocide as it should have been done[9].

This way, previous disasters urged new thinking, trying to address three variants – the ri-

ght to prevent, the right to react and the right to rebuild, all shaping the so called *responsibility to protect* (R2P). This concept was formally mentioned in the 2005 World Summit Outcome, on the UN General Assembly, in its sixtieth session (A/RES/60/1)[10], and affirms that it is the basic obligation of States to protect its population against war crimes, genocide, crimes against humanity, ethnic cleansing, etc (this is the first part of the R2P, encompassing the basic obligations of sates towards its own population); but when a certain State fail or is unwilling to do so, or even if it is the source of the threat (as in the Darfur case), it is the responsibility of the international community to stop mass atrocities, in favor of the human person individually (this is the second part, addressing the responsibility of the international community to respond – economically, politically, diplomatically and even military). The UN General Assembly put it more formally in its Outcome Document of the 2005 Summit:

> Each individual State has the responsibility to protect its population from genocide, war crimes, ethnic cleansing, and crimes against humanity. (…) The international community through the United Nations also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, (…), to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action in a timely and decisive manner, through the Security Council (…) on a case-by-case basis and in cooperation with relevant regional organizations, should peaceful means be inadequate and national authorities manifestly fail to protect their population (…).[11]

It encompasses the principles of the classic concept of humanitarianism in the 1980 and 1990's: humanity, neutrality, impartiality and independence. It is also a right based approach, emphasizing on individuals rights. The priority is to protect the rights of people over protecting the rights of states to do as they please. In this sense, international action is warranted for a range of actions even if they do not meet a formal definition of genocide. In the case of Darfur, the International Commission of Inquiry, which investigated the mass killings on behalf of the United Nations, in January 2005, reached a softer conclusion that both the Sudanese government and its paramilitias *Janjaweed* were responsible for serious violations of international humanitarian and human rights law.

The Darfur conflict is an extremely difficult one to reach a solution that is guaranteed to work, especially due to its historical background of the North-South Sudanese civil war and the emerging realities at stake. In fact, recalling the international responsibility to protect and setting policies requires a frank understanding of the choices and related risks. The guiding principle the international community should bear in mind in order to choose which action to take, is the lowest possible costs to the people who actually need protection, especially the huge amount of internally displaced persons inside Sudanese camps, which nowadays are being forced to return to unsecured areas.

For instance, one risk to consider is the pressure just to do something, as it happened on the signing of the DPA, which resulted in a rushed and incomplete agreement that left a political vacuum. Also, the DPA lack of legitimacy is to be considered as the CPA had the same problem, once it is limited to the NCP (on behalf of Khartoum government) and the SLA faction led by Minni Minawi (SLA/MM) and some other rebels (which have strongly resisted reopening the DPA talks). Even the Transitional Darfur Regional Authority (TDRA), the highest government body for the region, launched by the DPA, suffers from lack of legitimacy as well. An inclusive regional forum in this regard would be a tool in order to build a broad consensus on the future of the region, in parallel with the DDD-C.

Furthermore, the lack of a joint negotiating position among the non-signatories of the DPA is a serious problem. They have sent mixed signals and sometimes they appear to demand a reopening of the DPA, while other times acknowledging the DPA has valuable elements. At one side, the divided SLA urges for more power sharing and more compensation for the displaced; at the other, JEM (Justice and Equality Movement), the other rebel group, calls for a more decentralized national political structures, in order to create a more strong federal system. In fact, a simple annex to the DPA or a Protocol is unlikely to deal with these differences. A comprehensive political strategy to achieve a political and inclusive settlement in Darfur is an urgent need to end this human tragedy.

Nevertheless, the political will to take risks is one of the main obstacles to converting the responsibility to protect into a program of action. Firstly, the United Nations has failed to take strong action in the Security Council since China has adopted the role of Sudan's protector inside it. Besides, there is an urgent need to reinforce the already existing Resolutions of the UN Security

Council, especially Resolution 1564 (2004), that embargos the Sudanese petroleum; Resolution 1556 (2005) regarding the arms embargos and the authorization of a ban on Sudanese military flights; the Resolution 1591 (2005) that prohibits the main Sudanese persons that has been charged of crimes to travel and the creation of a pathway for sanctions on certain financial interests of the Sudanese leadership; the Resolution 1593 (2005) that has referred indicted war criminals to the International Criminal Court[12], among others. This last Resolution (1593) also requires that the government of Sudan cooperate fully with and provide any necessary assistance to the Court and to the Prosecutor[13].

Furthermore, Sudan Interim National Constitution includes a Bill of Rights that guarantees most of the rights contained in the international human rights treaty, including rights contained in international instruments that Sudan is not party, as the Convention Against Torture. Even the CPA contains a number of provisions relating to the protection of human rights, as well as the DPA, that contains an explicit section on human rights. Also, Khartoum has accepted the three-phased hybrid approach, in November 2006 in Addis Ababa, which the full deployment of the UNAMID would be the last one. Important as these steps may be, they have not proven adequate in ensuring effective protection on the ground. Gross violations of human rights and grave breaches of humanitarian law continue across the region.

3. THE RULE OF LAW AND JUSTICE APPROACH IN DARFUR TOWARDS A SUSTAINABLE PEACE PROCESS IN SUDAN

3.1. The rule of law approach

The emphasis on fostering rule of law in the international agenda has increased significantly over the years. Apart from being a paradoxical, vague and inherently complicated concept as well as controversial and an undefined common definition, it has an imperative value and a political statement when it comes to address its core elements on a conflict and post-conflict situation, as a mean and an end in itself[14].

Strengthening the importance of a broad/material rather then a narrow/formal concept of rule of law is imperative to address the present conflict at hand, in the sense that it embraces not only the 'law and order' approach (thin conception) but more importantly, the democratic approach, the individuals rights, the right to live with dignity and the right to justice, and a broader social welfare (thick conception). In this sense, Per Bergling observes that: "*Empowered with this knowledge, it will be easier to assess country-specific needs, set up realistic goals, formulate strategic and comprehensive programs, maintain focus in implementation, and determine success and failure*."[15]

Also, bearing in mind the promotion of rule of law as a crucial component of protecting fundamental human rights and diminish its violations, the broader concept defined by the former UN Secretary General in its 2004 Report entitled "*The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*" (following 'The Report') will be the essence of the rule of law approach to a sustainable peace in Sudan. It states:

> 'The rule of law' … refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[16]

3.2. The justice approach

Bearing in mind the past actions and the emerging realities of the Darfur conflict, a move towards a sustainable peace must enhance justice, especially viewed not only as a *prevention* to the denial of the conflict, spreading over the territory (as stated in the introduction) but also as a *trustful* and legitimate approach for civilians and rebel groups towards a inclusive and political settlement for the peace process. In this regard, the conception of justice also defined in the Report is valuable for the present conflict. It states: "'justice' *is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large*."[17]

3.3. The implications of the rule of law and justice approaches to the Darfur peace process

Implications of the rule of law and justice approach encompass: the nature of the conflict in order to draw the nature of the peace, the will of the parties, the identification of vulnerable groups, the role of community leaders and women, the condition and nature of the country's legal system and public institutions, the widespread and systematic violations, and the rule of law implications of the peace agreement[18].

Regarding the emerging specificities of the Darfur conflict addressed in the first part of this essay and bearing in mind the multi-dimensional complexities within it and the principle of the responsibility to protect, the implications of addressing the rule of law and justice approach to the issue must be seeing as a *continuum*, a work in progress, with a cross-cutting and comprehensive program of transitional justice, accountability and reconciliation together with the maintenance of a secure environment through the UNAMID.

In addition, strategies to implement the rule of law and peace in Darfur must enable a sustainable and safe return of the displaced, promoting not only human security but also policies for environmental sustainability due to the process of desertification, destruction of basic infrastructure, and competition for resources, especially water shortage. In this way, trust could be built progressively through a combination of capacity, developmental and security-building measures. Reintegration is vital and should be done together with the demilitarization and demobilization since the access to small weapons in the region continues widespread. It is difficult to build trust while ceasefire has still being violated. The UNAMID, working as a neutral third party of the conflict has an important role regarding this matter.

Moreover, it is needed the full and effective joint deployment of a correct number of the UNAMID's military and civilian personnel, aiming not only on the security sector reform, especially the police forces, and the implementation of a secure environment but also on the rebuild of trust and the legal system through capacitated personnel in a process of a Darfur-wide consultation, through which the views and wishes of all affected communities on an appropriate course of transitional justice can be heard. In this sense, this expertise could deal per example with the vital question of access to land and provide mechanisms for handling land disputes, providing clarification and consultancies of the various types of rights and responsibilities of different populations group with respect to land as Sudan does not have an uniform government policy on land tenure, while in Darfur it has tended to remain under tribal control.

As the Report of Concordis International on "Land Use and Tenure: a key to sustainable peace in Darfur" states the establishment *"through broader consultation, of a transparent, nationwide government policy on land tenure that takes into account regional variations in practice"*[19] In fact, native administration plays an important role in Darfur as they are responsible for both the management and disposition of tribal land. An initiative has been done in this regard, as the DPA appointed a Darfur Land Commission to deal with land uses policies and rules and also arbitrating land disputes. However, negotiations on the DDD-C must empower its mandate, incorporating, for instance, a "*commission of inquiry, with a clearly defined mandate and backed by laws enabling it to address land expropriation and augment to the local courts and the land commission's arbitration function*" [20]

Furthermore, efforts to foster a rule of law approach in a society that lacks rule of law tradition as seen by the occidental powers, as the Sudanese, might run to problems if not addressed in a comprehensive manner. In this sense, actions towards the rebuild of justice, trust and rule of law in a society must concern its ordinary people to whom those concerted efforts are drawn, in order to maintain coherence, and have a counter-effect of undermining the rule of law. In fact, fostering rule of law and justice within a society as a path to sustainable peace is a matter of cultural commitment together with institutional and legal structures. It must take into account the community's leadership commitments as well as legitimacy among the broader population, in power-sharing arrangements. Also, an inclusive approach to transitional justice ought to focus on a multi-lingual approach and the role of women.

3.4. Towards a incorporation of a transitional justice approach within the implications of the rule of law and justice approach

The NCP still hold the position of supporting the division and isolation of rebel movements, at least before the 2009 elections, stipulated in the

CPA. Also, a lasting peace requires more than a few additional signatories in the DPA, it must consolidate the rebel's positions. In this sense, the AU/UN team must take control of the peace dialogue process and create a framework for it. This must encompasses actors such as Eritrea, Chad, Central Africa Republic, Libya and other regional players as well as the SPLM, and even China and some important countries of the Arab League. In fact, several issues were left from the DPA that must be tackled in order to revitalize the peace process. First, as stated before, it is needed to unify the rebel movements as a prerequisite for successful negotiations. If they cannot unify, they have, at least, to unite into recognizable blocks with coherent platforms.[21] A wide Conference that encompasses not only rebel leaders of different factions and movements but also a wide range of stakeholders from civil society, the IDP camps, political parties, women and Arab groups, could be a possibility. To hold this broadly inclusive conference, UNAMID should offer enough security for the foreseeable meeting.

In this regard, the peace talks must be as inclusive as possible; this is a second step to be considered, especially in the DDD-C. The DPA lacks legitimacy for darfurians, especially as it left the local authority with the NCP, providing a small power-sharing. The dialogue must encompass inter-tribal reconciliation, distinguishing genuine tribal leaders, and the emerging Arab insurgency inside the territory. In addition, the representation of women and IDP population in the reconciliation and reconstruction process is vital, as they are more than 80 per cent of the population, their concern must be heard. In this sense, they demand a wider representation and also a degree of greater participation in the Dialogue.

In the third place, the peace strategy should learn from past experiences, especially with the Abuja mistakes and make reasonable deadlines as a negotiating tactic in order to have enough time for the building of confidence and trust among the parties if peace talks are to succeed. Lastly, some areas must be addressed in the UNAMID mandate, such as power sharing compensations and disarmament, especially of the *Janjaweed*.

This way, the new peace talks inside the region will have to encompass justice and accountability mechanisms as well as a broader representation of all parties. Within the mandate of the UNAMID, it clearly tackle its role in the preparation of the peace negotiations, creating an atmosphere favorable for them in pursuit of a political progress, which is the third phase appointed by Jan Eliasson, the United Nations Secretary General Special Envoy for Darfur, together with his African Union counterpart Salim Ahmed Salim.[22] For that end, a concerted action and framework in an attempt to unify the platforms of rebels groups for peace negotiations to come is essential, as stated above.

In fact, if a long-term maintenance of peace is to be achieved, the population must be confident that redress of fundamental rights breaches they have suffered can be reached trough legitimate structures for the resolution of the dispute and a fair administration of justice. For this end, fostering rule of law in the war-torn region must include the pursuit of genuine political will among the parties on the table, bearing in mind not only their immediate human security needs, but also addressing the root causes that often is left for future negotiations, as the DPA left out main problems for the Darfur-dialogue to handle. In this sense, the idea of transitional justice plays an important role for building trust among darfurians and the government as well as among the rebels, if a sustainable peace is to take place. The 2004 Report of the UNSG states its notion as

> (…) a full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. This may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth seeking, institutional reform, vetting and dismissals, or a combination thereof.[23]

Taking this concept into account and applying its imperatives in the context of the present conflict, it is worth noting that a foreseeable scenario for justice and reconciliation in Sudan must encompass transitional justice process. In the specific case of Darfur, such process must be legitimate, accountable and focus on the underlying problems rather then a pre-package solution, where pre-experiences should be used as guidelines and where a large process of victims and public consultation must be carried out. This way, there is an emerging need for a multi-level approach of transitional justices, interlinked with each other.

In the local or regional level, the traditional tribal and native administration practices such as the *judiyya* system that encompasses traditional resolution of dispute through local elder chief is to be considered to a certain extend, as the high

politization and government influences on those mechanisms has increased. The legitimacy of tribal leaders rests on its election by its people, not pointed by the government. However, as the native administration is based primarily on customary law and with the increase demand on the region for a national respond to crimes committed, especially regarding the women's rights and gender-based violence or issues related to land tenure, these traditional mechanisms are no longer a suitable possibility for the seek of justice. For instance, in Rwanda, sexual violence against women was dealt with national courts and war crimes tribunals. Also, in the one hand, the Rwandese *gacaca* system[24], in the local level, was a good initiative in creating an atmosphere of better dialogue between Tutsis and Hutu people in some places. In fact, gacacas gain much of their legitimacy from their identification with tradition and their basis on customary notions of accountability and responsibility. On the other hand, it created an environment for further tensions. These conventional machineries if addressed cautiously could be an important tool to foster a better dialogue, rebuild trust, especially in a low-level ethnic dispute.

The inter-group dynamics and tribal clashes demands a need for regional reconciliation linked with a national reconciliation, requiring a national level resolution. The national court system in Sudan has jurisdiction over Darfur, including human rights crimes. However, theses courts, due to lack of transparency and independence, shortage of legal staff and judges, as well as the institutional high political level, have been inefficient. In addition, the government has created some judicial and quasi-judicial bodies to tackle the human rights violations in Darfur, as the Special Criminal Courts on the events in Darfur (SCCED), the National Commission of Inquiry, and others *Ad hoc* Investigatory Committees. Those organs are in fact a *façade* of the government in order to harmonize its commitments with the international community. Also, its lack of political will and perceived policies to maintain or postpone the situation still is the main problem for creating dysfunctional institutions. A national approach to an effective justice system is among the urgent priorities if efforts to governance reforms are to take place successfully. In this sense, rebuilding the domestic security and justice capabilities – including polices, courts and prisons – is crucial for a minimal functional justice. Local actors play an important role in this regard to develop effective, respected and legitimate security institutions.

Furthermore, in the international/national level, accountability options for large scale victimization, as in the case of Darfur, could be better addressed trough truth commissions in conjunction with international prosecutions. The UN Security Council, in its Resolution 1593 of 31 March 2005, referred the situation to the International Criminal Court (ICC), which issued arrest warrants against former Minister of State for the Interior of the Government of Sudan, Ahmad Harun, and *Janjaweed* commander Ali Muhammad Ali Abd-Al-Rahman for crimes against humanity and war crimes (including, forced displacement, rape and mass killings), in April 2007[25]. To date, the government of Sudan has not delivery neither of them. Making matters worse, Harun continued in the government in a vital position to deal with the reconciliation and justice process, as the current Ministry of Humanitarian Affair. How come a country can have as a head of the humanitarian affairs someone charged for crimes against humanity and war crimes? Those crimes are considered *jus cogens* international crimes and demand justice. As Bassiouni clearly states: "*An international crime that raises to the level of jus cogens induces an obligation erga omnes which is non-derogable*."[26] *Obligation erga omnes* presume the duty to prosecute *jus cogens* international crimes, impunity can not be granted, as a result, amnesty for theses crimes is not an option.

Nonetheless, Sudan's Interim Constitution guarantees most of international treaties it has signed, even those it did not sign, as the Convention Against Torture. However, as stated above, the national judicial system is unable and unwilling to prosecute *jus cogens* international crimes. In this sense, the ICC plays an important role. In fact, as another follow-up of the Nuremberg Tribunal, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity was adopted by the General Assembly of the United Nations (UNGA) on 26 November 1968. In 1971, the UNGA expressed its conviction that the effective punishment of war crimes and crimes against humanity was important for ending such crimes and for promoting peace and international security. By 1973, the Assembly proclaimed some principles of international cooperation regarding detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. But this is far from being a comprehensive solution. For instance, in two and a half years, the ICC has issued indictments for only two persons and the international community must urge Sudan government to fully

cooperate with the investigatory commissions. It is necessary that the ICC continues its investigation, not only during the period of 2003 and 2004 but also for recent atrocities committed. In this regard, recently (in July 2008), the Prosecutor of the ICC urged a warrant of arrest for Sudanese President Omar al-Bashir for genocide, crimes against humanity and war crimes committed in Darfur[27]. This legal strategy recalls the responsibility to protect that comes with risks for the fragile peace and security environment, such as making impossible the needed effective deployment of UNAMID, putting also at risk the humanitarian relief operations that keep alive more than two million people in Darfur.

Both national and international criminal system must reinforce each other, bearing in mind that the role of the international community on Sudan is not substitutive, but complementary. Yet, tribunals have not been the only institutional response offered by human rights advocates. An additional justice mechanism and reconciliation process will be necessary, as the establishment of Truth and Reconciliation Commissions (TRCs)[28]. Those commissions have focused on restoring the dignity of victims and survivors and producing a definite account of the past, applying a *restorative justice*[29] (opposing the retributive justice present in the international tribunals). Although powerful agents of accountability, trials are not as successful as commissions when it comes to acknowledging the suffering of victims. Also, as truth commissions are not procedurally limited to individual prosecution, their capacity to investigate past atrocities may be broader, offering a great complement to trials, in cases such as Darfur. Besides, commissions encourage victims, relatives and perpetrators to participate and in some instances offer them a public forum to do so. Also, TRCs operate for a specific period of time in a specific conflict, at the end of which they produce a report of their findings for public dissemination (producing an accurate public record of a country's past crimes).

As a matter of fact, TRCs may occupy a unique space between the state and the civil society, as they include greater inputs of NGOs and local leaders in the process. In addition, commissions could provide policy recommendations for legal and institutional reform and genuine reparation programs for victims, contributing to fostering rule of law and reconciliation. This way, the past is broadly discussed before the nation can move on, trying to avoid the poisoning of social relations. Besides, as TRCs are not placed as juridical bodies, they can use symbolic forms of punishment, such as shaming and humiliating perpetrators, providing accountability[30].

The prosecution of every accused would be not efficient in the case of Darfur also. Therefore addressing the past and promoting reconciliation through truth-seeking approaches should be an option to consider. In South Africa, the truth commission was an option for accountability of human rights violations and to put the past behind. In Sudan, as it was in South Africa, it is difficult to identify who are the victim and the perpetrator. However, in Sudan, where the State is accused of committed crimes against its own people, a Sudanese TRC would be essential in reestablishing trust among Sudanese population and must encompass a national element of political transformation. In fact, the TRC in South Africa, despite its limitations and problems, had an important symbolic function to provide accountability for crimes perpetrated that would be overlooked otherwise.[31] And this has an important value in the context not only on the Darfurian society, but also in the Sudanese society as a whole. Moreover, a key component of South Africa TRC, as a restorative justice, is to restore the dignity to survivors by publicly acknowledge their suffering, reviving social bonds destroyed during the period of violence.

Another characteristic of the TRC in South Africa that could apply for Sudan, regards its vast mandate, including the grant of amnesty for political objective crimes. Amnesties are linked with forgiveness, which is also a characteristic of the Sudanese society that could be explored. In addition, the election of Commissioners should be legitimate, credible, transparent and democratic. The TRC should enjoy independency from the government for this proposes, bearing in mind that in some transitions, the judiciary remains an enclave of the past regime, limiting the ability of victims to obtain redress.

Where the perpetrator population is large, as in Darfur, restrictions on resources might make unlikely to prosecute every single perpetrator. In such cases, TRCs would better apply then trials. Rwanda was also a good example of this use of the truth commission. Another characteristic linked to the Rwanda conflict regards budgetary constraints as well as the shortage of lawyers in the country, making it almost impossible to do a fair trial to all perpetrators. Tribunals, in particular, are especially costly.

4. FINAL REMARKS

The twentieth century enjoys the macabre distinction of having experienced the highest number of state-sponsored murders and mass killings in the history of humanity. The Darfur conflict is not an exception to that. The Nuremberg and Tokyo Trials as well as the UN Genocide Convention established the principle that individuals that perpetrate crimes against humanity, genocide and war crimes should be tried and punished for their actions. But again the political devices of the Cold War put human rights and humanitarian concerns aside. In fact, human rights law is still much weaker than international business and trade law as a component of international jurisprudence. Still, with the end of the bipolar world, the human rights discourse has gained strength. The 1990s put retributive justice as a core issue and has established two international war crimes tribunals (Rwanda and ex-Yugoslavia), followed by tribunals for sierra Leone, Congo, East Timor and the establishment of the ICC. Yet, restorative justice through Truth and Reconciliation Commissions were also and institutional response offered by human rights advocates, attempting nations to came to terms with their violent history.

In an attempt to conquer with the Sudanese past and the darfurians emerging realities, a rule of law and justice approach that encompass a broad and inclusive spectrum of peace negotiations is needed. That must be the main aim of UNAMID in creating an accurate atmosphere for the Darfur-dialogue (DDD-C). Also, an effective coordination between the multi-level approaches of transitional justice is imperative in order to create a sustainable peace in Sudan. The underlying principle of accountability measures addresses the ending of the process of victimization which implies the cessation of the conflict in itself. It is essential to notice that the peace talks and negotiations, in particular the establishment of transitional justice mechanisms did not have to wait until the cessation of the hostilities to be addressed, as the case of South Africa has shown. However, to achieve this goal, it is imperative that the unification of the platforms of the rebel/liberation movements be done, developing a common negotiation position, in order to foster a more inclusive government and a better power sharing strategies.

Bearing in mind a victim-centered approach and recalling the so-called Responsibility to Protect, the international response towards the atrocities occurred in Darfur need to be consistent and punitive measures should be taken if obstructions and unwillingness of the Sudan government continues to take place. A more active role must be taken especially by China, the US and other members of the UN Security Council, together with the Arab League in this regard, cooperating to develop a consensus for a political and concertized strategy, including application of punitive measures against those responsible, as the ICC have been done so far, especially charging the Sudanese President for genocide, war crime and crime against humanity; as well as the *Janjaweed* commander and the current Ministry of Humanitarian Affair, also charged for crimes against humanity and war crimes.

Furthermore, it is imperative the full deployment of UNAMID military and civil personnel in order to create a legitimate framework and a more secure ground for the peace talks, especially focusing on unifying the rebel movement; broader participation that includes key Darfur constituencies left out of past rounds, including Darfur's Arab tribes, IDP communities, women's group and civil society as a whole; strengthening the negotiation process and fully disarmament of the rebels and paramilitias, together with a functioning, well-monitoring and enforced ceasefire on both sides of Sudan and Chad border.

Any sustainable solution for the peace process in Darfur and, consequently, in Sudan must be politically and structurally practical, reinforcing the rule of law and fostering justice and reconciliation. Institutional responses are an important, though by no means sufficient, element of larger societal efforts to confront the past. Nevertheless, institutional mechanisms can make a difference, particularly when the retributive elements of tribunals are paired with the restorative dimension of truth commissions, which focus primarily on acknowledging the suffering of victims, providing a definite account of the past. The discussion of past violence is a step towards the building of trust and the reconstruction of society. In the eloquent words of Basiouni: "*To remember and to bring perpetrators to justice is a duty we owe to our own humanity and to the prevention of future violations of international humanitarian and human rights law*."[32]

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NOTES

1. UNAMID statistics. Available at <http://www.unamid.org>, last visited in 25th of January, 2008.
2. G**rave breaches** of the Conventions and Protocols are regarded as **war crimes**, as stated in the Protocol I "*expressis verbis*." Those are violations that represents a especial grave danger to humanity and if they continues to happen and if the international community does not sanction it, it could represents the collapse of the whole system. The definition of grave breaches and war crimes in the Conventions and Protocols has been inspired by the numerous violations of international humanitarian law committed during World War II and by the Nuremberg Law. However, the Geneva Law leaves entirely to states the responsibility for searching for violators of the Conventions and Protocols, for judging them, and if warranted, to sanction them. In fact, the Nuremberg Trials based on the definition in the London Charter that was published on August 8, 1945. Along with war crimes, the Charter also defined crimes against peace and crimes against humanity, which are often committed during wars and in concern with war crimes, but are different offenses under international public law. Under the Nuremberg Principles, war crimes are differs from crimes against peace as the later is characterized as planning, preparing, initiating, or waging a war of aggression, or a war in violation of international treaties, agreements, or assurances. The International Criminal Court is the Organization that can prosecute war crimes committed on or after July 1st, 2002. However, the court only has jurisdiction over these crimes where they are "*part of a plan or policy or as part of a large-scale commission of such crimes*" (Rome Statue, Part I, Article 8).
3. The Rome Statute Explanatory Memorandum states that crimes against humanity "*are particularly odious offences in that they constitute a serious attack on human dignity or grave humiliation or a degradation of one or more human beigns. They are not isolated or sporadic events, but are part of a government policy (although the perpetrators need not identify themselves with this policy) or of a wide practice of atrocities tolerated or condoned by a government or a de facto authority. However, murder, extermination, torture, rape, political, racial or religious prosecution and other humane acts reach the threshold of crime against humanity only if they are part of a widespread or systematic practice. Isolated inhumane acts of this nature may constitute grave infringements of human rights, or depending on circumstances, war crimes, but may fall short of failing into the category of crimes under discussion*." In fact, the Nuremberg and Tokyo trials and the UN Genocide Convention established the principle that perpetrators of crimes against humanity should be tried and punished for their actions. Indeed, the systematic persecution of one racial group by another, such as occurred during the South African apartheid government, was recognized as a crime against humanity by the United Nations General Assembly in 1976. The United Nations, especially the UN Security Council has a major responsibility in referring to the ICC cases related to crimes against humanity, war crimes, genocide and ethnic cleansing. In this way, the ICC has broad authority and jurisdiction for this cases. A crime against humanity is defined in Article 7.1 of the Rome Statute and must be part of a "*widespread or systematic attack directed against any civilian population*." In this sense, an individual crime on its own, or even a number of such crimes, would not fall under the Rome Statute unless they were the result of a State policy or an organizational policy, as it was the case of Darfur.
4. The first important innovation of the 1949 Conventions and the 1977 Protocols was the adoption of rules to protect civilian populations who have become more vulnerable in the new types of conflict. The second one was to provide more detailed protections in non-international armed conflicts, a more frequent occurrence since world War II, Protocol II supplements and develops article 3 common to the four Geneva Conventions of 1949, the only provision until then applicable to armed conflicts of a non-international character, which is the case in Sudan, although it has consequences and spill-over effects on neighboring countries.
5. International Crisis Group, *Darfur's New Security Reality,* African Report n.134/ 26 November 2007, at 01.
6. *See also*: Johnson, Douglas H. *The root causes of Sudan's Civil Wars*. International African Institute, London, 2003.
7. Riaka, Lago Gatjal. *Darfur conflict's connection to the North-south Peace Process*, Sudan Tribune, April 24th, 2007. Available at: <http www.sudantribune.com>, last visit in 20th of July, 2008.
8. Resolution 1769 of the United Nation Security Council, issued in 31 July 2007.
9. On December of 1948, the UN General Assembly approved the Convention on the Prevention and Pu-

nishment of the crime of Genocide and it entered into force on January 1951. The Convention establishes that genocide, whether committed in times of peace or war, is a crime under international law. This way, the scope of international humanitarian law was thus extended to violations committed in times of peace. In this sense, the Genocide Convention is an advance over the Nuremberg Charter, once it is not connected only in times of war. Also, the Convention confirms the key Nuremberg principle that establishes the individual penalty responsibility of responsible rulers, public officials or private individuals.

10. The Sudan government joined in the adoption of the World Summit Outcome, explicit accepting its responsibility to protect and pledging in accordance with it. Also, with its ratification of various Human Rights and Humanitarian law treaties, it has also accepted specific legal obligations that underpin this responsibility (These treaties include, for instance, the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Rights of the Child, the African charter on Human and People's Rights, and the four Geneva Conventions of 1949). In addition, in the signing of other treaties while not yet ratifying them, Sudan remains legally bound to refrain from acts that would defeat the purposes of those treaties (these include the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Rome Statue of the International Criminal Court).
11. UN General Assembly, Sixtieth Session, *2005 World Summit Outcome*, A/RES/60/1, 2005, para. 138.
12. UNSC Resolution 1674, adopted by the United Nations Security Council on 28 April 2006, "*reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity*." In fact, the Resolution commits the council to act to protect civilians in armed conflicts.
13. 51 persons among political and military authorities, leaders, etc., including the president Omar al-Bashir, have been identified as responsible for crimes committed in Darfur, as the investigations of the ICC, on the presidency of Moreno-Ocampo, has shown so far.
14. See Bergling, Per, *Rule of law in the international agenda: International support to Legal and Judicial Reform in the International Administration, Transition and Development Co-operation*, Intersentia, Oxford, 2006.
15. Bergling, *supra*, at 19.
16. Report of the United Nations Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies 2004. UNSG Report S/2004/ 616, at 04.
17. UNSG Report S/2004/ 616, *supra*, at 04.
18. See UNSG Report S/2004/ 616, *supra*.
19. Concordis International. *Land Use and Tenure: a key to sustainable peace in Darfur*, Concordis Papers I, May 2007, at 05.
20. International Crisis Report, *supra* note 2, at 26.
21. The unification of dissident factions of the SLA movement is especially recommended in order to unify the SLA military leadership.
22. The first phase is to unite all peace initiatives and the second entails shuttle diplomacy to Sudan government and the non-signatories of the DPA, as a part of the 'road map towards peace in Darfur' presented to the UN Security Council on 9 June 2007.
23. UNSG Report S/2004/ 616, *supra* note 8, at 04.
24. *Gacacas* are essentially popular tribunals rooted in local costumes, for lower-level perpetrators.
25. Identifying and punishing leaders individually of crimes against humanity and war crimes places individual guilt on key actors, organizers and institutions, avoiding collective guilty. In fact, trials are created first and foremost to assess and assign culpability. Tribunals focus on punishing perpetrators rather than recognizing victims, and thus are driven by the importance of establishing accountability.
26. Bassiouni, M C, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights in Post-Conflict Justice*, 2001, pp. 3-54, at 14.
27. These are the first time that charges of genocide against a head of state are brought before the ICC. The first time charges against genocide were brought against individuals were at the *ad hoc* Tribunals for ex-Yugoslavia and Rwanda, on the 90's. The Tribunal for ex-Yugoslavia was given the power to prosecute persons committing or ordering to be committed grave breaches of the 1949 Geneva Conventions, genocide, violations of the law of the Hague and crime against humanity (Nuremberg law). The Rwanda Tribunal was given similar power, except for the law of the Hague.
28. Nations in South America, Asia, Africa and Eastern Europe have adopted truth commissions as a way of coming to terms with painful pasts.

29. For further information on this matter see: JONES, Adam. *Genocide, war crimes and the West: history and complicity*. Intersentia, Oxford, 2007.
30. South Africa's final report morally condemned publicly the persons associated with the apartheid abuses.
31. See Concordis International, *Promoting Sustainable Peace in Sudan through Post-Conflict Justice and Reconciliation*, Concordis Papers VI, at 08.
32. Bassiouni, *Supra* note 15, at 54.