



# THE NEXUS BETWEEN INTERNATIONAL CRIMINAL JUSTICE AND POLITICAL STRATEGIES OF WAR

- THE ICC INDICTMENTS IN SUDAN -

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# **THE NEXUS BETWEEN INTERNATIONAL CRIMINAL JUSTICE AND POLITICAL STRATEGIES OF WAR**

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## Abbreviations

AMIS – African Union Mission in Sudan  
AU – African Union  
CoI – Commission of Inquiry on Darfur  
ABC – Abyei Boundary Commission  
CPA – Comprehensive Peace Agreement  
DPA – Darfur Peace Agreement  
DoP – Declaration of Principles  
DUP – Democratic Unionist Party  
GoNU – Government of National Unity  
GoS – Government of Sudan  
GoSS – Government of South Sudan  
ICC – International Criminal Court  
ICL – International Criminal Law  
IGAD – Inter-Governmental Authority on Development  
JEM – Justice and Equality Movement  
JIU’s – Joint Integrated Units  
LJM – Liberation and Justice Movement  
MHS – Mutually Hurting Stalemate  
MEO – Mutually Enforcing Opportunities  
NCP – National Congress Party  
NDA – National Democratic Alliance  
NIF – National Islamic Front  
NRF – National Resistance Front  
SAF – Sudanese Armed Forces  
SLM – Sudan Liberation Movement  
SLA – Sudan Liberation Army  
SLA/AW – Sudan Liberation Army, Abdel Wahid’s faction  
SLA/MM – Sudan Liberation Army, Minni Minawi’s faction  
SPLM – Sudan People Liberation Movement  
SPLA – Sudan People Liberation Army  
SSIM – South Sudan Independence Movement  
TDRA – Darfur Transitional Regional Authority  
UNAMID – United Nations-African Union Hybrid Operation in Darfur  
UNAMIS – United Nations Advance Mission in Sudan  
UNMIS – United Nations Mission in Sudan  
UNSC – United Nations Security Council

## INTRODUCTION

Justice and peace are not always mutually compatible goals. While justice is often identified as being one of the key pillars of a long lasting peace, there is a friction between the twin objectives. In the 1990's, after a reinvigorated international commitment to the fight against impunity, scholars, lawyers and political leaders started to debate the desirability of prosecutorial justice in unstable, conflict-ridden environments. In recent years the International Criminal Court (ICC) has brought new impetus to this "peace versus justice" debate. With the establishment of a permanent international tribunal, jurisdiction over international criminal law is no longer directly dependant on Security Council resolutions, as had been the case for the ICTY and ICTR<sup>1</sup>, and the time-consuming political process that accompanied the establishments of these *ad hoc* tribunals. As a result of this, the ICC has the capacity to respond much more swiftly to violations of international criminal law and thus influence ongoing conflicts (Kastner 2008:149-154). Where international justice used to be predominantly applied to post-conflict settings, it is now easier accessible while the actual violations are still taking place. Thus international criminal justice has the capacity to impact and affect ongoing conflicts. As the ICC is established to prosecute those individuals who bear greatest responsibility for international criminal violations, the Court does not shy away from indicting political and military leaders, still in power. Under these circumstances the very leaders that face trials are key figures in peace negotiations. Prosecutions in such cases thus impose the danger of resulting in non-cooperation, increased violence and prolonged conflict. On the other hand, the credible threat of such prosecutions might entice leaders to the negotiation table.

When the ICC issued an arrest warrant against Sudanese President al-Bashir in March of 2009, criticism against the Court started to abound. One of the most fervent opponents to al-Bashir's indictment has been the African Union (AU), which in response to investigations against the Sudanese President expressed that "in view of the delicate nature of the processes underway in the Sudan, approval by the Pre-Trial Chamber of the application by the ICC Prosecutor could seriously undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur and the promotion of long-lasting peace and reconciliation in the Sudan as a whole" (African Union 21 July 2008). Because of the possible consequences of the indictments against President al-Bashir, the African Union requested a deferral of the indictment to the UN Security Council (UNSC). The position of the AU has found resonance with important members of the Security Council, such as Russia and China, that have also expressed their concern over the consequences of ICC indictments in Darfur on the local peace process (Oette 2010:348).

In response to the request for a deferral and recent news of support for a deferral by permanent members of the Security Council (Financial Times 4 February 2011) the goal of my research is to investigate the justifiability of claims by the AU that suggest a disruptive effect of the indictments in Sudan on the peace process in Darfur. Aside from the claim-making, little systematic analysis has been initiated to investigate the actual effects of ICC indictments in Sudan up to date. However, examining ICC indictments in Sudan should not be limited to Darfur. Although the indictment themselves are solely aimed at targeting violations in Darfur, it cannot be assumed that it leaves the conflict and peace negotiations in South

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<sup>1</sup> The International Criminal Tribunal for the former Yugoslavia (ICTY) was established in 1993 to try war criminals of the Balkan conflict of the 1990's. The International Criminal Tribunal for Rwanda (ICTR) was established in 1994 and is set up to try top-level perpetrators of the Rwandan genocide

Sudan unaffected. This paper will thus take on a highly relational approach to studying the effects of ICC indictment in Sudan, assuming a strong and interdependent relation between the Government of Sudan, the ICC and the Insurgent Regions of Sudan; Darfur and South-Sudan.

### **I Academic Debate and Relevance**

While international criminal justice became an increasingly important element of international politics in the course of the 1990's, academics, politicians, peace mediators, and human rights advocates started debating the nexus between justice and peace. The central component of this debate centered around the question of whether justice should still be pursued if this would lead to a prolonging of violent conflict, and thus human suffering. In contemporary conflicts, negotiations have become the dominant form of conflict settlement as opposed to military victories that often ended conflict during the first half of the 20<sup>th</sup> century. When peace negotiations are taking place, prosecutions of high ranking officials run the risk of obscuring peace and stability. As a result of this "post-Nuremberg pattern of justice", in which prosecutions are aimed at political and military leaders that still have their power base, the objectives of peace and justice are ever more interrelated (Akhavan 2009:625-627). This shift in the nature of conflict-settlement, have led some scholars to believe that our conventional thoughts on morality, in which prosecution is the indisputable higher good should be reclaimed by new values that take into consideration the need to end atrocities and stabilize societies. In this line of thought prosecutions are only desirable when they are compatible with the peace process and the greater good of building a stable society, making timing of prosecution something to take into account (e.g., Awol Kassim Allo 2009, Jose Zalaquett 1991).

Other scholars, mostly with a judicial background argue that while the sacrifice of justice for peace might have short term benefits, justice should be seen as a vital element for the building of a stable society and the establishment of long lasting peace. Or in the words of war crimes expert and professor of law, M. Cherif Bassiouni: "if peace is not intended to be a brief interlude between conflicts, then in order to avoid future conflict, it must encompass what justice is intended to accomplish: prevent, deter, punish, and rehabilitate" (1997:13). Nick Grono, deputy president of International Crisis Group, also highlights the importance of international prosecutions as a deterrent for future violations. In his line of argumentation, international prosecutions send out a very strong message world-wide, that the international community will not stand by and let impunity reign. Instead the prevalence of international justice can be a strong disincentive for the use of large scale violence (2007). From this point of view justice thus contributes to peace by discouraging grave breaches of International Criminal Law.

The scholarly literature centered around the subject of ICC indictments and peace in Darfur largely calls for support for ICC indictments. However the main concern that surfaces in these papers is not so much related to the possible effects of the indictments on the peace processes in Sudan. Instead, encouragements for ICC prosecutions in Sudan are much more related to the fear that a deferral might threaten the international standing of the Court and damage its reputation (Reynolds 2010; Udombana 2005; Kastner 2008). Political scientist Mary T. Reynolds furthermore highlights the importance of safeguarding the future effectiveness of the ICC and the prevalence of International Criminal Justice. She argues that the work of the ICC in Sudan is crucial in this regard as it sets the tone for an international political climate that either advances International Criminal Law or obscures it (Reynolds 2010). Reynolds line of argumentation finds resonance with Rick Dicker, the director of the International Justice Program at Human Rights Watch, who speaks against a possible deferral of prosecutions in Darfur arguing that:

*“If the UN were to decide that it would allow a Government to bully it into silence in confining its own human rights reporting (...) I think that would be a huge step back for the UN, its commitment to human rights, and its credibility (UN press release, September 19 2008).*

Although little scholarly literature on the relation between ICC indictments in Sudan and the conflict in Darfur exists, Kastner recognizes that the indictments might negatively impact on the Darfur peace process. The investigations against President al-Bashir are a particular cause for concern according to Kastner, as leaders, faced with prosecutorial trials, can feel like they have “nothing to lose” and push for an all-out victory (2008:178). Moreover, Kastner highlights that the work of the ICC in Sudan might have detrimental effects on peace missions in the region as the GoS might fear that international staff will collaborate with the ICC for the arrest of key individuals (Kastner 2008:180). Despite these possible effects of ICC indictments on peace and stability in Sudan, Kastner too argues that the ICC should continue its work in Sudan.

## **II Research question**

As the academic literature on the subject of ICC indictments in Sudan has failed to include a systematic examination of the effects of ICC indictments on peace and stability in Sudan, this paper aims to bridge this gap by examining the relation between the ICC indictments and the peace processes in Sudan up to date. The focal point of this study is to analyze patterns of change within the political strategy of the GoS towards the peace processes in Darfur and South Sudan. The central question guiding me in this research is:

*To what extent and how have the ICC indictments affected the political strategy of the GoS towards the peace processes in Darfur and South Sudan?*

## **III Methodology**

This thesis is primarily founded on document-based research. Reports from the International Criminal Court, the Secretary-General on the Sudan and the UN Panel of experts on the Sudan have been central in this investigation. In these reports the peace processes in Sudan have been extensively documented year by year, giving me the opportunity to identify patterns of change in Sudan’s conflict dynamics throughout the years. The research also relies on reports from renowned international think-tanks such as Human Rights Watch and the International Crisis Group. In spite of limited access to conflict zones in Sudan reports by these organisations give a rather concise picture on the peace process in Sudan since 2007. Lastly news reports from the Sudan Tribune have enabled me to give an up-to-date analysis on the peace processes in Sudan.

## **IV Limitations**

As this research is primarily elite-level orientated I have not been able to conduct first-hand investigations and thus I have been subjected to second-hand interpretations and documenting. Another possible shortcoming of this research is my inability to speak Arabic, limiting my access to recourses such as Sudanese newspapers, reports and Government statements. As a result of this, my research is based primarily on western documentation and thus inherently poses the risk of over-representing western perceptions. However, as much of the reports are largely based on on-ground interviews with Sudanese stakeholders to the conflict, I have managed to integrate Sudanese perceptions on the conflicts as well, albeit to a limited extent.

## **V Chapter Overview**

This thesis is divided into five chapters. In the first chapter, the theoretic framework on which the paper is based is presented. The chapter will furthermore elaborate on and clarify analytic concepts used throughout the paper. The second chapter provides the general framework of the historic and political context to the violent insurgencies in Sudan. In addition, the chapter gives a descriptive analysis to the formation and operation of the insurgent movements in South Sudan and Darfur. The third chapter presents an examination of the peace processes in South Sudan and Darfur, analyzing the most important developments in the peace processes before ICC indictments were issued in 2007. The main goal of the chapter is to examine the pre-indictment interdependent relation between the GoS and the Insurgent Regions and to establish what the political strategy of the GoS towards these borderlands was prior to the issuance of ICC indictments. The chapter that follows examines how and why the ICC started investigations in Sudan and how the GoS responded to ICC activities in word, and in its diplomatic/military interaction with the international community since 2005. An analysis of the inter-dependant relation between the GoS and the International Community, the UN and the ICC in particular, is central to this chapter. In the fifth and final chapter, I examine how and to what extent the military-, diplomatic- and framing-practices of the GoS towards he Insurgent Regions changed since the first ICC indictments were issued in 2007. The chapter is thus aimed at examining patterns of change in the political strategy of the GoS towards the peace process in South Sudan and Darfur in relation to developments within the field of the International Community. The thesis will end with a final conclusion on the basis of the outcome of the examination presented in the five chapters, on how and to what extent the ICC indictments affected the political strategy of the GoS towards the peace processes in Darfur and South Sudan.

## CHAPTER ONE: SUDAN AND THE TRIADIC NEXUS

In this research my prime concern will be to analyze the relation between ICC indictments and the political strategy of the Government of Sudan toward the peace processes in Darfur and South Sudan. Examining the nexus between prosecutorial justice and political strategies of warring parties in Sudan inherently poses the danger of oversimplification of Sudanese conflict dynamics. The violent conflict in the South of the Sudan and Darfur are both highly complex, making it extremely difficult to suggest direct linkages between the work of the ICC and conflict dynamics in Sudan. Therefore, in this research my intention is not to propose a direct cause-and-effect relation between the pursuit of justice on the one hand and peace in Sudan on the other. However this research does intend to map and analyze the dynamic interplay between the ICC, the GoS and the Insurgent Regions in Sudan that shapes and influences conflict dynamics in the country.

### 1.1 The triadic nexus

I have chosen to use an analytic framework developed by Brubaker in his study on newly nationalizing states in Eastern Europe (1995). In this study, Brubaker identifies a “triangular relationship” between nationalizing states, national minorities within these states and the national homelands of these minorities. The interaction in this triangular relationship is not necessarily hostile or problematic. However, when vigorous nationalist programs are launched, favoring the dominant elites over national minorities in areas ranging from language to political and economic participation, resistance amongst minority groups can grow and demands for autonomy or self-determination can arise. In response to this, leaders or elites from the external “homelands” of these minorities might feel the moral need or obligation to support their “kin” in the quest for more autonomy. Thus, a highly dynamic interplay between the nationalist state, national minority and external homeland is generated in which change or activity in one “field” affects the other fields (Brubaker 1995:108-110). Brubaker uses the term “field” as analytical concept, based on earlier work of Pierre Bourdieu (1992), to highlight that the units of analysis are not “fixed entities but variably configured and continuously contested political fields”(Brubaker 1995:111-112). Within each field different players make competitive claims and positions change over time. Thus, alongside the relational nexus *between* fields, there is a dynamic interaction *within* the fields. In this research Brubaker’s triangular relationship is transferred to the case-study of Sudan. The triadic nexus under study here consists of the Government of Sudan, the Insurgent Regions of Darfur and South Sudan and the International Community, with a predominant focus on the International Criminal Court, but also taking into account the United Nations and the African Union. The relationship between the triadic nexus is highly interdependent and a constantly changing dynamic process. A close analysis of the interaction within the fields under study and between them will help shed light on the affects of ICC indictments on political strategies in Sudan. The main goal of this paper is in essence, to map and analyze this responsive interaction and the interdependent relationship between the triadic nexus, consisting of the Government of Sudan, the Insurgent Regions of Darfur and South Sudan and the International Community.

### 1.2 The GoS – Insurgent Regions – International Community nexus

In the triadic nexus under study in this paper, the Government of Sudan plays a central role. I am particularly interested to examine the interdependent relation between this field and the field of the international community, analyzing responsive behavior in the GoS to change and development in the field of the International Community. Since independence, the political centre of Sudan has been a contested area. There have been numerous *coup’s d’états* and

political leaders have never been fully secure of their power. In this study the GoS is represented by the National Congress Party (NCP, formerly NIF), that came to power in 1989 and is led by President Omar Hassan al-Bashir. The NCP immediately banned opposition parties after having come to power; there is thus no formal opposition in Sudan. However the NCP in itself should not be analyzed as one unitary party as it has faced numerous internal power struggles, the most important being between President al-Bashir and religious leader Hassan al-Turabi. Furthermore, after years of war with the rebel groups from South Sudan, the most prominent Southern rebel group SPLA/M<sup>2</sup> was incorporated into the GoS as part of the Comprehensive Peace Agreement (CPA) that was signed between both parties.

The second field under study are the Insurgent Regions of South Sudan and Darfur. For well over fifty years there have been strong centre-periphery tensions in Sudan. Different political groups in South Sudan have been fighting against political, economic and cultural/religious marginalization since the 1950's. Since 2003, groups from the region of Darfur have also started to fight what they perceived to be an unjust, pro-Arab regime. Even though the conflict in Darfur cannot be directly equated to the conflict in South Sudan, taken the strong relational approach of this paper, the two should not be studied in isolation. Between and within the geographically separated struggles there are many different stances and ideas on how the quest for political rights should be fought. Once again, we are thus not dealing with a unitary field, but a multiplicity of stances, opinions and strategies within the insurgent regions that are highly dynamic, and change over time. The defense of these competing stances within the field is not unproblematic as there is a continual fight to, in the words of Brubaker, "monopolize the legitimate representation of the group" (1995:113).

The third element of the triadic nexus is the International Community, the ICC in particular. The International Community expresses a manner of responsibility and obligation to protect and defend the people in Darfur and South-Sudan. This has resulted in the direct involvement of the International Community, The AU, UN and ICC in particular, in the conflict in Sudan through actions ranging from diplomacy, sanctions and peace missions to judicial prosecutions. To different extents the International Community tries to shape representations of the conflicts in Sudan and within the field itself there is competition over these representations of the GoS and the Insurgent Regions.

### **1.3 Identifying political strategy; a conceptual breakdown**

As this research is interested in identifying changing political strategies of the Government of Sudan in relation to the ICC indictments it is important to specify how 'political strategy' is defined in this paper. In the field of strategic studies there has been a tendency to define 'strategy' in strictly militaristic terms, in which policy objectives are pursued through military measures. In this study however I have chosen to use a broader definition of 'political strategy' as militarism is only one aspect of a larger spectrum of strategies designed to pursue policy objectives. I prefer to use J.C Wylie's definition of "strategy" which suggest that strategy is

*"a plan of action designed in order to achieve some end; a purpose together with a system of measures for its accomplishment"* (Wylie 1967:14).

This definition however misses an important element that is essential for understanding how strategy develops and that is: "process". In this research the interdependent relation between

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<sup>2</sup> The SPLA is the military arm of the SPLM rebel group. Throughout this paper both variants of the name will be used interchangeably, depending on whether reference is made to the political or military arm of the rebel movement.

and within the triadic nexus is a focal point. Change and development in one field influence dynamics in another field and vice versa. This responsive interaction affects how political strategies within a given field form, develop and change. Political strategies are thus formed in a highly dynamic, interdependent and interactive environment. As such, political strategies are responsive to activity and change. Murray and Grimsley's (1994) definition of strategy includes this responsive characterization of "strategy" arguing that strategy is

*"a process, a constant adaption to the shifting conditions and circumstances in a world where chance, uncertainty, and ambiguity dominate"* (Murray and Grimsley 1994 in Baylis and Wirtz 2007:5).

In this research Wylie, Murray and Grimsley's definition of strategy will be taken together (1967, 1994). In summary this means that a political strategy is a purposeful arrangement of deeds within one field that changes constantly and adapts to "shifting conditions" within other fields of the triadic nexus, with the intent to achieve a political goal.

As the concept of "purposeful arrangement of deeds" is still a rather vague concept, I suggest narrowing the concept down to three dimensions, or categories of deeds, that are aimed at achieving a political goal. These categories are based on Robert Osgood's analytic understanding of "strategy". He suggests that there are four "instruments of power" that find themselves in the terrain of armed coercion, economics, diplomacy and psychology (Osgood 1962 in Baylis and Wirtz 2007:5). Given the nature of this research I have chosen to sidestep the use of economic "instruments of power" as a political strategy, seeing that this would require a very unique research approach and would not fit the scale of this research. The other three types of strategy will function as indicators of political strategy within this research in which the psychological domain will mostly refer to framing-practices used by the GoS to represent or misrepresent changes and developments in the external fields of the triadic nexus. In short, I will examine and analyze the military-, diplomatic- and framing-practices of the fields within the triadic nexus as indicators for political strategy.

In identifying changing political strategies in Sudan I will focus my attention firstly on acts of violence and examine if military performances and violent incidences have increased or decreased following important changes in the field of the International Community, particularly surrounding ICC activity. The analysis of military practices as a political strategy will examine the inter-dynamic relation between the GoS and the Insurgent Regions and will also take into account changes in diplomatic interaction between the GoS and the Insurgent Regions in terms of the peace processes in the South and Darfur. I will furthermore explore developments of diplomatic interaction between the GoS and the International community and examine change in this relationship as a result of ICC indictments. While examining the inter-dynamic relation between the GoS and the International community I will furthermore assess if ICC indictments effected government cooperation in terms of international peace missions and humanitarian interventions. Lastly I will analyze framing and labeling practices used by the GoS in relation to both the International Community and the Insurgent Regions in response to ICC indictments.

## CHAPTER TWO: SUDAN; A HISTORY OF INSURGENCY

*“Conditions in Darfur have deteriorated in the weeks leading to the referendum [in South-Sudan], with a resumption of conflict between Sudanese government forces and Sudan Liberation Army rebels (...) in several locations in North and South Darfur. Clashes and attacks on civilians by government forces in Khor Abeche, Shearia and Shangil Tobayi have caused the displacement of 32,000 people”*

Human Rights Watch, 8 January 2011

For most of its years as an independent state, Sudan has been entrapped in a seemingly inescapable web of civil wars. Where the conflict in Darfur only hit full throttle after 2003, different rebel groups in South Sudan have been at war with the Sudanese government since 1956. In spite of various peace agreements, Sudan is still stuck in a vicious cycle of violence and social unrest, with disastrous humanitarian consequences.

The central focus of this thesis is to examine the interdependent relation between the Government of Sudan, the ‘Insurgent Regions’ of South Sudan and Darfur and the International Community. In order to do this it is essential to understand the historic context in which these relations were formed. Moreover it is important to examine the characteristics of each field under study, how the fields developed over time and to identify the competitive stances that exist within each field. This chapter will examine the evolvement of each field under study, particularly in the period ranging from 1989, when the current regime in Sudan came to power, up to 2005/2006, just before the peace agreements were signed between the GoS and Southern and Darfurian rebel movements.

### 2.1 Slave raids, exploitation and the spread of Islam

Sudan as we know it today is the largest country in Africa. Its vast territory ranges from mostly dry, desert lands in the North to tropical rainforests in the South. The population of Sudan, consisting of roughly forty-five million people, is divided amongst ethnic and religious lines. The largest and most disruptive ethnic divide in Sudan is the Arab-African dichotomy. Arabs comprise roughly thirty-nine per cent of the population, predominantly, though not exclusively, living in Northern areas. Fifty-two per cent of the population is from African descent. Alongside this ethnic divide, the country is segregated along religious lines. Around seventy per cent of all Sudanese are Muslim, the rest of the population are Animist or Christian (CIA Worldfactbook 2011).

Given the ethno-religious diversity of Sudan, and the enormous geographical span of the country, it might come as no surprise that unity in Sudan has historically been far sought. Governing powers in Sudan have consistently failed to control Sudan’s peripheral regions and from an historic perspective, South Sudan has never really been fully integrated into the larger unit of Sudan. Instead, North and South Sudan have mostly been governed separately.



Figure 1.1: Geographical map of the Sudan

When Sudan was conquered by Ottoman-Egyptian forces in 1821 the foreign invaders were only able to control the Northern area of Sudan. This however did not exempt the South from the cruel practices of the new rulers, who needed large amounts of slaves to help build up their newly acquired empire. Brutal slave-raids in the South caused the deportation of no less than 15.000 Southerners annually. As a result of these slave-raids North-South relations hardened (Collins 2008:13-15).

After roughly sixty years of harsh rule the Ottoman-Egyptian forces were conquered by the troops of Muhammad Ahmed al-Mahdi, a devout Muslim who claimed to be sent to prepare the way for the coming of the prophet Isa (Jesus). Even though the Mahdi himself died soon after his victory, his successor was able to hold power for another fourteen years. The Mahdists governed Sudan as an Islamic nation and imposed Islamic law, Shari'a, on the entire population. Sudan's heritage as an independent state is thus rooted in the Islamic tradition (Otto 2006:114). While South Sudan was not integrated in the Mahdist Empire and was thus exempt from the spread of puritanical Islam, Dar Fur, meaning land of the Fur, was incorporated in the Madhist Empire. Although Dar Fur was an African kingdom, it was very open to Arabs and the people in the region were known to embrace multiple identities (Flint and de Waal 2008:2-6).

## **2.2 Underdevelopment and segregation; Sudan under Anglo-Egyptian rule**

In 1899 Sudan was once again invaded by foreign troops. This time it was a collaboration between Egyptian and British forces that led to the overthrow of the Mahdist Empire. Initially, Darfur was exempt from British rule and was instead governed by the Fur sultanate of Ali Dinar. However during the First World War, Ali Dinar joined the Ottomans in their battle against the British; a choice that turned out to be a huge strategic mishap. As soon as the Ottomans were defeated the British moved to incorporate Darfur in their Sudanese empire (Collins 2008:35). The incorporation of Darfur led to large-scale displacement in the area that to this day still leads to land disputes (Flint and de Waal 2008:10).

Roughly ten years after Darfur's integration into the British Empire, South Sudan was annexed to the empire as well. The British governed Sudan using a policy of divide-and rule, which led to a the establishment of an ethnic hierarchy in which Arabs were favoured and deemed superior in relation to non-Arabs. The British administrators were little interested in developing the peripheral regions. There were no investments in infrastructure, health and education in Darfur during this period (Flint and de Waal 2008:10-12). In the South the British hoped to limit the spread of Islam by isolating the area from the North. South Sudan became a "closed district" meaning that people from the North were not allowed to enter South-Sudan and vice versa. While Arab remained the dominant language in the North, English was encouraged as the main language in the South (Collins 2008:41-43). Thus a huge gap between North and South Sudan was created, or rather, reinforced as the regions were governed in total separation. This North/South division has remained characteristic to Sudanese internal dynamics up to this day.

## **2.3 Independence and rising nationalism**

As Sudan was preparing for independence during the 1950's, many people in South Sudan expected that two separate nations would be formed; North- and South Sudan. However Southern politicians were completely excluded from the negotiations with the British-Egyptian colonisers. As the date of independence drew near and it became clear that a separate South Sudan was but a dream, Southern army officers mutinied and started a battle against Northern domination that would last for nearly seventeen years (Jok 2007:54).

When colonel Nimieri came to power through a coup d'état in 1969 he sought peace with the South, eventually leading to the signing of the Addis Ababa peace agreement in 1972. This

agreement, which officially ended what is now known as Sudan's first civil war, promised autonomy for the South and called for the integration of the rebels into Sudan's national Army (International Crisis Group 2010). However with the discovery of oil in South Sudan in the late 1970's Nimieri started to increase his power-hold on South Sudan and eventually abrogated the Addis Ababa peace agreement with the South in 1983. He furthermore intensified the process of Arabisation in Sudan by making Arabic Sudan's official language. Not long after this, Nimieri introduced Islamic law, Shari'a, as a replacement for Sudan's traditional judicial system. Not surprisingly, Nimieri's new strategy was met with fierce resistance from the South (UN CoI 2005).

#### **2.4 The Insurgent Region of South Sudan**

Under the leadership of Colonel John Garang, a rebel group named the Sudan People's Liberation Army (SPLA) was called to life. Garang had been fighting on the side of the rebels during Sudan's first civil war and had been integrated into the national army as part of the Addis Ababa agreement. With the continual marginalization of the South and the spread of Islamic domination the SPLA was established to fight for a "New Sudan". In their manifesto the SPLA clarified that unlike the Anya-Nya<sup>3</sup> they were not fighting for autonomy. Instead, the SPLA claimed their main goal was to transform Sudan into a secular, democratic state in which minorities would no longer be marginalized (Collins 2008:143). Before long, Sudan was once again entangled in a brutal civil war.

When in 1989 General Omar Hasan al-Bashir came to power through a coup d'état planned by the National Islamic Front (NIF) the war with the South intensified. After his grab for power, al-Bashir was swift to get rid of all possible obstacles that could interfere with his quest for total dominance and power in Sudan. As part of this strategy, al-Bashir dissolved the parliament and abrogated the national constitution. Large scale purging within Sudan's political apparatus followed and media censorship was enacted. Furthermore a process of "recentralization" was started in which a great deal of regional powers, in for instance the judicial sector, were handed back to Khartoum (Daly 2007: 248- 250). There was no doubt that Sudan's new leader was prepared to go a long way to hold on to his newly acquired powerbase. However, as a result of purges within the military, the national army was unable to make advances in their fight against the SPLA. In the meantime, the SPLA was battling its own demons, with increased internal divisions over the desired status of South Sudan. The SPLA was separated between more than seven different factions, many of whom demanded session from the North. John Garang's faction however remained dedicated to fight for a united, secular and democratic Sudan (Collins 2008:246-284).

Although both parties faced their own difficulties, the battle for military victory continued for years. It is believed that over two million people have lost their lives during the long conflict between the North and the South. On top of that, an estimated 4.5 million people have been displaced due to the violence in the South (UN CoI 2005:19). The scale of destruction in the region is thus enormous and there is a great need for safety and stabilization to enable the millions of refugees to return home.

#### **2.5 The Insurgent Region of Darfur**

While the GoS was preoccupied with internal divisions and peace negotiations with the SPLA, the situation in the region of Darfur started to escalate. Much as South Sudan, Darfur had been subject to a policy of structural marginalization for decades. Successive regimes in Khartoum had been very little interested in developing the peripheral regions of Sudan. In the

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<sup>3</sup> The Anya-Nya was the South Sudanese rebel movement that fought for autonomy during Sudan's first civil war

1980's Darfur was faced with several challenges that eventually exacerbated already existing tensions between Arab and African tribes in the region. Firstly, Libya, under the notorious Colonel Gaddafi, started using Darfur as a military base to carry out attacks against the sitting regime in Chad. By the time Libyan forces left the region, Darfur was flooded with weapons. In the meantime Darfur was exposed to a terrible famine in 1984 during which an estimated 100.000 died. Under these circumstances frustrations amongst Darfurians began to grow. Another crucial development in this period was the rise of "Arab supremacism". In the early 1980's Arab tribes started to mobilize in what came to known as the "Arab Gathering". The Arab Gathering wanted to promote domination of Arab tribes in Darfur through regional governance, arguing that the dominance of black rule in Darfur was unjust as Arab tribes formed a majority in the region (Flint and de Waal 2008:44-49). When the NIF came to power during the 1989 coup, tensions came to a head when Darfur was divided into three states, changing the ethnic power balances in the region in favour of Arab tribes. The Fur for example, once being the largest tribe in Darfur, now became minorities in their new states. In 1982 the Arab Gathering launched its first attacks on African tribes. The Arab fighters soon became known as *Janjaweed*, a word that customarily referred to bandits from neighbouring Chad. Initially the attacks seemed economically motivated, involving cattle theft and land disputes, however when cattle was no longer stolen but killed and land and houses were burnt it became increasingly clear that the attacks entailed more than just tribal fighting (Daly 2007:262-278). In the years that followed roughly 100.000 African Darfurians were forced to flee to Chad due to continuous attacks (Flint and de Waal 2008:74). During the 1990's the tension between Arab and African tribes in the region grew, especially since the Arab-Islamist government clearly favoured Arabs over Africans (Kastner 2008:156). At the end of the 1990's African tribes started to unite in self-defence groups to protect their people against *Janjaweed* attacks. The mobilization of these self-defence groups in Darfur has been a very important element to the conflict in Darfur. Through these vigilante self-defence groups African tribes were united and eventually became an easily accessible recruitment pool for Darfurian rebels (Flint and de Waal 2008:76). In May 2000 the so-called "black book" was spread on the streets of the capital Khartoum. The black book, of whom the authors remain anonymous, addressed the structural neglect of Darfur and accused the government of ethnic favouritism. Although the black book wasn't able to transform governmental politics towards Darfur and other marginalised regions, it boosted the unification process amongst African tribes in Darfur to fight against Arab domination and as such, was another important step towards the formation of politically and military organised resistance groups in the region (Daly 2007:276). Starting in the summer of 2001 a movement called the Sudan Liberation Movement/Army (SLM/SLA)<sup>4</sup>, consisting mostly of African Muslims from the Masalit, Fur and Zaghawa tribes, started launching attack on government posts. At this point the attacks were small-scale and sporadic and no official political agenda was formed. In March 2003 the SLM published its manifesto which called for the end of political and economic marginalisation in the whole of Sudan through a process of decentralisation. Furthermore the SLM wanted to rid Sudanese politics of its Islamic character and demanded a secular state. Just as the SPLA in the South, the SLM was convinced that separatism was not the solution to Darfur's problems. During this time the SLA geared up its military program and increased its attacks on government targets. Within a few years time the SLA grew enormously, from a few hundred troops in 2001 to over 11.000 in 2005.

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<sup>4</sup>The SLM is a political faction. The SLA is its military arm. In its beginning years, the SLA was called Darfur Liberation Front (DLF). Before the war in Darfur truly escalated in 2003, the movement was renamed Sudan Liberation Army (Daly 2007: 278- 280)

Although the SLA had some great military successes in their early years, it suffered from grave internal divisions. Leadership positions had been divided amongst the three dominant African tribes in Darfur; Abdel Wahid representing the Fur as chairman, Abdalla Abakir from the Zaghawa tribe was chosen as SLA's military commander and Khamis Abakir became vice chairman of the rebel movement. However, while different tribes had come together in unity to fight a common goal there was much tribal division that eventually led to splintering within the SLA (Flint and de Waal 2008:91-96).

Within a month after the establishment of the SLA in July 2001 another Darfurian rebel movement was called to life; the Justice and Equality Movement (JEM), consisting mostly of educated Islamist Darfurians. Although the SLA and JEM shared many of the same objectives, as both groups fought against marginalisation of minorities and for greater equality, JEM strongly opposed the idea of a secular state (Flint and de Waal 2008:105 and Daly 2007:271). JEM was chaired by Khalil Ibrahim, a medical doctor who had been a prominent NIF politician for years and was a close friend of state-enemy Hasan Al-Turabi. Ibrahim's political expertise and international influence was what made JEM a huge threat to the GoS, even though from a military perspective, JEM posed little danger. One of the great successes of JEM was its ability to represent the conflict in Darfur as genocide which placed great pressure on the government of Sudan and delegitimized it in the eyes of the international community (Flint and de Waal 2008:101).

Due to the conflict in Darfur, an estimated 200.000 to 300.000 people have lost their lives and another two million people have been forced to flee their homes (Degomme and Guha-Sapir 2010 and Kastner 2008:257). While the peak of the fighting took place between 2003 and 2004, the violence has continued up to this day.

## **2.6 Sudan and the International Community**

The response of the international community in Sudan, Darfur in particular, has been severely criticized. Initially the international community was preoccupied with the peace process between North and South Sudan, trying to settle a conflict that had had Sudan in its grip for nearly two decades. Thus, "international negotiators were willing to leave the nascent crisis in Darfur aside or, at least, to postpone open criticism and more active involvement, in order to avoid endangering the promising peace process for the South"(Kastner 2008:161). In June 2004 the Security Council, by resolution 1547 established the United Nations Advance Mission in the Sudan (UNAMIS). A mission aimed at facilitating the peace process in South Sudan. UNAMIS was later on transformed to UNMIS, a United Nations mission established to support implementation of the peace agreement between North and South. The mission counted roughly 10.000 military personnel (UNMIS website).

Initially the UN was reluctant to deploy military forces to Darfur and attempted to contribute to stabilization in the region through the use of sanctions and embargo's. In July 2004 there was willingness on the part of the UN Security Council (UNSC) to carefully respond to the escalating violence in Darfur by the adoption of resolution 1556 which put an arms embargo into effect to "prevent the sale or supply, to all non-governmental entities and individuals, including the Janjaweed (...) of arms and related materiel"(UNSCR 1556). Interestingly enough the GoS was no target of the embargo, while it was no secret that the GoS was one of the main perpetrators in the war in Darfur and the main supplier of arms to the *Janjaweed*.

In September 2004 the UN resolution 1564 called for the establishment of a Commission of Inquiry (CoI) into Darfur as a result of which a huge investigation into human rights violations in Darfur was unleashed. Within half a year after the establishment of the CoI UN resolution 1591 restricted suspected war criminals in Darfur from travelling abroad and furthermore blocked these individuals access to their funds in foreign bank accounts. These

international efforts however did little to relieve the people of Darfur of the continual violence they faced.

Besides the preoccupation with the war in the South, there are several possible reasons for the lack of international response in Darfur that are linked to the relation of members of the permanent five of the Security Council and Sudan. Firstly, the United States was preoccupied with the 'war on terror', and had found a great intelligence partner in Sudan. Would the US have responded with military measures to stop the violence in Darfur it ran a great risk of losing Sudanese cooperation. China on its part was in a process of broadening its influence in Africa and was structurally against foreign intervention that surpasses state sovereignty. Moreover China was an important consumer of Sudanese oil and it thus seems that its economic interest overruled the possibility of military intervention to halt the violence in Darfur. Lastly, Russia was known to be one of the main arms suppliers in Sudan. Once again, economic interest seems to have overruled humanitarian concern (Daly 2007:295-297).

While the UN was reluctant to take appropriate action, the African Union (AU) has from the beginning been very much involved in the crisis in Darfur. The AU not only functioned as mediator during ceasefire meetings in 2003/2004 but agreed to send a monitoring mission, AMIS to Darfur in July 2004. Roughly 3000 AMIS soldiers were sent to Darfur in 2004. However, with a region almost the size of France, the AMIS force was not strong enough to achieve much even though its troops were doubled in the course of 2005. Only in the summer of 2006 the UNSC finally stepped in to help the African Union in Darfur with the adoption of resolution 1769 which established the United Nations-African Union Hybrid Operation in Darfur (UNAMID).

Overall it can be said that the International Community has been slow to respond to the crises in Sudan. When it did respond, the measures taken were often weak, lacking boldness and enforcement. This has strongly enabled the government of Sudan to act as it wished without having to fear painful consequences.

## **CHAPTER THREE: KHARTHOUM'S PRE-INDICTMENT POLITICAL STRATEGY TOWARDS THE PEACE PROCESSES IN SUDAN**

*"It is quite possible that efforts to resolve a conflict may not end a war, and efforts to end a war may not resolve the underlying conflict"*

(Ramsbotham, Woodhouse and Miall 2005:159)

In Darfur and South Sudan numerous efforts have been made to secure a stable peace for the people of Sudan. An examination of the peace processes between the GoS and the Insurgent Regions will demonstrate the difficulties the parties faced in their attempts to end the wars. It also exposes the vulnerability of the internationally mediated peace agreements in Sudan and the limitations of enforced peace when the intrinsic desire for a negotiated settlement is lacking by one, or more of the parties.

In this chapter I will examine the peace processes in South Sudan and Darfur before the first ICC indictments were issued in April 2007. The chapter will start with an extensive evaluation of the peace agreements in South Sudan and Darfur. My analysis will include an assessment of the prelude to the signing of the peace agreements, because, as will be demonstrated in this chapter, the manner in which peace processes are conducted and take form are equally as important as the outcome of an eventual peace agreement. After this rather descriptive section, the peace processes will be analysed using Hampson's (1996:217-221) analytic model on conflict settlements. In doing so, the strengths and weaknesses of the peace accords will be laid bare, allowing us to examine the effectiveness and stability of the peace processes in Sudan before ICC indictments were issued. This chapter will primarily zoom into the GoS – Insurgent Regions relation of the triadic nexus. However the field of the International Community will not be entirely excluded as the IC has been very much involved as mediators in the peace processes in both Darfur, and South Sudan.

As this thesis aims to map changes in the political strategy of the Government of Sudan towards the peace processes in Darfur and South Sudan, the chapter will aspire to record the political strategy of the GoS before ICC indictments were issued. The chapter also seeks to identify shifts in the strategy adopted by the GoS and attempts to rationalise how these alterations in strategy came about. It will be particularly interesting to examine which government strategies were most dominant in each of the peace processes in Sudan and how differences between GoS strategy in Darfur and the South can be explained. The chapter furthermore aims to establish if and how developments in the field of the International Community shaped or influenced the chosen strategy of the GoS towards both peace processes. In short, this chapter will thus examine how the interdependent relationship within the triadic nexus affected the political strategy of the GoS before ICC indictments were issued.

### **3.1 Early peace efforts between Khartoum and South Sudan**

South Sudan has been the stage of brutal conflict for decades. The SPLM/A insurrection that is under study here broke out in 1983 and continued for over twenty-two years. Finally on the 9<sup>th</sup> of January 2005 the GoS and the SPLM/A signed the Comprehensive Peace Agreement (CPA) in Nairobi. Although the CPA was a definite landmark in Sudan's history it was not entirely unproblematic. A little more than two years after the signing of the accord, the leader of the SPLM declared that the CPA was in a state of crisis and needed to be "saved" (Sudan Tribune 23 October 2007). This revealed that the peace process in South Sudan was still in full motion and peace was not at all self-evident. However, before we look into the problems that surfaced after the signing of the CPA, let us now examine the peace process that preceded the actual signing of the agreement.

The extensive duration of the war between the GoS and the SPLA has certainly not been due to a lack of peace efforts. The first attempts by the GoS to forge a peace with the South were made as early as 1985. At this point however, the parties were not yet able to agree upon the terms of an agreement and fighting between the parties quickly resumed. In 1989 too, there were serious prospects to end the war in South Sudan. A coalition government headed by the Democratic Unionist Party (DUP) was determined to end the devastating war and an agreement with SPLM leader Garang was signed on 3 April 1989. One of the focal points of that agreement was the suspension of the implementation of Shari' a law. Many Islamists, especially from the National Islamic Front (NIF) saw the peace agreement as a huge threat against the prevalence of Islam in Sudan. Therefore, one day before the agreement was to be endorsed the NIF under leadership of general al-Bashir, launched a coup d'état, effectively dismissing the peace agreement with the SPLM (Collins 2008:169-170).

### **3.2 Militarism or diplomacy? The political strategy of the GoS during the first round of IGAD Peace Negotiations**

Soon after al-Bashir came to power in Sudan the SPLA entered a period of serious struggle. The regime in Ethiopia, that had been one of the main sponsors of the SPLA, was overthrown in 1991 and thus the flow of funding started to run dry. Furthermore, by this time internal factionalism started to gain ground, with the most important split being the departure of Dr. Riek Macher who formed the South Sudan Independence Movement (SSIM). This weakening of the SPLA gave the GoS reason to believe that a military victory was at hand, as a result of which al-Bashir initially showed little interest in peace negotiations.

However, in spite of growing weakness the SPLA was able to stand ground and in the course of the 1990's was able to regain strength as Uganda, Eritrea and the new regime in Ethiopia all stepped up their military support for the SPLA. It is believed that this reinvigoration of regional military support for the SPLA was the result of al-Bashir's religious zeal, that made neighbouring countries perceive the Sudanese regime as an "Islamist threat to their sovereignty" (Young 2007:10). The SPLM also started to increase its cooperation with the National Democratic Alliance (NDA), a group of opposition forces from Northern Sudan, thereby hoping to weaken the regime in Khartoum. These developments led to a re-shifting of the power balance between the GoS and the SPLM and gave the GoS new impetus for negotiations (Young 2007:8-10). Here, we see a shift in the political strategy of the GoS towards the insurgency in the South. The dominant military approach that had been used was now complemented by diplomatic initiatives due to changing dynamics within the field of the Insurgent Region of South Sudan.

The two most significant peace initiatives in South Sudan were initiated by the Inter-Governmental Authority on Development (IGAD), a regional institution initially called to life to increase regional cooperation in the fight against natural disasters. The first IGAD peace initiative was launched in September 1993 when a peace committee was established to mediate between the GoS and the SPLM. It was President al-Bashir himself who suggested IGAD mediation in the Sudanese war, as part of his new diplomatic strategy towards the conflict in the South. This shift in the political strategy of the GoS, from a military to a diplomatic approach underlines the inter-dynamic nature of the GoS – Insurgent Regions link in the triadic nexus. The changes in the field of the Insurgent Region of South Sudan, in that it regained military strength rapidly and became a strong fighting force to be reckoned with, affected the calculus of the GoS in deciding upon its strategy in South Sudan. While splintering within the SPLA had given the GoS hope for a military victory, it had now become clear that diplomacy might be a less costly affair and could safeguard the GoS from embarrassing military defeats. It is important to note that the shift in political strategy was by no means the result of a changed attitude towards the conflict on behalf of the government.

Neither did the new openness to diplomacy reflect a true willingness for a negotiated peace. Instead, and as will be demonstrated in the course of this chapter, the increased focus on a diplomatic strategy was now deemed to be a more effective way to safeguard the political survival of the NCP government. Although the first round of IGAD negotiations triggered hope for a diplomatic solution to the conflict between the NCP regime and the SPLM, the situation remained highly unstable with the GoS continually changing its political strategy towards the peace process. Eventually, in the course of 1998 the GoS stepped out of IGAD negotiations to return to fighting in the hope to win an out-right military victory over the SPLM (Young 2007:9-10).

All in all, the first rounds of IGAD peace talks were characterized by a constant shifting in the political strategy of the GoS towards the insurgency in the South, from a military to diplomatic approach and vice versa. This continual shifting in political strategies adopted by the GoS reflects the calculus of the government that was not so much based on the interest for a stable peace but was directed towards the political survival of the NCP party. It also reflects the highly interdependent relation between the field of the GoS and the Insurgent Region of South Sudan, as changes in GoS strategy can be traced back to developments within the SPLA that resulted in a changed balance of power between the two fields.

### **3.3 Towards a lasting peace?**

In 2002 the impetus of the GoS and the SPLM for a second round of peace negotiations started to grow. For the government it had become increasingly clear that its military strategy was not working. Moreover civil unrest was growing in Sudan as a result of rising unemployment, food shortages and a general lack of social services. In this troubling socio-economic environment the costly war with the South became increasingly strenuous. For the SPLM too, the time seemed to be ripe for peace negotiations. Internal fighting with splinter groups had decreased significantly and from a military perspective, the SPLA was strong. This gave the SPLM good prospects for fruitful negotiations and a favourable position at the bargaining table (Collins 2008:262-263).

During this time the international pressure for a peace deal in Sudan also began to grow. The United States especially, became increasingly involved in the peace process in Sudan. There were several reasons for this. First of all the domestic pressure on the United States Government had increased significantly since the year 2000. Pressure groups from the Christian right started to demand governmental response to the suffering of their 'Christian brothers' in South Sudan and human rights activist lobbied against human suffering in Sudan. On top of that lobbyists from the oil industry started to protest against the economic sanctions against Sudan as this limited them from doing business in the oil-rich provinces of South Sudan. Lastly, the terrorist attacks of 9/11 made the US government realise that conflict-ridden Sudan might well be a hot-bed for international terrorism (Young 2007:12-13). These domestic developments within the United States all contributed to an increased incentive to establish peace in South Sudan as this would silence the Christian/human rights lobby groups, provide American oil magnates with economic opportunities in Sudan and reduce opportunities for international terrorists on Sudanese soil.

At the insistence of the United States, a peace conference was hosted by IGAD in June 2002 at Machakos. The conference succeeded in bringing the belligerents together and led to the signing of the so-called Machakos protocols by Ghazi Salahuddin Atabani on behalf of the government and Salva Kiir as representative of the SPLM. Growing interference of the United States in the peace process in South Sudan thus seems to have contributed to the GoS's willingness to once again turn to a diplomatic strategy towards the South, emphasising the interconnected nature of the relation between the GoS and the International Community. Interesting to notice at this point, is that the President of Sudan himself and SPLM leader

Garang were absent from the negotiation meetings. It appears that al-Bashir was not ready to accept Garang as a legitimate source of authority. Either way, the signing of the protocol, which was to form the basis for an eventual peace agreement, was a big step ahead for the peace process in South Sudan. It stipulated the right to self-determination in the South and granted Shari' a as legitimate source of legislation in the North while the South would be exempt from Islamic law.

In essence the Machakos protocol was intended to be a simplification of the Declaration of Principles of 1998. By reducing the high targets of the DoP, that for instance called for the total separation of state and religion, the mediators hoped to woo the GoS into signing the protocol without estranging the SPLM. The ideological foundation for the protocol was thus largely pragmatic. The reductionist nature of the Machakos protocol was also evident in its lack to address important issues such as the exact North-South border demarcation and the status of the oil rich Abyei province. This simplification of the peace process, by diminishing the content of the protocols, would later contribute to the fragility of the actual peace agreement and demonstrates that pragmatic peace negotiations aimed at a speedy resolutions to conflict are very often not durable.

Although the signing of the Machakos protocol was hopeful and stimulated the peace process, research on the ground has revealed that both parties were in fact distrustful of the intentions of the other party, in spite of the protocol. When asked about the signing of the Machakos protocol one of the SPLM negotiators said that “all the protocols were signed in bad faith” (Young 2007:17). The suspicious attitudes of the belligerents also came to the fore when the SPLM refused to agree upon ceasefire arrangements, afraid that this would undermine their bargaining position at the negotiation table. In fact, within half a year after signing the Machakos protocol the SPLA attacked the town of Torit. The exact motives for this aggressive move remain unclear, although it seems the SPLA was trying to force the GoS into a peace agreement that would be more favourable to SPLM demands. In response to the attack on Torit, the GoS immediately retreated from the peace negotiations until it had recaptured Torit and a ceasefire was agreed upon. The ceasefire however was not able to put an end to all the hostilities, although violent encounters between the GoS and the SPLA greatly diminished in this period (Young 2007:17-18). At this point it seems that, in general, the Government had largely departed from its military strategy towards the peace process in South Sudan and increasingly adapted a diplomatic strategy in dealing with the Southern insurgency. While growing international pressure on the GoS certainly played into Khartoum's increased leniency towards a diplomatic strategy, changes in military balances between SAF and the SPLA also contributed to this diplomatic turn.

As negotiations between the government and the SPLM/A continued, they became increasingly centred around Garang and Sudan's Vice President Ali Osman. By reducing negotiations to two people, the mediators deemed the changes for a successful settlement highest. The negotiations were complex enough as they were and there was simply no room for additional opinions and demands, as this would reduce the chances for a peace agreement significantly. However by doing so, the mediators seemed to forget that both in the North and in the South there were many other parties to the conflict. There was thus no wide support for the negotiations as many critical voices remained unheard. By personalising the negotiations to Garang and Osman moreover, the eventual peace agreement missed broader civil support, even from within the GoS and the SPLM (Young 2007:21-25).

Eventually on 9 January 2005 the SPLM and the GoS signed the Comprehensive Peace Agreement. The CPA stipulated that South Sudan had a right to vote for self-determination in a referendum that was to be held in 2011. However, during the six years of transition, the GoS was to try to make unity an attractive option for the South by reducing peripheral marginalization and increasing democratization. In the period before the referendum the

South was declared autonomous. Furthermore the SPLM would join the GoS in a Government of National Unity (GoNU) in which it would gain 28 per cent of the seats. The SPLA would withdraw its troops from the North and would become the official army of the South. The GoS on its end promised to have its troops removed from the South before July 2007. The CPA also stipulated that revenues from oil from the South were to be equally shared between the North and the South. Furthermore, Islamic law was only to be applied to Muslims living in the North. John Garang became President of South Sudan and Vice President of the new GoNU (Comprehensive Peace Agreement 2005).

### **3.4 Pragmatic diplomacy; the GoS and the CPA implementation phase**

While the CPA effectually ended Africa's longest running civil war it would soon become clear that signing a comprehensive peace agreement alone would provide no guarantee for a stable peace in Sudan. One year after the signing of the CPA the International Crisis Group observed that "the NCP has the capacity to implement [the peace agreement] but lacks the political will, whereas the SPLM has the commitment but is weak and disorganised" (International Crisis Group 2006: prelude).

Within weeks after he signed the CPA, SPLM leader John Garang, who was now not only Vice-President in the GoNU but also the President of the newly established Government of South Sudan (GoSS), was killed in a plane crash. His death severely weakened the SPLM that would soon be subdued to internal fighting over vision and ideology. The main areas of division were centred around the question of whether the SPLM should aim its arrows at gaining self-determination or whether it should continue in Garang's vision of a secular and democratic 'New Sudan'. The death of Garang furthermore uncovered one of the weak spots of the CPA negotiations; its individualistic approach. As explained in the previous section, the CPA negotiations had largely been built around the person of Garang and Ali Osman. Garang and Osman had found a relative basis for mutual trust in each other that they deemed would be enough to base negotiations on, or the words of the ICG, "the two leaders counted on their positive personal relationship to overcome areas of disagreement during the implementation process" (International Crisis Group 2006:2). At the time this individualistic approach seemed to be an effective way to move forward in the negotiation process. By limiting the peace negotiations to these two individuals however, there was no broader support for the CPA within the GoS and the SPLM. The death of Garang thus seriously undermined the implementation phase and destroyed the collaborative relationship that had developed between the SPLM and the GoS. Silva Kiir, Garang's successor was in no position to fill Garang's shoes. Ideologically his outlook on the implementation of the CPA differed greatly from Garang, who had been committed to a unified, secular and democratic 'New Sudan'. Kiir instead, was a fierce supporter for Southern independence.

Another critical shortcoming of the CPA, which is in fact an outcome of the individualistic nature of the peace negotiations, is its lack to address key issues, the most important being the North-South border demarcation and the status of the oil rich Abyei province. During the peace negotiations, Garang and Osman had decided that these key issues would be resolved later in the presidency and thus the CPA made no provisions on these matters (Young 2007:21). The CPA did create the so-called Abyei Boundary Commission (ABC), a commission tasked to determine the exact boundaries of Abyei. The outcome of the ABC report was to be decisive. The conclusions of the commission however did not fare well with the NCP, who consequently rejected the report, as the ABC's boundary included several important oil reserves that the NCP deemed to be part of the North (International Crisis Group 2006:4-5). We can thus observe that the CPA, as a peace agreement, was inherently flawed. Two elementary characteristics of a successful peace agreement as identified by Hampson - the need for an inclusive peace agreement covering multiple layers of society and the

importance of addressing all the key issues to the conflict – were both lacking from the CPA (Hampson 1996:217-221 in Ramsbotham, Woodhouse and Miall 2005:175-176). These flaws within the CPA can be seen as early indicators of the instability of the peace process in the South.

After Garang's death a shift in GoS policy towards the peace process was noticeable. Where there initially seemed to be momentum for a stable peace and willingness towards the implementation of the CPA, the GoS began to move away from the provisions made in the CPA. Not only did the GoS fail to establish some of the key commissions that were part of the CPA, such as the Human Rights Commission and the Commission on the Rights of non-Muslims in the National Capital, it has also manipulated the power sharing arrangements with the SPLM by reducing the governing powers of the ministerial posts given to the SPLM. Moreover, the NCP made detrimental law changes in the period just before the GoNU was formed, which increased the NCP's ability to control the population through the police and army and gave them more monitoring powers concerning foreign humanitarian work. The diplomatic strategy of the GoS was thus combined with such twisting and turning of the provisions of the CPA as to keep it from significantly limiting the power of the NCP regime. Garang's death further increased the Government's practise of selective and slow implementation of the peace process as the SPLM was deemed severely weakened by the death of their charismatic leader (International Crisis Group 2006:6-7).

Once again it is not difficult to see the interdependent relation between the field of the GoS and the Insurgent Region of South Sudan. The developments within the SPLM, the most important being the death of its popular leader Garang, once again affected the political strategy of the GoS towards the peace process. Observing the increased weakness within the SPLM once again made the GoS believe it could alter its commitment to the CPA. At this point international pressure was such, that the regime in Khartoum did not perceive it as a significant enough threat to incite full implementation the CPA. Thus, although the dominant political strategy of the GoS towards the peace process in the South after the signing of the CPA remained diplomacy, the type of diplomacy used was very cunning and highly pragmatic. The GoS's pace of implementation of the CPA was tremendously slow and selective, aimed at giving in as little as possible while still appeasing the International Community sufficiently to prevent further intervention. Through this strategy it seems the regime in Khartoum hoped to 'trick' the SPLM into a peace which kept the NCP fully in charge of the political 'ship' of Sudan.

### **3.5 Imposing peace on Darfur**

While peace negotiations between the GoS and the SPLM where in full motion under the auspices of IGAD, a simultaneous peace process was started between the government and the rebels in Darfur. In the spring of 2004, when levels of violence were still extremely high, the African Union started it's first round of the Inter-Sudanese Peace Talks on the Conflict in Darfur. After seven rounds of negotiations, the Darfur Peace Agreement (DPA) was finally signed on 5 May 2006. Although the speedy response of the African Union might seem praise-worthy and the signing of a peace agreement so early on in the conflict hopeful, a closer look at the peace process awakens us to a grim reality; violence in Darfur is still ever present and the DPA has failed desperately. According to the International Crisis Group, the DPA was not only unsuccessful it also "contributed to deteriorating security" as it "accelerated the break-up of the insurgency into smaller blocs along loose ethnic lines" (International Crisis Group 2007:1 and International Crisis Group 2006:1).

The negotiation phase, leading up to the signing of the DPA, was a strenuous process. The main rebel negotiators, SLA/AW leader Abdel Wahid el Nur, SLA/MM leader Minni Minawi and Khalil Ibrahim from JEM all lacked the diplomatic skills and experience needed for

effective negotiations. Moreover the rebel groups were unable to form a united front and refused to compromise on their demands. In fact, Nathan notes that little actual negotiations have taken place between the belligerents as “they made no attempt to accommodate each other’s concerns and showed no interest in trying to find common ground. None of them was willing to make concessions to its opponents” (2006:8). The government on the other hand seems to have entered the peace process due to international pressure rather than a genuine desire for a negotiated settlement. The United States had promised to lift sanctions after a comprehensive peace accord would have been signed with the SPLM. However, now that the situation in Darfur had escalated the US demanded a solution to that conflict too, before it would end the imposed sanctions on Sudan (Justice Africa 2004 and Brooks 2008:418). The political strategy of the GoS towards the insurgency in Darfur thus, under international pressure, shifted from a military strategy to a dual militaristic and diplomatic approach. On the one hand the GoS wanted to appease the international community while on the other hand, there was little willingness to make concessions to the rebels whom the GoS deemed it could defeat through a military strategy. As a result of this, the regime in Khartoum agreed to partake in the internationally organised peace talks while at the same time pushing towards a military solution in Darfur.

As a result of the deficiency in diplomatic skills of the rebels, their stiff necked demands and lack of unity on the one hand, and the GoS lack of internal desire for negotiations on the other hand, the peace process was making little progress (Nathan 2006:3). In June 2005 the mediators managed to have the parties agree on signing a Declaration of Principles (DoP) that would serve as a foundation for future negotiations. However although the parties had managed to agree upon the general principles of an agreement in the DoP, which was largely based on the CPA, the parties were inflexible in coming to a comprehensive peace agreement. Frustrated by the lack of progress the international community began to increase the pressure for a speedy resolution to this impasse. In order to speed up the negotiations, secret bilateral talks were instigated between Wahid’s SLA’s faction and the NCP, hoping that this would at a later term incite the other rebel factions to join the agreement. Wahid was a popular leader amongst one of the largest tribes in Darfur, the Fur. It was thus believed that his signature would lead to broad based support for the peace process in Darfur. However the SLM/AW and the GoS were unable to come to an agreement as a result of which the mediators turned to Minni Minawi, who’s rebel faction had the strongest military capacities. Although not full-heartedly committed to peace negotiations, Minawi seemed to be more open to bilateral negotiations. In the spring of 2006 the AU Peace and Security Council demanded a peace agreement be signed before the end of April, a deadline that was certified by the UNSC. The international community had grown impatient, and donors were threatening to pull away their funds unless a peace agreement would be signed soon. The rebel movements and the GoS were warned that without a speedy peace deal, sanctions would soon follow (Nathan 2006:3-4).

A few days before the announced deadline, a peace agreement was handed over to the parties by the AU. The rebel groups and the NCP had only five days to read and respond to the document. The GoS was quick to sign the peace accord, which at this point did not force the NCP to make detrimental concessions toward the rebels. Moreover signing the peace accord seems to have been part of the GoS’s diplomatic strategy to appease the international community while at the same time increasing division amongst the rebels. At this time it had already become clear for the government that unity was lacking within and between the rebel movements and thus fighting and divisions over the signing of a peace agreement were to be expected. Furthermore the regime in Khartoum had learned from the peace process in the South that, in spite of a signed peace agreement, it had ample manoeuvring space for slow and selective implementation. Besides, this diplomatic strategy of showing goodwill to the

international community did not keep the government from covertly continuing its military strategy in Darfur.

While the GoS had been quick to sign the DPA, the rebel groups were more hesitant. However, Minawi, who had been the focal point of negotiations in the weeks leading up to the drafting of the DPA, was put under severe international pressure to sign. Threats of personal sanctions by the UNSC eventually contributed to Minawi's willingness to sign the DPA. (International Crisis Group 2006:3 and Nathan 2006:6). Despite international pressure, JEM and SLA/AW did not sign the peace accord. The reasons given for JEM/SLA/AW's refusal to sign the DPA were that the document did not sufficiently take into account the root causes to the conflict, such as the historic marginalization of Darfur and the lack of representation of Darfurians in central government (Sudan Tribune 1 May 2006). In the direct aftermath of the signing of the DPA, JEM pleaded with the AU to renegotiate some central issues such as IDP safety and political representation. However, the international community refused to change the content of the DPA. One negotiator of JEM claims that the AU presented the DPA as a "take it or leave it document" and that they told JEM they would not "add even a comma" (Satya 2006).

### **3.6 Procedural shortcomings of the Darfur Peace Process**

Unsurprisingly the DPA has failed to become the cornerstone for a lasting peace in Darfur. With two large rebel factions, the SLA/AW and JEM as non-signatories to the DPA a continuation of violence was to be expected. Furthermore disagreement amongst rebel parties over the DPA led to further splintering and in-fighting between en within the rebel camps, deteriorating the security situation in Darfur even further.

One of the most important shortcomings in the process leading up to the signing of the DPA was the "deadline diplomacy" used by the international community (Nathan 2006). By forcing the parties to sign a peace agreement they had not even negotiated themselves, the international community hoped for a speedy resolution to the conflict in Darfur. By doing so, they seemed to forget a very important element of peace agreement, which is a sense ownership by the parties. Nathan recognizes the need for ownership in peace agreements, arguing that: "An enduring peace cannot be forced on parties. It has to be shaped and owned by them since it cannot be implemented without their consent and co-operation and its sustainability requires their adherence to its provisions in the long term" (Nathan 2006:3).

In his extensive studies on peace processes, Zartman identified "ripeness" as a key condition for successful negotiations. In his theory the most important factor that determines whether a conflict is "ripe" for negotiations is what he termed a Mutually Hurting Stalemate (MHS). A MHS occurs when both parties perceive themselves to be in a costly "deadlock" and perceive the chances for out-right victory unlikely as a result of which they start looking for a "way out" (Zartman 2001:8). When peace negotiations are offered at such a moment, a MHS is what pushes them into it. However for negotiations to be successful, more is needed. During the negotiations parties need to be presented with "Mutually Enticing Opportunities"(MEO) that give them hope to benefit from the negotiations. The parties need to perceive the eventual outcome of a peace agreement to be favourable to their situation, thus keeping them from resuming to arms (Zartman 2001:14). The AU mediation team in Darfur seems to have neglected the importance of timing in their mediatory efforts. Although "ripeness" is not a condition that can always be identified by outsiders, as it is very much based on the subjective perceptions of the belligerents, there were indications during the Darfur peace process that the timing simply wasn't ripe. The rebel movements lacked the unity needed to form a opposition block against the government. Splintered and divided as they were, the rebels were in no position to demand large concessions from the GoS. While the GoS was under severe international pressure it seems to have calculated that it could sign the DPA to appease the

International Community while implementing only those parts of the DPA that were favourable to Khartoum. At this point the GoS had no real worries that this would have serious consequences as the International community “talked loudly on Darfur but carried a small stick”(Nathan 2006:11,4). Kriesberg has warned against this ‘peace process showcase’ in which a belligerent party presents itself as genuinely committed to peace negotiations just to be seen doing it, while they are in fact not at all committed to peace (1998:272). This seems to have been the case with the GoS who used a diplomatic strategy to appease the international community while in the meantime remaining committed to a military solution to the situation in Darfur.

### **3.7 DPA shortcomings**

Besides the structural difficulties in the Darfur Peace Process, some of the provisions in the DPA too, raise serious questions. The DPA largely covered three areas; power sharing, wealth sharing and lastly, security arrangements (DPA 2006). On the issue of power sharing the DPA provided for limited representation of the Darfurian insurgents in the national government. While the rebels had demanded the position of Vice President this request was not honoured. Instead the DPA established a new position within national government, that of assistant to the President, a function that could be filled by a representative from Darfur. While the new position would be high ranking in status, International Crisis Groups highlights that the “incumbent’s advice to the President and the presidency would not be binding”(2006:7 and DPA 2006 article 8:65,66). Thus, effectually power remained firmly in the hands of the government.

Another important demand frequently addressed by the rebels was a return of Darfur as a unified region instead of being divided into three states<sup>5</sup>. As a compromise to this demand the DPA created a Darfur Transitional Regional Authority (TDRA), an institutional body given transitional authority to deal with regional issues such as reconciliation and security. The TDRA would head several of the commissions on Darfur called to life in the DPA<sup>6</sup>. Eventually the people of Darfur were to decide through a referendum which was to take place before mid-2010 if they wanted Darfur to become a unified region (DPA 2006 article 6:48-54). In an attempt to adhere to the rebel’s power-sharing demands the DPA also gave twelve seats in the National Assembly to the rebel movements (DPA 2006 article 9:71). Although the DPA provisions on power-sharing might seem generous, International Crisis Group argues that they “are less favourable to the Darfur rebels than they may appear (...) [T]he presidency in Khartoum retains considerable powers as executive body for most key activities” (2006:9). Another significant chapter of the DPA was devoted to wealth sharing principles. While the rebel movements, JEM in particular demanded personal compensations to the victims of the violence in Darfur, the DPA limited compensation to general compensation projects and reconstructions efforts, individual compensation is not included in the agreement. This lack of compensation has been one of the key issues that kept JEM from signing the DPA (International Crisis Group 2006:9).

The last significant section of the DPA concerns security arrangements. One of the central aspects of securing a peace in an unstable, post-conflict environment is the disarmament, demobilisation and reintegration of fighting forces. Mostly such disarmament initiatives are left in the hands of peacekeepers to safeguard the process. However the DPA left the parties themselves responsible for their effective disarmament. This was a huge shortcoming for

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<sup>5</sup> In 1994 the NCP government had divided Darfur into three states, thereby separating the largest tribe in Darfur, the Fur and shifting electoral power balances in the region.

<sup>6</sup> For instance, the Darfur Land Commission, The Darfur Rehabilitation and Resettlement Commission and the Darfur Compensation Commission.

safety concerns in Darfur as there were little guarantees for speedy, or in fact any, disarmament to be carried out. While the AU mission in Darfur was authorized to monitor the disarmament, UNMIS simply did not have the capacity to do so (International Crisis Group 2006:4).

In his book on conflict resolution, Louis Kriesberg notes that in order for a peace agreement to be successful and well respected by all parties it has to be “regarded as a good one by the disputants and stakeholders”(1998:244). I believe it is fair to say that the DPA was not regarded as such by the rebel movements. In fact the belligerents felt pushed into the agreement and did not feel a sense of ownership towards the DPA whatsoever. When asked about the motivation for rejecting the DPA, a JEM official answered: “we have rejected the proposed peace accord because we do not think that the document is a product of a negotiated settlement. In fact, we think that this document is a product of intimidation, bullying and diplomatic terrorism”(Democracy Now 2006).

When evaluating the content of the DPA, we can establish that the peace agreement was written largely in favour of the NCP government who was not forced to make any large concessions on power- or wealth-sharing. Furthermore, no guarantor was put in place to enforce implementation, giving the GoS enough room to implement the peace agreement as it wished. Furthermore, the DPA made the government itself responsible for *Janjaweed* disarmament. Without an effective monitoring presence this meant the GoS could slack on this part of the peace agreement and instead continue its military strategy. We thus see that the diplomatic strategy of the GoS towards the peace process in Darfur at this stage was largely a showcase and not at all a genuine attempt to settle to conflict in Darfur.

### **3.8 Return to militarism; the collapse of the DPA**

Within days after the signing of the DPA violence in Darfur resumed. The *Janjaweed*, well armed by the government and growing fast as a result of active government recruitment campaigns, increased their scale of violence and staged hundreds of attacks on African villages, killing thousands of civilians. *Janjaweed* leader Masa Hilal was released from his house arrest to organise his forces and increase *Janjaweed* capacities. Witnesses to the violence often recall aerial bombings of their villages followed by on the ground attacks by *Janjaweed* militias. These accounts suggest close affiliation between the GoS and the *Janjaweed*. On several accounts Hilal has affirmed *Janjaweed* ties to the government saying “I answered my governments appeal, and I called my people to arms” (Flint and de Waal 2008:37). Hilal furthermore openly confirmed the intent of the *Janjaweed* to “change the demography of Darfur and empty it of African tribes” (Flint and de Waal 2008:37). By assisting the GoS in its fight against JEM and SLA, the *Janjaweed* found an opportunity to, in the words of African peace studies specialist Usman Tar, “vent their racial/ethnic anger and hatred on rival African communities with whom they had clashed for decades over economic resources and ethnic/racial differences” (Tar 2005:145). Out of fear that the dominant tribal groups in Darfur- the Masalit, Fur and Zaghawa- would join the rebels, the government-sponsored *Janjaweed* directed many of their attacks on the civilian population. The strategy of the GoS and the *Janjaweed* to target civilians backfired as this stimulated recruitment for the rebel parties (Kastner 2008:157-159). While the Government promised to disarm the *Janjaweed* on six different occasions it failed to do so. Instead the Government continued supplying the Arab militias with arms. In order to suggest a decline in the number of *Janjaweed*, the government integrated a large part of them into the national army and police force, thereby making them even stronger as a fighting force (International Crisis Group 2007:9).

Besides the direct military approach, the GoS successfully used indirect ‘military’ tactics to kill thousands of Darfurians. The GoS did so by prohibiting humanitarian efforts in the

region. Although millions of refugees in Darfur were in dire need of help, the GoS was non-cooperative to humanitarian efforts. Foreign relief workers were denied visas, and great amounts of food-aid destined for Darfur never reached their destination. It is believed that thousands of people have died in refugee camps due to the GoS's purposeful limitation of humanitarian support in the region (Daly 2007:286, 287). This can also be seen as a strategy to further the destruction of African tribes through indirect murder. Reports of sexual and gender based violence too, continued to spread in spite of the new peace agreement (IRIN News 10 August 2006).

In addition to using direct and indirect military instruments to quench the insurgency in Darfur, the GoS attempted to frame the violence in Darfur as merely tribal and thus tried to disaffiliate itself to the violence. The GoS furthermore attempted to label the violence as the work of bandits and criminals (Daly 2007:281). As death tolls started to rise however, this depiction swiftly lost its credibility. It is estimated that nearly half a million people have been displaced in the year following the signing of the DPA (International Crisis Group 2007:6). The DPA simply did not succeed in securing a lasting peace in Darfur. Instead, the agreement exacerbated factionalism and in-fighting within and between the rebel movements and led to the further deterioration of the security situation in the region. Throughout this phase of the peace process in Darfur, the GoS remained committed to a military strategy to defeat the rebels.

### **3.9 Reflecting the political strategy of the GoS towards the peace processes in Sudan before ICC indictments were issued**

The peace processes in Sudan, before ICC indictments were issued in April 2007, were both rather fragile. While the CPA had accomplished the ending of the war in the South there were still issues of dispute, such as the status of Abyei that threatened the peace. For the most part, the strategy of the GoS towards the peace process in the South shifted continually from a military to diplomatic strategy and vice versa, in relation to changing dynamics between the field of the GoS and the Insurgent Region of South Sudan. After the signing of the CPA the political strategy of the GoS towards the peace process in the South can be largely identified as diplomatic. It should however be noted that the GoS did not entirely resign from its military agenda in the South as it failed to properly redeploy its troops from the South as stipulated in the CPA. Furthermore the diplomatic strategy of the GoS at this point was completely aimed at the political survival of the NCP party. And while the NCP government had signed the CPA which formed a significant threat to its power, the government implemented the CPA rather selectively and was continually dragging its feet. Thus, while publicly showcasing its commitment to the peace agreement, behind the scenes the NCP worked hard to direct CPA implementation in such a way as it would benefit the party most. In Darfur the peace process had been an absolute failure before indictments were issued. Although the GoS used a diplomatic strategy to divert international pressure, it continued its military strategy in Darfur, hoping to defeat the rebels through an all-out victory.

When evaluating the political strategy of the GoS towards both peace processes in Sudan, it is fair to say that in general the GoS lacked the genuine will to be committed to either one of the peace agreements. In both peace processes a diplomatic strategy was used to appease the international community and at this point the GoS assumed it was in a position to make promises without following up on them. It is interesting to note that while the peace process in Darfur was, up to this point, an absolute failure, the peace process in the South was rather successful, in that the war was effectually brought to an end. This relative success of the peace process in the South may have been due to the calculus of the GoS in relation to the violence in Darfur and the International Community. Aware that the International Community was initially primarily interested in fostering a peace in the South the government may have

tried to manipulate the International Community by giving it what it wanted in the South, so that in Darfur, it could do as it wished. Thus we see how the triadic nexus of the GoS – Insurgent Regions – International Community constantly affected the course of the peace processes in Sudan. In the coming chapters it will be interesting to examine if ICC interference in Darfur placed sufficient pressure on the GoS to change its largely non-cooperative attitude towards the peace processes in Sudan or perhaps endangered the relative peace that had been established in the South.

## **CHAPTER FOUR: JUSTICE AS A STRATEGY FOR PEACE? ICC INDICTMENTS IN DARFUR**

While the last two chapters predominantly zoomed into the GoS – Insurgent Regions relation in the triadic nexus I now focus my attention on the interdependent relationship between the Sudanese Government and the International Community, principally the International Criminal Court. In doing so I intend to examine how and why the International Criminal Court became involved in the crisis in Darfur and how the GoS responded to these developments. Why, for instance, was prosecutorial justice chosen as the appropriate mechanism to respond to the violence in the region? And how did this affect the interaction between the field of the International Community and the Government of Sudan?

As this thesis is primarily aimed at examining the relation between the ICC indictments and their possible affects on the peace processes in Sudan, it is important to analyse how the GoS responded to them in word and deed. In this chapter, it is the Government's response to the International Community that is under study while the response of the GoS in relation to the Insurgent Regions will be the subject under study in the next chapter. In order to make a proper assessment of the interaction between the International Community and the GoS I have primarily focussed my research on assessing ICC reports to the UN Security Council, ICG Reports and the latest report by the UN Panel of experts on the Sudan. As my research is elite-orientated these documents are particularly useful since they include interviews and public statements by Sudanese high-level officials and are largely based on field documentation, giving valuable insight into the relational dynamics between the International Community and the GoS.

The chapter will start with a brief examination on how the International Criminal Court became involved in the crisis in Darfur. This section will be followed by a short introduction into the structure of the ICC as an international courthouse, giving insight into the rules and regulations that guide the Court. After this, an assessment of the activities of the ICC in Sudan will be provided, followed by an extensive analysis of the GoS's response to the indictments towards the International Community.

### **4.1 The referral of the situation in Darfur to the International Criminal Court**

During the first years of escalated violence in Darfur, the International Community, the Western World in particular, showed little interest to intervene in the Darfurian conflict. During this time, the peace process in the South was in full gear and the international community was primarily interested in securing a peace between the GoS and the SPLM. In spite of the lack of Western interest in the conflict in Darfur, regional interference in the region did start early on in the conflict through the mediation efforts of the African Union. Afraid of the detrimental effects the situation in Darfur would have on regional stability, and eager to prove to world of its capabilities, the African Union took on the challenge of peace mediation in Darfur while also sending peacekeeping troops in the form of the AMIS mission<sup>7</sup> to monitor the earlier mediated ceasefire-agreements. However the AU underestimated the task at hand and it soon became clear that the AMIS mission lacked the proper mandate, funding and skill to effectively contribute to safety in Darfur.

When the Comprehensive Peace Agreement was signed in the South, international attention for the situation in Darfur started to grow. In March 2005 the UN Security Council started to upscale its interference in the conflict in Darfur by imposing sanctions. Even though by that time the gruelling reality of the humanitarian catastrophe in Darfur was evident, as was the role of the GoS in fostering the violence, the UN Security Council failed to take any decisive

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<sup>7</sup> For more information on the AMIS mission, see chapter 2, paragraph 6

action. Several members of the Permanent Five (P5) objected strong intervention in Darfur, afraid that this would hurt their own domestic interests. The United States for instance, were unwilling to risk losing Sudan as an intelligence partner in their fight on terror. China and Russia on their part were in general not keen on intrusive interventions in civil conflicts as they feared they could at one point become subject to such interventions in Tibet and Chechnya. Moreover China, as one of the main oil consumers in Sudan, refused to support intrusive measures that could disrupt their economic bonds with Sudan (Grono 2006:628).

As an alternative to forceful political intervention by the UN, the UNSC decided to take on a strong legal approach by referring the situation in Darfur to the International Criminal Court in The Hague. This decision was based on the report of the Commission of Inquiry on Darfur (CoI) that had been established in the fall of 2004 to examine grave violations of International Criminal Law in Darfur. In the report the CoI concluded that the GoS, the *Janjaweed* and the rebel parties all bore responsibility for the humanitarian crisis in Darfur and that all parties had committed war crimes and crimes against humanity. In response to the gravity of their findings the CoI urged for the pursuit of justice in Darfur and argued that the ICC was “the only credible way of bringing alleged perpetrators to justice” (Report of CoI 2005:146). With resolution 1593, that was voted for by the Security Council in March 2005, the situation in Darfur was referred to the ICC.

#### **4.2 No peace without justice?**

What was the rationale behind the decision to refer the case of Sudan to the ICC and what was the expected outcome of ICC interference in Darfur? In Security Council Resolution 1593 the situation in Darfur was referred to the ICC. In this resolution, reference was made to the threat the situation in Sudan constituted to international peace and security, requiring appropriate action from the international community. The velvet threat running through resolution 1593 was the idea that combating impunity in Darfur would contribute to peace and safety in the region. The rationale behind this was that effective criminal prosecutions would create a disincentive for future violence and would thus contribute to lasting peace. This objective of deterrence is often mentioned as one of the greatest goals of international criminal prosecution. In the preamble of the Rome Statute it is stated that the international community is:

*“Determined to put an end to impunity (...) and thus to contribute to the prevention of (such) crimes”*

In the Rome Statute there is thus an inherent presumption that ending impunity will function as a deterrent. The use of prosecutorial justice in the context of Darfur was thus used as a strategy to enforce a secession of violence.

However, faith in the deterrent effect of prosecutorial justice does not seem to have been the only rationale behind the UNSC’s decision to refer the situation in Darfur to the ICC. At this point there was general unwillingness on behalf of the members of the Security Council, the P5 in particular, to commit resources, staff and energy to contribute to a solution to the conflict in Darfur. This unwillingness was partly due to the preoccupation of the UNSC with the North-South peace process in Sudan and reflects the fear that intervention in Darfur could seriously undermine peace negotiations between the GoS and the SPLM (Kastner 2008:161). Moreover, as was explained in the previous paragraph, the United States, China and Russia all had political and economic interest in Sudan that kept them from taking a hard stance against the Government of Sudan, afraid that this could undermine domestic interest (Grono 2006:628). It thus seems that the referral of the situation in Darfur to the ICC may also have been a strategy to shift international responsibility to another institution, enabling member-

states of the UNSC to wash their hands clean while avoiding the risk of losing important relational ties with Sudan.

### **4.3 Structure of the International Criminal Court**

Before elaborating on the role of the ICC in the conflict in Darfur, it is helpful to briefly discuss the functioning of the ICC as the first permanent international tribunal. The International Criminal Court is an independent judicial institution that was established “to exercise its jurisdiction over persons for the most serious crimes of international concern” (Rome Statute 1998 Article 1:1). The Court is seated in The Hague, Netherlands and is composed of four organs: 1. the Presidency 2. the Pre-Trial Chamber, the Trial Chamber and the Appeals Chamber 3. the Office of the Prosecutor (OtP) and 4. the Registry. The Office of the Prosecutor is currently headed by Luis Moreno Ocampo.

While the Rome Statute, the document that established the ICC, was signed by 120 states on 17 July 1998 it only entered into force on 1 July 2002, after sixty states had ratified it. The ICC thus only has jurisdiction over crimes that were committed after 1 July 2002. Today, 114 states are Party to the Rome Statute, thereby accepting ICC jurisdiction over their territories and inhabitants (ICC: About the Court). There are three ways in which a case can come before the court. The first is a State referral, in which a state that is Party to the Rome Statute refers a situation that occurred within the boundaries of its territory to the Court. Secondly, the Prosecutor himself can initiate an investigation and lastly, the Security Council has the power under chapter VII of the UN Charter to refer a situation to the court (Rome Statute 1998 Article 13:a-c).

The ICC has jurisdiction over three categories of crimes<sup>8</sup>. The first is the crime of genocide. For an aggressive act to be recognised as genocide, intent is a crucial element. Perpetrators of genocide must have the goal “to destroy, in whole or in part, a national, ethnical, racial or religious group, as such” (Rome Statute 1998 Article 6). This makes this particular categorization tricky as it is difficult to find evidence that will demonstrate personal intent. The second crime under the jurisdiction of the ICC are Crimes against Humanity. Murder, sexual violence and torture are some of the acts that fall under this category, if they have been systematically committed on a large scale. The last category within the boundaries of ICC jurisdiction are War Crimes which have been extensively codified in the Geneva Conventions of 1949 and the additional protocols of 1977.

The ICC is installed as an institution of last resort. This means that in the first place, the responsibility to prosecute perpetrators of International Criminal Law (ICL) lies with national governments. Only in a case in which a State is deemed “unwilling or unable genuinely to carry out the investigation or prosecution” of grave breaches of ICL, can the ICC start an investigation (Rome Statute 1998 Article 17:1a). A case has to be deferred if a State has started investigations or prosecutions that qualify as being held according to international principles of law.

### **4.4 ICC investigations and the issuance of indictments in Darfur**

In response to the United Nations Security Council resolution 1593 the Office of the Prosecutor initiated investigations into international crimes committed on the territory of Darfur since 1 July 2002. Even though Sudan is not party to the Rome Statute, the UNSC referral under chapter VII provided the ICC with a legitimate framework to start

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<sup>8</sup> A fourth category of crimes, the crime of aggression, is included in the Rome Statute (Article 5(1) and 5(2)). However, only after an international definition of the crime of aggression is adopted will the Court be able to carry out its jurisdiction over this particular category of crimes.

investigations. In his first report to the Security Council, Prosecutor Luis Moreno Ocampo concluded that there was “a significant amount of credible information disclosing the commission of grave crimes within the jurisdiction of the Court haven taken place in Darfur” (ICC June 2005). After further investigation the OtP requested the Pre-Trial Chamber to release arrest warrants against former Minister of State for the Interior, Ahmad Muhammad Harun and *Janjaweed* leader Ali Muhammad Ali Abd- Al-Rahman, better known as Ali Kushayb. The OtP argued it had sufficient evidence to prove that both men were guilty of having committed war crimes and crimes against humanity as they systematically organized attacks against the civilian population (ICC June 2007).

On 27 April 2007 the indictments against Harun and Kushayb were released. At this point Prosecutor Moreno Ocampo was convinced that the indictments would serve in the interest of peace and security in Darfur emphasizing that “justice for past and present crimes will enhance security and send an important warning to individuals who might otherwise resort to criminality as a means of achieving their aims”(ICC June 2007). Although the indictments against Harun and Kushayb did send out a warning to those violating ICL in Darfur, at this point the indictments did not sufficiently pose a credible threat to effectively alter the security situation in Darfur. How much weight the charges would eventually bear was dependent on cooperation of the Sudanese Government and the international community at large, as the ICC has no internal enforcement mechanisms to secure actual arrests. The ICC in Darfur was thus highly reliant upon other parties to enable its quest for justice and peace in Darfur. It soon became clear that the GoS was by no means planning to hand over Harun and Kushayb to the ICC thus protecting them from any prosecutorial threats.

In his sixth report to the Security Council the ICC Prosecutor announced further investigations into the mobilization of the state apparatus to facilitate violations of ICL in Darfur (December 2007). The OtP was particularly concerned with the Government’s decision to keep Harun, suspected of having coordinated the killings of large numbers of civilians and displacing even more, at the head of the Ministry of Humanitarian Affairs. According to the OtP this not only pointed towards the government’s “tolerance” to serious humanitarian violations, but suggested “active support” for the violations (ICC December 2007, paragraph 9). Further investigations by the OtP uncovered evidence of President al-Bashir’s direct involvement in systematic attacks on civilians through the Sudanese Armed Forces (SAF) and the *Janjaweed*. The attacks were aimed specifically at villages inhabited by Fur, Zaghawa or Masalit tribes, the ethnic communities deemed responsible for the insurgency in Darfur. Instead of targeting the rebels, Moreno Ocampo argued, government forces attacked these entire communities, aiming for their total destruction. As part of these systematic attacks, a ‘scorched earth’ policy was applied, destroying the entire livelihoods of the groups and making them completely dependent on external aid. Not only were the Fur, Zaghawa and Masalit chased from their territory, their land was often immediately seized and given to tribes associated with the *Janjaweed*. While the groups of IDP’s was growing drastically in Darfur, evidence suggested that President al-Bashir was blocking humanitarian aid in the region thereby encouraging malnutrition and the spread of disease in the camps (ICC December 2008, paragraph 24,31, 36,42).

On the basis of these findings, the Prosecutor requested the Pre-Trial Chamber for an arrest warrant against the Sudanese President on 14 July 2008. As opposed to the arrest warrants against Harun and Kushayb, the charge against al-Bashir included genocide, which is often considered to be the most severe of all international crimes. On 4 March 2009 the request for an arrest warrant against al-Bashir was accepted by the Pre-Trial Chambers. He was charged with five counts of crimes against humanity and three counts of war crimes. Initially, the pre-trial chamber ruled that there was not enough evidence available to charge al-Bashir for genocide. After an appeal of the Prosecutor however, a second warrant of arrest was issued

against al-Bashir on 12 July 2010, including three counts of genocide (ICC: situation in Darfur, Sudan).

The indictments against al-Bashir were a landmark for the ICC as it was the first time the Court subdued a sitting head of State to international prosecution in the midst of war. While the charges against al-Bashir were applauded by human rights activist and many political leaders, critical voices were simultaneously raised as the consequences of the indictments could mean a deterioration of the security situation in Darfur. At this point the scale could tip either way. On the one hand, the threat of prosecution could entice al-Bashir to better his conduct in the hope to have the charges dropped. On the other hand however, the arrest warrants could lead al-Bashir to believe he had nothing to lose and thus push him to use more draconian methods to hold on to his power and get rid of all internal opposition.

The news of a possible ICC indictment against al-Bashir triggered fervent opposition by the African Union (AU) who stated that “in view of the delicate nature of the processes underway in the Sudan, approval by the Pre-Trial Chamber of the application by the ICC Prosecutor could seriously undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur and the promotion of long-lasting peace and reconciliation in the Sudan as a whole” (African Union 21 July 2008). Although at first glance, this position might seem to reflect an earnest concern for a disruption of the peace process in Darfur. On second thought it does not seem unlikely that the AU’s position towards al-Bashir’s indictment was not solely motivated by a concern for the peace process but also reflected a fear that other sitting heads of states in Africa could be target of future ICC investigations; a grim prospects for leaders of whom many had some questionable practices on their name. Whatever the motivation and legitimacy of the AU’s opposition towards the Bashir indictments, the standpoint is significant as it reaffirmed and strengthened the GoS anti-ICC rationale and encouraged the Sudanese President to resist the indictments even more.

Besides the indictments against Kushayb, Harun and al-Bashir, in November 2008 a process was started against three rebel leaders from JEM, the SLA and URF<sup>9</sup>. Unlike the GoS the rebel groups accepted ICC jurisdiction and are momentarily in custody of the ICC in The Hague (International Crisis Group 2009:15).<sup>10</sup> As this thesis is primarily interested in examining the relation between ICC indictments and the political strategy of the GoS towards the peace processes in Sudan, the focus of this paper will be on the indictments against government official Harun and President al-Bashir.

#### **4.5 The ICC, a first class terrorist organisation? GoS framing practises in response to the ICC indictments**

After having examined how and why the ICC became involved in the conflict in Darfur, I now turn to analyse the response of the Government of Sudan in relation to the indictments. In the first phase of ICC investigations the GoS had to some extent cooperated with the ICC in providing documentation, even allowing interviewing with government officials. However as investigations proceeded and the first requests for indictments were issued by the OtP in February 2007 the willingness of the GoS to cooperate with the Court evaporated. Instead the GoS started to express itself as a fervent opponent to the ICC, completely rejecting its

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<sup>9</sup> The URF, or United Resistance Front is a rebel movement consisting of an agglomeration of five different Darfurian rebel movements joined in one.

<sup>10</sup> The Pre-Trial Chamber concluded on 8 February 2010 that there was not sufficient evidence to confirm the charges against Bahar Idriss Abu Garda (Chairman and General Coordinator of Military Operations of the United Resistance Front).

jurisdiction in Sudan. In a statement made in February 2007, Sudan's Justice Minister, Mohamed Ali al-Mardi publicly announced that no Sudanese national would be handed over to the ICC as the national judicial system of Sudan was itself capable of dealing with perpetrators of war (Sudan Tribune 27 February 2007). Any work of the ICC on Sudanese turf was labelled illegitimate. The lack of cooperation on behalf of the GoS seriously strained the work of the ICC in Darfur as arresting Harun and Kushayb without the assistance of the Sudanese Government would be nearly impossible.

The strategy of de-legitimization of the ICC on Sudanese territory by the GoS had already been set in motion three months after the UNSC referral of the situation in Darfur had been made. In an attempt to override ICC jurisdiction in Darfur, the GoS tried to play into the complementarity principle of the ICC. As was discussed in the second paragraph of this chapter, the Rome Statute holds that cases before the ICC are inadmissible if a State itself is willing and able to start investigations and prosecutions (Rome Statute 1998 Article 17:1a). In an attempt to force the ICC to stop investigations, the GoS set up the Special Criminal Court for Darfur (SCCD). However, this sudden pursuit of justice in Darfur by the GoS was not perceived by the ICC as being a genuine attempt at justice. The first suspects that were tried by the SCCD were charged for minor offences while the 'big fish' were not being pursued (IRIN News 24 June 2005). While one of the accused at the SCCD was Ali Kushayb, the *Janjaweed* leader who also faced charges by the ICC, the SCCD only focused its investigation on an isolated event that, in comparison to the case of the ICC was inexcusably marginal. As a result of these limitations of the Sudanese pursuit of justice, the Pre-Trial Chamber ruled that the complementarity principle would still apply to the situation in Sudan arguing that:

*While there are indications that Ali Kushayb is under investigation in the Sudan in relation to certain matters, the investigation does not relate to the same incidents as those investigated by the Office of the prosecutor. Concerning Ahmad Harun, there is no indication that he is or has been subject to any criminal investigation in relation to Darfur. (...) National proceedings are not in respect of the same incidents and address a significantly narrower range of conduct (ICC Fifth Report June 2007).*

Thus, according to the ICC, the GoS was not able to overrule ICC jurisdiction seeing that investigations and prosecutions in themselves were not enough for a deferral, as the Rome Statute states that in such a case the prosecutions have to be held "according to principles of due process recognized by international law" (Rome Statute 1998 Article 17:2) and this was most certainly not the case in Darfur.

Seemingly frustrated that the Sudanese 'show-case court' had failed to keep the ICC out of Sudan, GoS statements on the ICC became increasingly defensive arguing that any endeavour by the international community to arrest Kushayb or Harun would constitute "kidnapping and international piracy" (ICC December 2007, paragraph 13). By framing a possible arrest as such, the GoS in effect turned the tables on the ICC by criminalizing the Court, suggesting that not Harun and Kushayb, but the ICC would be violating international law. In the months that followed, government officials kept reaffirming the competency of the Sudanese judicial system to deal with perpetrators of war, highlighting that any ICC activity on Sudanese ground was illegitimate. Speaking about the ICC case against Harun, Sudan's Minister of Interior, Zubeir Bashir Taha was quoted saying "Harun had been interrogated about the allegations, and there is no case. The evidence does not stand scrutiny and whether it does or not, it is a matter for Sudan to decide and act upon. The Prosecutor has no jurisdiction here. He is an intruder" (ICC December 2007, paragraph 14). This statement once again reflects the GoS's strategy to undermine the ICC by highlighting the illegitimacy of ICC investigations in Darfur.

President al-Bashir himself too attempted to delegitimize and criminalize the ICC by announcing that “we view the ICC as a first class terrorist organisation. (...) Most certainly we will not hand over any Sudanese citizen. (...) We are not party to the Rome Statute so no Sudanese cannot be tried at the ICC” (Sudan Tribune 11 June 2008). The GoS, this time in the person of the President himself, thus labelled the ICC as a criminal organisation, thereby not only undermining it as an international institution but incriminating its very existence. It is interesting that the term “terrorist organisation” was used by al-Bashir, as this was exactly the label used by the International Community to justify the military invasion in Iraq and Afghanistan. Did the President perhaps use the term to clarify that he would use all possible means to stop ICC activities in Sudan? Only days after the indictments against President al-Bashir were released, the President took another shot at the ICC saying: “in reference to the ICC decision they can cancel it, or they can boil it and drink the water, we are ready for you...Mark my words – The Prosecutor, his court and all its members are under my shoes” (ICC June 2009, paragraph 35). The President thus took on an incredibly offensive attitude trying to convince the world and the people of Sudan that the ICC could not touch him and that in effect; he did not really care about the indictments. This fierceness with which al-Bashir attacked the ICC in word might well be a reflection of his concern of the ICC activities in Sudan and his insecurity of being able to fight against it. However, towards the true intent and purpose of al-Bashir’s framing practices we can only speculate.

In order to help stir anti-ICC sentiment amongst other states, the GoS also started to aim its arrows at the Muslim world, by adding a religious element to the ICC debate arguing that “in accordance with the Naivasha agreement and the constitution we use the Shari’a law which prohibits handing over a Muslim person to a court that does not implement the Islamic law. So from a religious perspective we will not surrender anyone” (Sudan Tribune 11 June 2008). This statement can be seen as a direct move by the Sudanese President to organize Muslim states against the ICC by insinuating that collaborating with the ICC goes against Islamic law and principle. It can also be seen as a strategy to foster internal support for the government’s non-compliance with the ICC amongst Sudan’s Muslim population.

Another framing strategy used by the GoS was the blunt denial of the humanitarian crisis in Darfur and the misrepresentation of the security situation in Darfur. The GoS is known to limit access to violent areas making it very difficult to estimate the gravity of the situation in Darfur (Human Rights Watch 2011:17, Amnesty International 2011). It is however clear that there are constant discrepancies between the information on the humanitarian crisis in Darfur provided by the government and UN institutions working in the field. For example, in June 2007 al-Bashir was quoted saying: “most of Darfur is now secure and enjoying real peace. People are living normal lives” (ICC December 2007, paragraph 54). However the UN Office for the Coordination of Humanitarian Affairs (OCHA) estimated that between January and July 2007 roughly 160.000 persons were newly displaced in Darfur due to continued violence in the region (OCHA 2007). Furthermore, when confronted with figures of rape in Darfur, al-Bashir was quoted saying “it is not in the Sudanese culture or people of Darfur to rape. It doesn’t exist. We don’t have it” (ICC December 2008, paragraph 51). Investigations by the UN Panel of Experts on the Sudan however found that “sexual and gender-based violence has been one of the most persistent human rights violations in the context of the Darfur conflict” (UN Panel of Experts March 2011, paragraph 161). By representing the situation in Darfur as peaceful, it seems al-Bashir hoped to convince the world that the situation in Darfur was stabilizing and that the war was as good as over, thereby diverting international attention from the region. The strategy can also be analysed as an attempt to conceal continual crimes from the International Community, further obstructing the work of the ICC in Sudan.

#### **4.6 The diplomatic strategy of the GoS in response to ICC indictments**

When examining the diplomatic response of the GoS towards the International Community a two-pronged approach can be identified. While Sudanese cooperation with much of the Western world stagnated, the GoS made serious attempts to mobilize the Arab/African world against the ICC, in particular in a quest to have the indictments against the President himself deferred. In relation to the ICC the GoS had showed a degree of cooperation before the first indictments were issued in April 2007. However since that period the ICC Prosecutor has noted that the GoS refuses any cooperation with the Court, in spite of being demanded to do so in UNSCR 1593 which stated that “the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor” (ICC June 2008, paragraph 30 and UNSCR 1593, article 2). The sudden lack of cooperation on behalf of the GoS shows a shift in strategy. Were the GoS first tried to keep the ICC out of Sudan by trying to play into the admissibility principle laid out in the Rome Statute, it now realized that this strategy was failing. The Prosecutor had made clear that the Special Court for Darfur did not sufficiently address the cases under investigation by the ICC and thus the situation in Darfur would be admissible. When the first indictments were issued, cooperation no longer seemed an effective strategy. The GoS instead worked to block ICC activities in Sudan to such an extent that it would not be able to effectively prosecute any Sudanese national. In fact, instead of cooperating with the Court by handing over Harun and Kushayb, the GoS left Harun in the position of Minister of State for Humanitarian Affairs and enabled him to, in the words of the Prosecutor, “enjoy a high profile in the Sudanese media and public life” (ICC June 2008, paragraph 33). In doing so, it seems the government wanted to demonstrate that the ICC had no power over internal Sudanese affairs and that it stood above any ICC indictments.

As part of the strategy of non-cooperation the GoS started a mobilization program amongst members-states of the African Union and the Arab League. For a great deal, this anti-ICC campaign has been successful. Many countries have openly opposed the ICC indictment against al-Bashir, such as Saudi-Arabia, Eritrea, Egypt and China. Furthermore the AU and Arab League have been fervent supporters of a Security Council deferral of al-Bashir’s indictment. During the 13<sup>th</sup> Summit of the AU, that took place only a few months after al-Bashir’s indictment, an agreement of non-compliance to the ICC was forged between the member-states. The agreement to some degree removed al-Bashir from his isolation by enabling him to travel to other African countries. This move by the AU highly undermined the functioning of the ICC that, as said before, is dependent on other states for its enforcement (International Crisis Group 2009:20). To the frustration of the Prosecutor, al-Bashir indeed travelled outside Sudan on several occasions, demonstrating to the world the failure of the ICC to have any grip on him. These travels were a public display of the ICC’s incapability of arresting the Sudanese leader and were thus rather humiliating to the standing of the Court. However the affect of the regional support for al-Bashir should not be overstated as many states, also on African turf such as Uganda, Kenya and South Africa, have expressed their intent to cooperate with the ICC and arrest al-Bashir should he set foot on their territory. The indictments have furthermore kept the Sudanese President from attending many high profile summits all over the world (ICC December 2009, paragraph 68, 69).

The last and most devastating diplomatic response of the GoS to the ICC indictments was the expulsion of humanitarian NGO’s from Darfur. Within hours after the arrest warrant against President al-Bashir was issued, thirteen international humanitarian organisations working in Darfur were notified that they were no longer allowed to work on Sudanese territory. This move on behalf of al-Bashir can be seen as a direct retaliation for the arrest warrant against him. It also reveals Sudan’s lack of commitment to human rights as over a million people were dependant on the help of these international NGO’s (Human Rights Watch 5 March

2009). The expulsion of international humanitarian agencies from Darfur should also be seen as a direct tactical move on behalf of the government to obstruct the work of the ICC in Darfur as the GoS feared that international staff of the NGO's might provide the ICC with information and witness statements against the GoS.

#### **4.7 The military strategy of the GoS in response to ICC indictments**

While the GoS's political strategy towards the International Community after the indictments were issued was dominated by framing and diplomatic practises, the GoS also responded through a military strategy. There are reports of violent attacks by government forces in Darfur "including arbitrary arrest and torture against humanitarian aid workers and human rights defenders" (Oette 2010:349). In Western Darfur for instance three employees from Médecins Sans Frontières (MSF) were abducted on 11 March 2009 by unidentified men. The ransom that was demanded in exchange for the lives of the three abductees was the cancellation of the indictment against al-Bashir. Incidents like these have reportedly increased "dramatically" since the indictment against al-Bashir was issued (International Crisis Group 2009:19). While this military response to ICC indictments is worrying it is important to emphasise that this type of strategy used by the GoS was incidental. There has been no large-scale, systematic military affront against international staff in Darfur. Incidents such as these do indicate however a certain desperation on behalf of the GoS to have the charges, especially those against President al-Bashir, dropped.

Besides the notorious move to expel aid organizations from Darfur, the GoS has been known for obstructing the deployment of the hybrid peacekeeping mission UNAMID by complicating visa arrangements and imposing on the troops an enormous bureaucratic ordeal that greatly slowed down the entire peace-keeping process. However it would be highly presumptuous to link this obstruction of the hybrid AU/UN mission directly to the ICC indictments. Ever since talks about a UN military presence in Darfur started to abound in 2006, the GoS had expressed itself in fervent opposition to it. When the Security Council Resolution 1706 called for the extension of the UNMIS mandate to incorporate Darfur, the GoS refused. When Khartoum finally agreed to a hybrid mission in November 2006 it still took another six months before the GoS officially gave permission for the deployment of UN troops (Lijn, van der 2008). Thus, the hesitant and sometimes non-cooperative attitude of the Sudanese Government towards the peacekeeping operations in Darfur should not be directly linked to the indictments.

#### **4.8 Non-cooperation and de-legitimization; reflecting the GoS's response to ICC indictments**

When reflecting upon the response of the GoS to ICC indictments several trends can be identified. First, a general attitude of non-cooperation on behalf of the GoS can be detected in word and in deed. The GoS framed the work of the ICC in Darfur as illegitimate, thereby denying the Court jurisdiction in the Sudan. The GoS furthermore refused to hand over any indicted Sudanese individuals. It also seems that the Sudanese Government tried its best to convince the International Community and the people of Sudan that the ICC indictments were not a big threat to the GoS, thereby aiming to undermine the standing of the Court. This strategy was reflected in many of the framing practises of the GoS. The strategy of undermining the ICC, representing the work of the ICC as little influential to Sudanese politics, also became evident in the GoS diplomatic practises, for instance by the public travelling of President al-Bashir outside the Sudan. In doing so the GoS seems to have wanted to publicly display the inability of the ICC to have grip on the President, let alone arrest him. By using labels such as "intruder" and "terrorist organisation" to refer to the ICC and depicting possible arrests as "kidnapping" and "international piracy", the GoS over-zealously

tried to deny the ICC any ground in the Sudan. The GoS gave much time and effort to convince the world, and perhaps itself, that the ICC could not touch it. This however indicates that the GoS was in fact concerned by ICC activities. This concern also became evident by the Governments expulsion of international aid agencies in direct response to the indictment against President al-Bashir. Such a drastic move reflected the GoS fear that perhaps the ICC would find a way to, in spite of the Governments lack of cooperation, arrest the President. It must however be said that the credibility of ICC indictments was severely reduced by the lack of cooperation on behalf of the International Community. Without an internal enforcement mechanism the ICC is completely reliant on the collaboration of states in arresting indicted individuals. While the Security Council explicitly demanded full cooperation to the ICC in Darfur from not only the Sudanese Government, but all other member states, it has done little to enforce this cooperation. The GoS and its international allies have, without any consequence, openly denounced cooperation to the ICC. This greatly undermines the ICC and limits its capacity to pose a credible threat to deter perpetrators of war.

## CHAPTER FIVE: THE POST-INDICTMENT POLITICAL STRATEGY OF THE GOS TOWARDS THE PEACE PROCESSES IN SUDAN

In this fourth and final chapter I now move to examine the political strategy of the GoS towards the Insurgent Regions of Darfur and South Sudan since the first ICC indictments were issued in April 2007. While ICC indictments were specifically aimed at the Darfur crisis it would be short-sighted to assume that the indictments could only affect the political strategy of the GoS towards the conflict in Darfur. Instead, as was highlighted and demonstrated in the previous chapters, the relationship between the fields within the triadic nexus is highly relational and interdependent. Therefore it is equally important to examine the possible affects of ICC indictments on the peace process in South Sudan.

Whereas the previous two chapters each focussed on the relation between two fields within the triadic nexus<sup>11</sup>, this chapter will bring the nexus to full circle by examining how and to what extent the military-, diplomatic- and framing-practises of the GoS towards the Insurgent Regions shifted since the first ICC indictments were issued in April 2007. By examining the GoS's political strategy towards the peace processes in Sudan after the first indictments were issued in April 2007, and comparing the outcome to the GoS's pre-indictment strategies, the chapter aims to identify possible patterns of change that could be linked to ICC activities in Sudan. Were there changes in the level of violence used by the GoS towards the Insurgent Regions? Can a sudden dead-lock in the peace negotiations be identified? Has the Government of Sudan become more lenient and cooperative since indictments were issued? Or is there perhaps little noticeable change in the political strategy used by the GoS towards the peace processes? In any case, it is important to stress that this chapter is not aimed at establishing a direct cause-and-effect relation between the ICC indictments and the peace processes in Sudan as many factors other than prosecutorial justice impact on conflict dynamics. However the chapter does shed light on the inter-dynamic nature of the relation between the GoS, the Insurgent Regions and the International Community and can help us understand to what extent changes in the field of the International Community, as a result of the UNSC referral of the situation in Darfur to the ICC, have influenced the political strategy of the Government towards the peace processes in Sudan.

The chapter will start with an examination of the peace process in Darfur since April 2007, focussing on the GoS's military-, diplomatic- and framing-practises in dealing with the Darfurian rebels and comparing these to the GoS's pre-indictment strategies in Darfur. After this, the same will be done for the peace process in South Sudan. The research in this chapter will be largely based on documents from the UN Panel of Experts on the Sudan and the Secretary General on the Sudan, reports of the ICC Prosecutor to the UNSC and documentation from renowned international think-tanks such as Human Rights Watch and the International Crisis Group. In spite of limited access to conflict zones in Sudan the above reports give a rather concise picture on the peace processes in Sudan since 2007.

### 5.1 Continued militarism; the GoS's post-indictment political strategy in Darfur

*“Within Darfur the actions of all sides make it clear that a military solution to the conflict has been chosen over any substantive engagement in peace talks. Attempts to bring warring parties to the negotiating table or to broker ceasefires have failed”*

UN panel of experts 2008:3

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<sup>11</sup> Chapter two highlighting the GoS – Insurgent Regions link within the triadic nexus and chapter three focussing primarily on GoS – International Community interaction

At the time of writing, it has been over four years since the first ICC indictments against government official Ahmed Harun and *Janjaweed* leader Ali Kushayb were issued. We now turn to examine if, how and to what extent these indictments, and in particular the indictments against President al-Bashir, affected the military strategy of the GoS in Darfur. In the second chapter we had already come to see that in spite of diplomatic efforts the GoS predominantly used a highly military strategy as a means to settle the conflict in Darfur. The signing of the DPA in March 2005 had not led to a reduction of violence in Darfur, as attacks between the Government forces, Government aligned militia's and rebel movements continued. Instead of disarming the *Janjaweed*, the GoS continued to rely on the militias. Civilians too, continued to be violently targeted by the GoS as a means to eliminate any rebel support bases. As a result of this, civilian deaths and large-scale displacement persisted in the region (International Crisis Group 2007).

Since the issuance of arrest warrants by the ICC, starting in April 2007, the military approach of the GoS towards the conflict in Darfur has not significantly changed. In December 2007 ICC Prosecutor Moreno Ocampo reported to the UN Security Council that Darfur was still subjected to persisting levels of violence. Attacks against civilians, particularly from the Fur, Masalit and Zaghawa tribes, in the second half of 2007 demonstrated the continuation of the Government's strategy to target 'rebel support bases' deemed to be responsible for the uprising in Darfur (ICC December 2007, paragraph 5). In February 2008 for instance, Government forces, supported by *Janjaweed* militia attacked the town of Abu Suruj and Sirba, killing an estimated seventy civilians and displacing thousands. As result of such attacks perpetrated by the GoS, more than 100.000 Darfurians were displaced in 2008 alone (ICC June 2008, paragraph 65,73).

While the DPA called for the disarmament of the pro-government militia by the Sudanese regime, the GoS failed to do so. Instead there is evidence that these groups were receiving active support from the Government in Khartoum. In 2008 a Sudanese Government official confirmed to members of the UN Panel of Experts that the Sudanese Armed Forces operated in conjunction with the *Janjaweed*, protecting militia members from prosecutions for any humanitarian or human rights violations (UN Panel of Experts 2008:51). These militia could thus rape, loot and murder without consequence. The continual targeting of civilians in Darfur by the Government of Sudan can be seen as a strategy to foster a climate of fear, insecurity and chaos in the region. By destroying complete villages and livelihoods, the people of Darfur would be in no position to effectively oppose the NCP regime or provide support to the rebel movements. It is important to stress at this point that the violence used by the GoS in Darfur did not accelerate after Harun and Kushayb's indictments were issued. Rather, in comparison to pre-indictment levels of violence there was a mere continuation of the GoS's military strategy in Darfur.

While the arrest warrants against Harun and Kushayb did not significantly seem to alter the military strategy of the GoS in Darfur, there were fears that the indictments against President al-Bashir would have detrimental effects on the peace process in Darfur. However, concerning the GoS's military strategy in Darfur, the indictments against al-Bashir too produced little noticeable change. Following the indictment in March 2009, the ICC continued to report ongoing attacks by Government forces and the *Janjaweed*. In the period ranging from 2009 well into 2011 the GoS kept bombing populated areas leading to more civilian deaths and casualties (ICC December 2010, paragraph 32,33,37 and ICC June 2011, paragraph 36-38). The manner in which these attacks were executed resembled the military strategy the Sudanese Government had been using in Darfur for years: "indiscriminate aerial bombardments followed by SAF ground troops and Militia/*Janjaweed*, destruction and looting of civilian properties, causing the displacement of local populations"(ICC December

2009, paragraph 76). The UN Panel of Experts confirmed this military strategy used by the GoS in their 2008 report, identifying a pattern in which Government aircrafts first bomb villages, followed by *Janjaweed* ground attacks. Then, after a village has been “secured” SAF forces would move in and take over the village (UN Panel of Experts 2008:47). By conducting attacks in this manner the GoS attempted to disguise its responsibility to the violence in Darfur and make it difficult for the ICC to prove GoS complicity in the attacks. This was nothing new; since the beginning of the war in Darfur the GoS has worked via *Janjaweed*, framing the violence in the region as tribal warfare and the work of bandits (Daly 2007:281). In 2007 the UN panel of experts found evidence that the GoS deliberately tried to make their aircrafts resemble those of the UN, up to the point where actual ‘UN’ markings were painted on the aircrafts (UN Panel of Experts 2007:60,61). This too, can be seen as part of a larger strategy by the GoS to deny responsibility for violent attacks in Darfur. Furthermore, by making the people of Darfur believe the UN were responsible for the offensive over-flights, the GoS anticipated growing anti-UNAMID sentiment amongst Darfurians, which would make it more difficult for the mission to execute its tasks effectively, thus giving the GoS more space to act as it wished in Darfur.

Besides aerial bombings and ground attacks, rape too, has continually been used by the GoS as an instrument of war in Darfur. In a refugee camp in Zalingei for example, an average of a hundred woman are raped per month by Government forces and *Janjaweed* (ICC December 2009, paragraph 92). In 2008, the UN Panel of Experts reported that “The Panel notes with concern the continued regular and widespread occurrence of cases of sexual harassment and degrading treatment (...) Armed pro-Government militias as well as regular soldiers belonging to Government forces are named as the perpetrators”(UN Panel of Experts 2008:73 and Human Rights Watch 2011:20). This pattern of systematic sexual abuse in Darfur has, according to the latest report by the UN Panel of Experts, continued “unabated” in Darfur during 2010 and the first months of 2011 (UN Panel of Experts 2011:5).

All in all, we can conclude that in terms of the GoS’s military strategy towards the insurgency in Darfur, little has changed since ICC indictments were issued. The reports by the ICC and the UN Panel of Experts since 2007 all indicate a continuation of Government affiliated violence in Darfur. In 2011, the ICC noted that “the pattern of targeting civilians has never abated nor varied” (ICC June 2011, paragraph 21). The latest report on Darfur by Human Rights Watch too, underscored that the practise of targeting civilians in Darfur by Government forces continues up to this day. In the first three months of 2011, this has caused 70.000 people to flee their homes (Human Rights Watch 2011:14-16). The ICC indictments have neither led to a decrease in the level of violence used by the GoS, nor to an acceleration of the Government’s use of force and thus seem to have had little impact on the military strategy of the GoS in Darfur.

## **5.2 Towards a political solution? The GoS’s diplomatic strategy towards post-indictment peace negotiations in Darfur**

While the GoS was pursuing a military agenda in Darfur, simultaneous efforts were made towards a political solution to the conflict in Darfur. In the second chapter we have seen that the GoS’s pre-indictment diplomatic strategy in Darfur was primarily a show-case to appease the international community. The DPA was an outright failure as the belligerents in Darfur lacked the political will for a negotiated peace. While the GoS made many promises, it implemented the DPA very selectively and according to its own interests and although international effort for a more inclusive political settlement in Darfur continued after ICC indictments were issued, the political process remained strenuous. In fact, the situation was further complicated by splintering and internal divisions in the rebel camps. In 2007, Darfur counted over twenty different rebel movements, each with their own political agenda (UN

Panel of Experts 2008:52). Due to the plethora of political demands made by the armed groups and the lack of coherence between the rebels, the chances of a credible peace process were seriously reduced. Furthermore, with opposition in Darfur highly divided, the rebel movements were in no position to demand concessions on behalf of the GoS. In the immediate aftermath of the first ICC indictments, the diplomatic process in Darfur was facing political deadlock (UN Panel of Experts 2007:55).

In June 2008, one month before the ICC Prosecutor announced investigations against President al-Bashir, the international community in the form of the AU and UN tried to rekindle the diplomatic process in Darfur by appointing Djibril Bassolé as new chief mediator in Darfur. While the parties showed reluctance to the newly initiated peace process, Bassolé finally managed to have the GoS sit down at the negotiation table with major non-signatory rebel movement JEM in February 2009, after a political deadlock of nearly three years (Small Arms Survey 2011). The timing of the negotiations, that were held in Doha, Qatar, was significant as the ICC Pre-Trial Chamber was expected to be making a decision on the request for an arrest warrant against President al-Bashir in March of the same year. The willingness of the GoS to sign a “goodwill agreement” and a ceasefire with JEM on February 17, could perhaps be seen as a strategy on behalf of the Government to appease the Pre-Trial Chamber in exchange of a remittance of the Bashir case. In September and October 2008, al-Bashir’s government had made extensive international diplomatic efforts to plead for a deferral of the ICC’s case against al-Bashir, sending diplomats to members of the P5 - France, England and the United States – to ask for their support on the matter. Both France and the United Kingdom expressed their willingness to consider support for a deferral, however, only if the Sudanese Government would seriously alter its policies in Darfur (International Crisis Group 2009:16-17). Thus it is not unlikely that the GoS’s sudden interest in diplomatic negotiations with JEM were a direct attempt to halt ICC investigations against al-Bashir. The foreign minister of Sudan confirmed this rationale saying: “if we come up with a clear roadmap for Darfur, then I think we can have the moral authority to begin to ask (...) whether they could defer the decision by the ICC”(BBC News 12 November 2008). This could implicate that instead of posing a threat to the peace process, the investigations against al-Bashir indirectly contributed to the GoS’s willingness to enter peace negotiations and solve the conflict in Darfur through diplomatic means.

As the hope for a deferral of the Bashir case evaporated with the issuance of an arrest warrant against the President in March 2009 the diplomatic interaction between JEM and the NCP Government once again deteriorated. This was not solely due to a change in the diplomatic strategy of the GoS. The indictment against al-Bashir gave an enormous boost of confidence to the rebel movements in Sudan. Not only did the indictment against the President further delegitimize the GoS in the eye’s of the rebel movements, the indictment was also perceived as an international vow of support for regime change in Sudan and encouraged the rebels to abide by a military solution in Darfur (ICG 2009:23). Days before the issuance of the arrest warrant, one of the leaders of JEM had stated that an arrest warrant against al-Bashir would mean “an end of his legitimacy to be president of Sudan. (...) If he doesn’t cooperate with the ICC the war will intensify” (Sudan Tribune 2 March 2009). In spite of the early euphoria over al-Bashir’s indictment by JEM, it soon became clear that the President’s arrest was not at hand and the expected change in balance of power in Darfur did not occur. In the course of 2009 peace negotiations between the GoS and JEM thus continued.

In February 2010 the GoS and JEM signed a ceasefire agreement and framework for a peace agreement. At this point it should be noted however, that even though the diplomatic process between the GoS and JEM was bearing fruit, fighting by GoS forces and JEM had steadily continued during this time. In fact, on the same day the ceasefire agreement between JEM and the Government was signed, Government forces attacked JEM territory in Jebel Marra,

killing over fifty civilians and leading to the displacement of an estimated 100.00 people (ICC June 2010, paragraph 75). The UN Panel of Experts confirms the continuance of militarism in spite of ‘successful’ diplomatic efforts between JEM and the GoS stating that “while their representatives were in Doha, SAF and JEM clashed on the ground in Darfur”(UN Panel of Experts 2011:64). Thus the diplomatic strategy of the NCP regime continued to be subject to its military strategy for Darfur. The GoS still seemed to be lacking the political will to truly commit to a diplomatic resolution to the conflict in Darfur and its participation in the peace talks should be seen as an appeasement strategy towards the international community.

After the signing of a ceasefire agreement and a new peace agreement framework by JEM and Khartoum in February 2010, the Liberation and Justice Movement (LJM) showed interest in joining the Doha talks. The LJM had formed in early 2010 and consisted of eighteen Darfur Rebel movements, joined together. JEM strongly objected to LJM participation in the Doha process, insisting that only JEM could properly represent the cause of the Darfurian people. Thus, any movement interested in joining the Doha process would have to submit itself under JEM’s political wing (UN Panel of Experts 2011:64). When the GoS signed a framework agreement with LJM in March 2010 in spite of JEM’s objections, the rebel movement stepped out of the peace talks and fighting between JEM and Government forces intensified (UN Panel of Experts 2011:15). Even though JEM<sup>12</sup> refused to partake in the Doha Peace Talks the diplomatic process between the GoS and LJM continued. The process however, remained extremely strenuous, with the GoS and LJM struggling to agree on principle matters on which to establish a peace agreement (Small Arms Survey 2011).

At the time of writing, the Doha Peace Process is in its conclusive phase. On 14 July 2011 a new Darfur Peace Agreement was signed between the GoS and LJM (Sudan Tribune 14 July 2011). JEM too is expressing openness to re-entering peace negotiations with the GoS, but stresses that this is contingent upon the Government’s willingness to renegotiate the newly drafted peace accord (Sudan Tribune 6 July 2011). The signing of a new peace agreement by the NCP government should, at this point, not be overrated. In the aftermath of the DPA the Sudanese Government had proven it’s lack of commitment to a negotiated peace and today, the continuing military approach adopted by the Government in Darfur demonstrates the NCP’s commitment to a military strategy in the region. The diplomatic strategy of the Sudanese Government once again seems to be largely based on an appeasement tactic and there is little evidence that suggests the GoS’s true commitment to the implementation of another negotiated peace agreement.

### **5.3 Peace and stability in Darfur? The GoS’s post-indictment framing practices in Darfur**

While the GoS’s military- and diplomatic strategies towards the conflict in Darfur did not change significantly after ICC indictments were issued, a shift in the Government’s representation of the Darfur conflict was noticeable. One of the main framing strategies adopted by the GoS in Darfur has, since 2007, been the diminishment of the gravity of the war up to a frank denial of the conflict in Darfur. In order to do this, the Government has made increasing efforts to limit international access to conflict zone’s thereby limiting the amount of information on the current situation in Darfur. Or, in the words of the ICC Prosecutor “instead of stopping crimes, members of the GoS are stopping the information about the crimes” (ICC December 2010, paragraph 31). By denying UNAMID and humanitarian organisations access to crime-sites the GoS tries maintains a monopoly on the representation of the conflict in Darfur.

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<sup>12</sup> Major rebel movement SLA/AW too, refused to join the Doha Peace Talks

Soon after the first indictments were issued in Sudan, the NCP regime started to announce that Darfur was stabilizing and that peace and security now abounded in region (ICC December 2007, paragraph 54). Besides diminishing the occurrence of violations in the region, the regime in Khartoum manipulated statistics on the occurrence of rape and malnutrition. When confronted with contradicting rape estimates the Government has been known to blame international media as they would “exaggerate the severity of the matter” (UN Panel of Experts 2011:73). Diminishing the gravity and the occurrence of violence in Darfur seems to be a strategy used by the Government of Sudan to divert international attention from the region and obstruct the work of the ICC in Darfur. By denying the occurrence of widespread and systematic violations in Darfur, the Government furthermore tries to cover up its tracks, making it increasingly difficult for the ICC to present strong cases against Sudanese individuals.

#### **5.4 A volatile peace; the post-indictment political strategy of GoS in South Sudan**

July 9<sup>th</sup> 2011 was a historic day for the people of Sudan. It was on this day that South Sudan officially seceded from the North, thus becoming a brand new independent State. The right to self-determination for the people of South Sudan had been one of the building blocks upon which the Comprehensive Peace Agreement between the GoS and the SPLM had been built. In January 2011, with a staggering majority of 98.83 per cent, the people of South Sudan voted independence over unity (Report of the Secretary-General April 2011, paragraph 4). North Sudan directly acknowledged the outcome of the referendum, reaffirming its commitment to the CPA. It seemed the GoS was now totally devoted to a diplomatic strategy in its relation to the South.

In the second chapter we had concluded that the pre-indictment political strategy of the GoS after the signing of the CPA had been dominated by diplomatic practises, although SAF and SPLA forces occasionally clashed. Furthermore the chapter demonstrated the GoS’s primary goal of securing its own political survival, and its cunningness in manipulating the peace process in its own interest. The GoS was extremely slow and selective in its implementation of the CPA and was not fully committed to a negotiated peace. While in general the pre-indictment peace process between the NCP and SPLM was making progress, there were still some major stumbling blocks that threatened the peace, such as the disputed status of Abyei, issues related to border-demarcation and the redeployment of troops.

After the first ICC indictments in Sudan were released in April 2007, tension between the SPLM and NCP government started to abound. The SPLM became increasingly frustrated with the slow implementation of the CPA by the NCP regime. The SPLM for instance accused the GoS of dragging its feet in the process of redeployment of SAF forces from the South. While the CPA stipulated a completed redeployment by 9 July 2007, the SPLM argued in October 2007 that SAF troops were still largely present in many of the oil-rich area’s in the South (International Crisis Group 2008:11). Because of the perceived lack of commitment to the CPA by the NCP government, the SPLA announced on 11 October 2007 that it would leave the Government of National Unity immediately, only to return once substantial progress would have been made. Not surprisingly this move by the SPLA seriously threatened the peace process. Fears about a return to war spread and slowly both sides started to rebuild their troops. In the meantime, both parties came together to negotiate a diplomatic solution to the crisis. On 12 December the NCP and SPLM reached an agreement in which new deadlines were determined on the issue of border demarcation, the national census and the redeployment of fighting forces. Interestingly enough, no such agreements were made concerning Abyei, which remained a huge stumbling block. While the SPLM rejoined the Government of National Unity, incidental fighting between the SPLA and SAF forces continued to be reported (International Crisis group 2008:10). In spite of the existing tension

both President al-Bashir and SPLM leader Kiir maintained that they were fully committed to the CPA (Report of the Secretary-General 2007, paragraph 10). However, during the course of 2008 both parties to the CPA reportedly started to build-up their military presence in the border regions, Abyei in particular (Report of the Secretary-General 2008, paragraph 3). Eventually tensions between the armed forces came to a head in May 2008, resulting in deadly clashes between the SPLA and SAF in Abyei, leading to the displacement of thousands of civilians. The Government's strategy towards the peace process in South Sudan thus, in spite of diplomatic progress, retained a military component. The military approach towards the South however seems to have been subject to the diplomatic approach of the NCP Government that continued to dominate the political strategy of Khartoum.

One month after the fighting between SAF and the SPLA broke out in Abyei, al-Bashir and Kiir signed the Abyei Roadmap Agreement, which called for the redeployment of SAF and SPLA troops from the region and their replacement by Joint Integrated Units (JIU's) (Sudan Tribune 8 June 2008). However, in spite of the Abyei Roadmap Agreement, tension over the area continued to flare up as both parties claimed ownership over the region (Report of the Secretary General 2010 ). Since the self-determination referendum was held in South Sudan in January 2011, military clashes in the Abyei region between SAF and the SPLA have increased (Report of the Secretary General 2011, paragraph 16-22). In order to solve the Abyei issue before the scheduled Southern independence of 9 July 2011, President al-Bashir met with Kiir on 17 March. However the two were not able to resolve the standing issues. In May 2011 SAF forces took over Abyei and the President singlehandedly suspended the administration of Abyei. Recently the Sudan Tribune reported that "despite international pressure, the Sudanese leader vowed never to withdraw declaring that Abyei belongs to the North" (13 June 2011). However on 20 June, the NCP and SPLM signed an accord on Abyei, promising to redeploy their forces from the region while Ethiopian forces fill the security vacuum (Sudan Tribune 20 June 2011). Even though such agreements are promising for the stability of the peace process between North and South Sudan, it provides no guarantee whatsoever as earlier accords have been violated on numerous occasions. In fact both the SPLM and NCP have since the Abyei accord both reiterated their ownership of Abyei and President al-Bashir has gone as far as to threaten with a resumption of war, would the SPLM claim the region (Sudan Tribune 11 July 2011). The situation in South Sudan is thus still far from stable and the threat of resumed war is ever-present. In recent weeks SAF military operations have been reported in the border-areas of Jonglei and Kordofan (Sudan Tribune 5 June 2011 and Sudan Tribune 19 June 2011). The reports of recent violent confrontations between SAF and the SPLA might seem to suggest a new commitment to a military strategy by the NCP regime. However, the military practises of al-Bashir's Government in South Sudan should rather be seen as a 'supportive instrument' to the diplomatic process with the SPLM. By showing military force the NCP aims to strengthening the GoS's negotiating position over outstanding CPA issues, aiming to get the best possible political settlements on the matters.

Although the peace process between North and South Sudan remains extremely volatile, huge progress has been made concerning CPA implementation. The self-determination referendum of January 2011 was conducted without serious security concerns. Furthermore the immediate acceptance of the outcome of the referendum by al-Bashir is noteworthy and seems to reflect significant commitment to the peace process with the South (Report of the Secretary General 2011, paragraph 2,104). Furthermore it is noteworthy that in spite of continuing tensions and violent attacks, the GoS has not resumed to all-out war and has instead, since the end of 2007 stepped up its implementation of the CPA. The complete redeployment of SAF forces from the South is a good example of the Governments reinforced commitment to the negotiated peace. The post-indictment phase of the peace process between the NCP and SPLM is thus

characterized by greater political commitment towards the CPA on behalf of the Government and could indicate a positive effect of ICC indictments on the political strategy of the GoS towards South Sudan. The indictments may have given the NCP regime the needed incentive to commit itself to the peace process in the South, and by doing so giving the international community, the UNSC in particular, just enough leverage to avoid a stronger, more forceful stance against the regime. It is too early however to evaluate the GoS's true commitment to peace with South Sudan, as the NCP regime is known for its unpredictability and unlimited commitment to its own political survival. With important key-issues of the CPA remaining unresolved the peace process between North and South Sudan remains fragile and peace between the NCP and SPLM is by no means self-evident.

## CONCLUSION

Throughout this paper the complexity and intractability of the wars in Sudan have been demonstrated. For decades Sudan has been trapped in a seemingly inescapable web of wars and unfortunately it does not seem that the people of Sudan will be able to enjoy stable peace in the nearby future. The historic analysis featured in this paper demonstrated that the violence that plagues Sudan today is very much rooted in a history of marginalization of the geographic units of Darfur and South Sudan. During Anglo-Egyptian rule at the beginning of the 20<sup>th</sup> century, both areas were structurally neglected and underdeveloped, exacerbating poverty and grievances and leading to a buildup in frustration amongst the population. Moreover South Sudan had been independent for centuries prior to the invasion of the Anglo-Egyptian forces. Even though the British annexed South Sudan to the North in the 1930's, the territory was governed in complete separation from the North. South Sudan thus developed in relative isolation from the North and historically there has been a division between the two geographic entities that has remained characteristic to Sudanese internal dynamics. The administrative unification of North and South Sudan at independence turned out to be a huge fiasco and resulted in decades of fighting. Because of their distinct histories and political developments, the hostile relation between North and South Sudan comes as no surprise, as tensions and discrepancies between the two regions had been exacerbated for centuries. Moreover, the structural marginalization of Darfur and South Sudan, that has been the result of decades of neglect, has been a major incentive for rebellion and dissent. It is unlikely that Sudan will stabilize unless the unequal treatment and underdevelopment of the regions are properly addressed.

Unfortunately we have seen that the Darfur Peace Agreement failed to sufficiently address the issue of marginalization as a result of which some of the larger rebel movements refused to sign the peace agreement. This lack of inclusivity of the peace process has in a significant way contributed to the continual violence that terrorizes the people of Darfur to this day. The lack of ownership of the DPA, due to the "deadline diplomacy" that was used by international mediators, also contributed to continual instability in Darfur. Moreover, as no guarantors were put in place to ensure commitment to the DPA the GoS was able to showcase its commitment to a diplomatic solution to the conflict in Darfur, while in the meantime pursuing a military agenda in Darfur.

In South Sudan too, the peace process was inherently flawed. The Machakos protocols of 1998, which formed the basis of the eventual Comprehensive Peace Agreement between the SPLM and the GoS was aimed at securing a quick peace and in doing so neglected central issues of conflict between the belligerents, such as the status of Abyei and the North/South border. Today, these issues are still left unresolved and continue to form a major basis of contention between the GoS and the SPLM, severely threatening the peace process. By structurally neglecting key issues of conflict during negotiations, both parties became increasingly inflexible and unwilling to compromise on the issues. The nature in which the peace process in the South was conducted was thus severely flawed, contributing to the instability of the peace process today.

Throughout the peace processes in Sudan the International Community has been hesitant to respond decisively, especially concerning Darfur. As important members of the P5, such as the US, China and Russia all had their domestic interest to keeping 'friendly' ties with the Sudanese regime, the UNSC sought to balance a correct response to the conflicts while maintaining sound diplomatic relations with the NCP regime. As a result of this, the UNSC threatened Khartoum on numerous occasions, but showed unwillingness to forcefully intervene in the conflicts. Consequently a political environment was created in which the GoS was lead to believe it could adopt any strategy necessary to quench the insurgencies, first in the South and later in Darfur. While international political intervention in Sudan was rather

weak, a strong legal approach was chosen to tackle the instability and violations that roamed in Sudan when the UNSC referred the situation in Darfur to the ICC.

When the ICC became involved in Sudan, fears of the possibly disruptive effects of indictments on the peace process in Darfur were expressed. On the basis of the previous chapters, what can be said concerning the justifiability of the request by the AU for a deferral of the Bashir case? Have the ICC indictments indeed threatened the peace process in Darfur and are there any indications that suggest a disruptive effect of the indictments on the peace processes in Sudan? When reflecting upon the post-indictment political strategy of the NCP Government in Darfur it can be concluded that the ICC indictments have done little to alter the Government's strategy. Both before and after indictments were issued in Sudan, the regime in Khartoum was committed to a military strategy in Darfur. The indictments were neither followed by a reduction of the use of Government force in the region, nor were there any indications that Government-sponsored violence increased in the post-indictment era. With regards to the acclaimed function of prosecutorial justice as a deterrent, the case study of Darfur has thus revealed that this is by no means always the case. In Darfur, ICC indictments have not been able to entice perpetrators of war to restrain the use of force. Violations of International Criminal Law continued in spite of the indictments.

Concerning the diplomatic strategy of the Sudanese Government towards the insurgency in Darfur there was some indication that the threat of the ICC indictment against President al-Bashir enticed the Government to enter peace negotiations. In the period directly following the announcement of ICC investigations against al-Bashir, the GoS was willing to enter peace negotiations with rebel movement JEM for the first time since three years. This could indicate that instead of having disruptive effects on the peace process in Darfur, the threat of ICC indictments contributed to the GoS's willingness to enter peace negotiations. However this possible relation between the GoS's sudden openness to diplomatic negotiations and ICC indictments remains difficult to establish as the regime in Khartoum has been known to join peace negotiations as a showcase, intended to divert international attention, while in the meantime pursuing a military agenda. In general the diplomatic strategy of the NCP regime towards the peace process in Darfur has proceeded without much change since ICC indictments were issued in Sudan; it has remained subject to the Government's military strategy in the region.

With regards to the GoS's political strategy towards the peace process with South Sudan there might be some indication that ICC indictments contributed to a stronger commitment by the GoS towards the CPA. Before ICC indictments were issued in Sudan, the commitment of the NCP regime towards the peace process was hesitant, to say the least. The Government was slow and selective in its implementation of the CPA. In the post-indictment period, the GoS has made some huge progress towards the peace process with the South, continually confirming its commitment to CPA implementation. The Government's direct acceptance of the outcome of the Southern referendum and the complete redeployment of SAF forces from the South have been a reflection of this. Thus, in spite of continual clashes and the volatile nature of the peace process in South Sudan, the GoS seems to have been more lenient and committed to the negotiated peace with the South since ICC arrest warrants were issued. This could be an indication that the ICC indictments to some extent enticed al-Bashir to cooperate in the peace process with the South in order to appease the international community and distract attention from the situation in Darfur, where the Government continued to use a highly militarized strategy to combat the insurgency. However with many outstanding issues to the CPA left unresolved, the peace process with the South too, remains extremely fragile and the coming years will have to demonstrate the GoS's true commitment to peace in Sudan. The future impact of ICC indictments on the peace processes in Sudan is still very uncertain, and is to a large extent related to the level of international cooperation to the Court, as

enforcement is completely dependent on member-states. If the international community, especially members of the African Union, would work with the Court to ensure al-Bashir's arrest, the political strategy of the GoS towards the peace processes in Darfur and South Sudan might alter. While the indictments have thus far not significantly disrupted the peace processes in Sudan, an actual arrest of President al-Bashir could impact conflict dynamics in Sudan in ways not yet seen. Continual monitoring of the peace processes in Sudan and the work of the ICC in Darfur is thus needed to come to a better understanding of the relation between the pursuit of international criminal justice by the ICC and political strategies of war in Sudan.

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