

**CREATING OBSTACLES TO PEACE**  
**THE INTERNATIONAL INVOLVEMENT IN DARFUR**

Master of Arts in Law and Diplomacy Thesis

**Submitted by Viola J. Erdmannsdoerfer**

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<http://fletcher.tufts.edu>



**THE FLETCHER SCHOOL**

TUFTS UNIVERSITY

**Abstract**

The conflict in Darfur raises the question why despite the high levels of international attention and involvement so little progress has been made over the last six years. This thesis is going to suggest that the misalignment of strategies and objectives by the international community itself has contributed to creating the main obstacles to a settlement of the conflict: the ICC arrest warrant for President Al-Bashir and the fragmentation of the armed opposition groups.

Regarding the amount of additional human suffering caused by these interventions, some standards have to be found to hold the international community accountable.

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## **Introduction**

Since the outbreak of the conflict in Darfur in 2003, the conflict has been most prominently on the international agenda and the international community has been greatly involved, using different approaches from international criminal investigations, peacekeeping and mediation.

This thesis raising the question why despite this level of attention and involvement so little progress has been made over the last six years and whether it is “possible that ill-informed outsiders with the threat of military power on their side can make things worse rather than better”.<sup>1</sup> It is going to suggest that the misalignment of strategies and objectives by the international community itself has contributed to creating the main obstacles to a settlement of the conflict: the ICC arrest warrant for President Al-Bashir and the fragmentation of the armed opposition groups.

The paper first is going to give a general overview of the conflict in Sudan, its historical background, main actors and the major developments of the peace process so far. In the second part, the ICC involvement is going to be analyzed as a conflict termination strategy from the standpoint of strategic coercive diplomacy theory. This is going to demonstrate that mixing diplomacy with judicial prosecution distorts the calculations of all parties in the peace process as well as creates a major obstacle to successful negotiations. In the third part, the fragmentation of the armed opposition is going to show that because of a lack of understanding of the agency-relationships within the rebel groups, the international community has failed to come up with an effective spoiler management strategy, rewarding spoiling and violence and hence contributing to the fragmentation.

Finally, the question will be raised how the international community can be held accountable for their actions and failures.

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<sup>1</sup> William Easterly, “Did “Save Darfur” lose Darfur?,” *Making sense of Darfur*, April 14, 2009, <http://www.ssrc.org/blogs/darfur/2009/04/14/did-save-darfur-lose-darfur/>.

## A. Background

### I. Sudan and the Darfur conflict<sup>2</sup>

The Darfur conflict emerged in 2003, centering on the long-term marginalization of non-Arab Muslims in Darfur by the Arab-dominated Muslim government in Khartoum. This marginalization was aggravated by environmental degradation, consequently endangered livelihoods and the involvement of neighboring states.<sup>3</sup>

Former nomads who had lost their livelihoods during continuing draughts and the inexorable advance of the Sahara desert, had become militarized, armed with the help of Libya which was trying to establish an Arab belt across Africa, and equipped with an increasingly Arab-supremacist ideology that also found support from the government in Khartoum. They began raiding African tribes since the 80s in competition for land and water. The impunity they were granted by the regime in combination with economic neglect of the region led the increasingly marginalized African Darfurians to start fighting back in local self-defense groups.

From these self-defense groups emerged first the Darfur Liberation Front, a secessionist movement founded in 2002, which later turned into the Sudan Liberation Movement (SLA). Around the same time, in 2000, a group around Dr. Khalil Ibrahim published the so-called *Black Book: Imbalance of Power and Wealth in Sudan*, denouncing the economic and political marginalization of Darfur. Khalil thereafter founded the rebel group Justice and Equality Movement (JEM). Both JEM and SLA represent Muslims of primarily African descent and fight against the rule of the Arab-Muslim-dominated Khartoum government.

The Darfur Liberation Front's attack on Golo, the district headquarters of Jebel Marra, on 26 February 2003, officially marked the start of the rebellion, and the rebels began attacking government targets

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<sup>2</sup> for the history of the conflict, see: J. Flint and A. De Waal, *Darfur: A Short History of a Long War* (Zed Books Ltd, 2005); "Crisis in Darfur - The Current Situation" (International Crisis Group, July 2008), <http://www.crisisgroup.org/home/index.cfm?id=3060>.

<sup>3</sup> David Lanz, "Sudan/ Darfur, Abuja Negotiations and the DPA," in *Unpacking the Mystery of Mediation in African Peace Processes* (Mediation Support Project Swiss Peace, 2008), 79, [http://www.css.ethz.ch/Mediation\\_in\\_Africa\\_full.pdf](http://www.css.ethz.ch/Mediation_in_Africa_full.pdf).

in protest against this negligence, surprising and even humiliating the government with their military capacities. Khartoum reacted by mobilizing its national armed forces and Arab militias – the so-called Janjaweed. Upgraded to a full paramilitary fighting force, the Janjaweed began raiding villages all over Darfur, stealing, burning, mutilating, killing and raping – and destroying “everything that made life possible while granted impunity by the government, in return for suppressing the rebellion.”<sup>4</sup> The government exacerbated the situation by denying nearly all humanitarian assistance to those who had survived the atrocities, causing death rates 41 times higher than the standard threshold for an emergency. More than 200,000 people are believed to have died since then and more than 2.3 million have fled their homes. The US and some human rights groups said that the violence amounted to a genocide; the UN and now the ICC however refrained from this terminology.

Additionally, especially since 2006, “Darfur has been the terrain of regional proxy wars, where the Sudanese, Eritrean, Libyan, and Chadian governments have respectively empowered and armed local proxy groups, thus exacerbating local conflicts.”<sup>5</sup> Also, Sudan is home to yet another internal conflict between the North and the South. In 2005, the government signed a Comprehensive Peace Agreement (CPA) with the Sudan People’s Liberation Movement (SPLM), officially ending that war, although the situation remains extremely fragile. The exclusion of the Darfur issue in this agreement fuelled new resistance within Darfur.

## **II. The parties**

### **1. The Government of Sudan**

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<sup>4</sup> see Alex De Waal, “Darfur and the failure of the responsibility to protect,” *International Affairs* 83, no. 6 (2007): 1040.

<sup>5</sup> Lanz, “Sudan/ Darfur, Abuja Negotiations and the DPA,” 79.



## Creating obstacles to peace – the international involvement in Darfur

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When looking at the Government of Sudan (GoS), it has to be kept in mind that it is far from being a unitary actor itself. It is dominated by President Al-Bashir and the National Congress Party (NCP), which has some major divisions. Also, since the signing of the Comprehensive Peace Agreement (CPA) in 2005 by the NCP and the Sudan People's Liberation Army/ Movement (SPLA/M), ending the civil war with the south, Sudan is ruled by a Government of National Unity, led by President Al-Bashir and Vice-President and President of the Government of Southern Sudan (GoSS) Salva Kiir.<sup>6</sup> Therefore, next to Al-Bashir himself, the NCP and the SPLM influence the politics of Sudan and have to be taken into account:

The NCP came to power in a military coup in 1989 in a "coalition of Islamists and military men, who had created new constituencies through a powerful Islamic financial system"<sup>7</sup>, called National Islamic Front (NIF) at the time and later renamed in National Congress Party. After an internal struggle in 2000, Al-Bashir's rival Hasan al-Turabi who had "inspired the regime's vision of an Islamist Sudan"<sup>8</sup> had to leave the party, the "regime's base narrowed – it now depends heavily on the client groups it has created and on the perception of some people in the Northern Nile Valley that the economic advantages of the centre can best be maintained by their support"<sup>9</sup> and whose loyalty was bought with oil rents. Hence, the "two main outcomes of NCP rule are a regionalized, tribalized and unsustainable periphery and a still-dynamic commercial-security nexus at the centre that is flexible enough to create incentives and niches for former adversaries."<sup>10</sup>

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<sup>6</sup> *Sudan Country Profile 2009*, Economist Intelligence Unit (London: Economist Intelligence Unit, 2008), 4.

<sup>7</sup> Edward Thomas, "Against the gathering storm. Securing Sudan's Comprehensive Peace Agreement" (Chatham House Report, January 2009), 24, [http://www.chathamhouse.org.uk/files/12941\\_0109sudan\\_r.pdf](http://www.chathamhouse.org.uk/files/12941_0109sudan_r.pdf).

<sup>8</sup> *Ibid.*, 25.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

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A further powerbase for the NCP is their cooperation with “tribal militias and paramilitary forces named Popular Defense Forces (PDFs)” which are “sidelining the Sudanese Army” and are “loyal not to the state, but to the regime itself”.<sup>11</sup>

Despite its Islamist origins, the party is dominated by “pragmatic and survivalist policy-makers” who “constantly calculate how much they can get away with”.<sup>12</sup>

Cohesion within the NCP has been strained by recent developments and particularly the arrest warrant for Al-Bashir, leading to a growing division between “Bashir’s loyalists and potentially more pragmatic elements of the NCP.”<sup>13</sup> The main opposition comes from a “group led by Sudan’s Second Vice President Ali Osman Taha, its intelligence chief Salah Abdullah Gosh, and its energy minister Dr. Awad al-Jaz” which is blaming Al-Bashir for Sudan’s “increasing international isolation.”<sup>14</sup>

Another player is the Government of Southern Sudan, led by Vice-President Kiir and mainly consisting of the SPLM. According to the CPA, “elections are due in 2009 and a referendum on self-determination in southern Sudan in 2011”<sup>15</sup>, and the SPLM leadership is divided whether to support Sudan’s unity or not.<sup>16</sup> Next to these internal differences, there are further tensions between the SPLM and the NCP. Some NCP “hardliners believe that the CPA implies the dissolution of the NCP system”<sup>17</sup> and that it set a precedent for the “need to challenge the NCP militarily before negotiations”<sup>18</sup>. Further, there are significant disagreements about the implementation of the CPA

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<sup>11</sup> P. Castillo, “Rethinking Deterrence: The International Criminal Court in Sudan,” *UNISCI Discussion Papers* 13 (2007): 1732

<sup>12</sup> John Prendergast and Colin Thomas-Jensen, *Echoes of Genocide in Darfur and Eastern Chad* (Enough Project, September 2007), 3, [http://www.enoughproject.org/files/publications/echoes\\_darfurb.pdf](http://www.enoughproject.org/files/publications/echoes_darfurb.pdf).

<sup>13</sup> Enough Team, *What the warrant means. Justice, Peace, and the Key Actors in Sudan* (Enough Project, February 12, 2009), 1, [http://www.enoughproject.org/files/publications/sudan\\_warrant.pdf](http://www.enoughproject.org/files/publications/sudan_warrant.pdf).

<sup>14</sup> *Ibid.*, 2.

<sup>15</sup> Alex De Waal, “Dilemmas of multiple priorities and multiple instruments: the Darfur crisis,” in *Powers of Persuasion: Incentives, Sanctions and Conditionality in Peacemaking*, Griffiths & Barnes (ed.) (Conciliation Resources, 2008).

<sup>16</sup> Thomas, “Against the gathering storm. Securing Sudan’s Comprehensive Peace Agreement,” 25.

<sup>17</sup> *Ibid.*, 31.

<sup>18</sup> *Ibid.*

and particularly wealth sharing (most of the oil is found in the South, particularly in the oil-rich area of Abyei, where there were major clashes in June 2008).<sup>19</sup>

## **2. The armed opposition movements**

The main armed groups of the opposition are the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM), although especially the SLA has factionalized into various splinter groups.

The SLA, consisting of Fur, Masalit and Zaghawa, was formed in 2003 out of a common unhappiness with the government.<sup>20</sup> „Many commanders were opportunists who came together on the basis of what united them [at the moment], with little discussion of what divided them”.<sup>21</sup> Therefore, the SLA lacks a clear ethnic base or ethnic identity, with conflicts between rebel leaders and traditional chiefs, a clash of generations, mistrust between field commanders and political counterparts outside of Darfur<sup>22</sup>, all connected by the demand to end government neglect of Darfur<sup>23</sup> with a stronger and unified Darfur state, the devolution of wealth and economic opportunity and greater representation of Darfuris in the central government. Since 2003, the SLA has fragmented into many factions. The main factions are SLM/A Minni Minawi (Zaghawa dominated, signatory of Darfur Peace Agreement DPA), SLM/A-Abdul Wahid (Fur dominated) and more recently SLM/A Unity led by Suleiman Jamous and Sherif Harir (Zaghawa dominated; it remains to be seen whether this faction gains momentum).<sup>24</sup> The two main wings are fighting against each other as brutally as against the Khartoum government.<sup>25</sup>

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<sup>19</sup> *Sudan Country Profile 2009*, 4.

<sup>20</sup> see V. Tanner and J. Tubiana, *Divided They Fall: The Fragmentation of Darfur's Rebel Groups* (HSBA Working Paper, 2007), 25, Google Scholar.

<sup>21</sup> see *Ibid* 25

<sup>22</sup> see *Ibid.*, 30.

<sup>23</sup> see *Ibid.*, 37.

<sup>24</sup> “Who are Sudan's Darfur rebels?,” *BBC*, February 24, 2009, sec. Africa, <http://news.bbc.co.uk/2/hi/africa/7039360.stm>.

<sup>25</sup> see A. De Waal, “Darfur-the crisis explained,” *PROSPECT-LONDON-PROSPECT PUBLISHING LIMITED*- 132 (2007): 64.

The other of the original rebel movements is JEM, whose ethnic base is narrower and mainly limited to the Zaghawa-Kobe<sup>26</sup>, despite attempts at reaching out across ethnic lines and creating a national program. It was established in 2001 by disaffected members of the National Islamic Front. Because of these links to ideologue al-Turabi and his People's Congress Party, many Darfurians are suspicious of JEM<sup>27</sup> and its potentially Islamist agenda.<sup>28</sup> In the *Black Book: Imbalance of Power and Wealth in Sudan* published by JEM leader Khalil Ibrahim, JEM's objectives of a redefinition of the nation, including a return to six regions, with the country led by rotating presidents from each region and representation of all, are laid out. JEM rejected the CPA of 2005 in the North-South peace process because it allowed the NCP<sup>29</sup> to stay in power and "did nothing to address other marginalized areas of Sudan, such as Darfur, the east, the Nuba mountains, and southern Blue Nile".<sup>30</sup> The relation with the SLA is mixed, both having fought along each other but at other times fighting each other, e.g. in May 2005.<sup>31</sup> JEM is currently the militarily strongest of the rebel movements and was able to launch an attack at Khartoum in May 2008. Following heavy clashes with the government, it was the only group invited to the talks in Doha in February 2009.

### 3. Secondary parties

Chad is heavily involved in proxy war with Sudan in Darfur: "Armed opposition groups are supplied and armed on their respective territories with the active support and encouragement of the two host Governments and their respective military and intelligence branches. Arms and related military materiel delivered to Chad and the Sudan outside of the provisions of the embargo and the territory

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<sup>26</sup> see Tanner and Tubiana, *Divided They Fall*, 34.

<sup>27</sup> see Ibid., 33.

<sup>28</sup> see Ibid.

<sup>29</sup> National Congress Party

<sup>30</sup> see Ibid., 35.

<sup>31</sup> see Ibid.

concerned by it are diverted into Darfur and fuel the conflict.”<sup>32</sup> The Darfuri rebels have a long relationship with President Déby who had been supported by Zaghawa from Darfur in taking power in a coup and were strongly represented in Chadian security forces. Now, Déby is facing huge domestic pressure to support his Sudanese kinsmen.<sup>33</sup>

The US has a twofold relationship with Sudan. On the one hand, there is a CIA counterterrorism operation with Sudanese government<sup>34</sup> and particularly al-Bashir’s state security agency<sup>35</sup> on the war on terror. Especially the Director of National Security, Salah Gosh, has been “providing valuable information on international terrorists”<sup>49</sup> and has been supported by the US who pressured the UN to not make Gosh a target of sanctions. On the other hand, there is an enormous public outrage in America caused by the Darfur war. The main US action was a range of unilateral financial sanctions targeted at specific corporations with close links to the NCP and security agencies, beginning in June 2007.<sup>36</sup> It remains to be seen how the new administration will handle relations.

China had been a long-term supporter of Sudan in the Security Council and in arms dealing, having high stakes in Sudan’s economy and as the “China National Petroleum Company owns 40 percent of the Sudanese state owned oil production.”<sup>47</sup> Most recently under increasing international pressure, China has slightly revised its Sudan policy, but remains an ally, especially in the SC.

### III. The negotiation process

#### 1. Background political culture: Marketplace for loyalty

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<sup>32</sup> *S/2008/647*, November 11, 2008, 3, <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Sudan%20S2008%20647.pdf>.

<sup>33</sup> Roland Marchal, “The Roots of the Darfur Conflict and the Chadian Civil War,” *Public Culture*, Fall 2008, 431.

<sup>34</sup> John Prendergast, “Toward a new strategy for Darfur,” *Journal of International Security Affairs* 13, no. Fall 2007 (Fall 2007): 26.

<sup>35</sup> N. Grono, “Briefing--Darfur: The international community's failure to protect,” *African Affairs* 105, no. 421 (2006): 628; *Sudan: The ties that bind Bush and Bashir* (Africa Action, April 8, 2008), 1, [http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/ASIN-7DJK46-full\\_report.pdf/\\$File/full\\_report.pdf](http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/ASIN-7DJK46-full_report.pdf/$File/full_report.pdf).

<sup>36</sup> De Waal, “Powers of Persuasion.”

It is important to understand the political culture of Sudan. In Sudan, as in many African states, power is bargained for in a “patrimonial political marketplace” where “the only semi-stable outcome is an inclusive buy-in of all elites by the best-resourced actor in the marketplace”.<sup>37</sup> As outlined above, “military victories are rarely decisive”<sup>38</sup> and the conflict is temporarily calmed when “members of the losing side quickly negotiate a lower price for their loyalty”.<sup>39</sup>

This leads to a pattern of “provincial elites to open a round of bargaining against the government with a targeted assault on the economic and human assets of the metropolitan elites”<sup>40</sup>, constituting a “demand for a higher payment for loyalty”.<sup>41</sup> The government then responds with violence in return, “designed both to reduce the value of the insurgent group by destroying, stealing or damaging its assets (villages, land, cattle, women, men and children) and to deter others”.<sup>42</sup> Finally, “after these two reciprocal but asymmetric acts of violence, the two parties reconsider their bargaining positions”<sup>43</sup>, either settling or deciding to go for another round.

International engagement has a distortive effect on this bargaining process. The CPA between the NCP and the SPLM in 2005 can be seen as a bilateral deal after such a bargaining process: however because of international intervention, the government NCP feels it has conceded too much. Similarly, in the Darfur negotiations until now, the international interference “has driven up the price of loyalty to levels at which the ruling National Congress Party (...) feels that it is being grossly overcharged”<sup>44</sup> while the armed movements “estimated their value on the basis of rhetoric from the US Congress and the Save Darfur campaign.”<sup>45</sup>

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<sup>37</sup> Alex De Waal, “Mission without end? Peacekeeping in the African political marketplace,” *International Affairs* 85, no. 1 (2009): 102.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid., 105.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid., 109.

<sup>45</sup> Ibid.

While not taking into account the role of civil society and the population in general, De Waal writes that realistically, an “elite bargain is the first and most essential component”<sup>46</sup> to any sustainable agreement.

## **2. The N’djamenan ceasefire<sup>47</sup>**

In April 2004, Chadian and AU mediators (especially African Union Chairman Alpha Konare) brokered a first ceasefire in N’djamenan. The ceasefire was to be monitored by AU observers (AMIS) but violations by all sides made that mandate impossible to fulfill and turned the agreement into a failure.<sup>48</sup>

## **3. The DPA**

After seven rounds of negotiations in Abuja under the auspices of an African Union mediation team led by Salim Ahmed Salim and supported by the UN<sup>49</sup>, the Darfur Peace Agreement (DPA) was signed in May 2006 by the NCP and one of the rebel groups, the SLA/ Minni (which represents less than 10% of Darfur’s population).

There were several factors that negatively impacted the process. Among those was the disengagement of the SPLM. After John Garang’s death, Salva Kiir, the new leader of the SPLM, drastically changed course for the SPLM to become less involved with Darfur because of internal

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<sup>46</sup> Ibid., 113.

<sup>47</sup> S. P. Brooks, “Enforcing a Turning Point and Imposing a Deal: An Analysis of the Darfur Abuja Negotiations of 2006,” *International Negotiation* 13, no. 3 (2008): 417.

<sup>48</sup> Ibid.

<sup>49</sup> see “Handbook for Darfur Peace Negotiations” (Joint Mediation Support Team, October 27, 2007), <http://www.unmis.org/JMST/2007docs/Press%20Information%20Libya%20new/JMST%20Mediation%20Handbook/English/doc%20%20HANDBOOK%20FOR%20Darfur%20Peace%20NEGOTIATIONS%20cover-intro-content.pdf>.

pressures and the goal of southern independence in 2011.<sup>50</sup> Furthermore, at the end of October 2005, the SLA split into two groups – respectively led by Minni Minawi and Abdel Wahid, which “altered the negotiating dynamics significantly”<sup>51</sup> and contributed to their “non-negotiating posture”.<sup>52</sup> This was aggravated by the fact that next to a general imbalance of power between the intellectually and militarily stronger government, the majority of the parties saw the “battlefield as the strategic arena of conflict and the negotiations as simply a tactical arena”.<sup>53</sup>

Also, the external involvement was only of very limited help. When there was no progress towards a solution, under pressure from the US the mediation team drafted a 87-page proposal on power-sharing, wealth sharing and security, which was supposed to be adopted within a week.<sup>54</sup> This deadline diplomacy did further undermine the mediators’ ability to build confidence<sup>55</sup> and finally led to a failure of the talks. The mediation team’s strategy had been to secure Minnawi’s signature, believing that if one rebel group signed, the others would follow.<sup>56</sup> Minnawi signed in May 2006 after severe pressure by the US<sup>57</sup>; yet, not the other two movements. Khalil Ibrahim rejected the deal, while Abdel Wahid had asked for “for just a handful of relatively minor concessions”.<sup>58</sup> Additionally, relations between the two SLA factions had become so poor that if one would sign, the other would not on principle.

The DPA includes some power and wealth sharing provisions, but “did not address core issues that drive the conflict, such as land tenure and use, grazing rights, and the role and reform of local government and administrative structures”.<sup>59</sup> The DPA’s logic was to “postpone systemic causes of

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<sup>50</sup> Brooks, “Enforcing a Turning Point and Imposing a Deal,” 421.

<sup>51</sup> Ibid., 422.

<sup>52</sup> Ibid., 423.

<sup>53</sup> Ibid.

<sup>54</sup> De Waal, “Darfur-the crisis explained.”

<sup>55</sup> Brooks, “Enforcing a Turning Point and Imposing a Deal,” 423.

<sup>56</sup> Ibid., 414.

<sup>57</sup> De Waal, “Darfur-the crisis explained.”

<sup>58</sup> Ibid.

<sup>59</sup> see “Darfur's New Security Reality, ICG Africa Report N° 134” (International Crisis Group, November 2007), executive summary, <http://www.ciaonet.org/wps/icg10310/icg10310.pdf>.



conflict to the process' non-binding second phase"<sup>60</sup>, the Darfur-Darfur Dialogue, which turned out to be an unworkable approach as these issues are core challenges<sup>61</sup>, and hence failed to deliver the most important – security.

#### 4. The negotiation process after the DPA

On the side of international efforts, in the aftermath of the DPA, a process was launched headed by two special envoys from the AU (Salim Ahmed Salim) and the UN (Ian Eliasson) and supported by a Joint Mediation Support Team (JMST) to revitalize the peace negotiations.<sup>62</sup>

The DPA also had various impacts on the political landscape. Signatory Minnawi lost all popular support in Darfur, while insecurity and forced displacement were on the rise, partly due to fighting between non-signatory groups and GoS coalition including SLA/ Minni.<sup>63</sup> The main development has been the increased fragmentation of the rebel groups. Even among the pro-DPA rebels, several splinter groups emerged: the SLA/ Free Will formed and instead of joining Minni, on whose side they should have been as supporters of the DPA, they ended up fighting his forces.<sup>64</sup> Supposedly, they are a creation of the GoS trying to "split the rebels along tribal lines in a divide-and-conquer policy".<sup>65</sup> Also, JEM/ Peace Wing split from JEM during the DPA and signed a declaration of support for the DPA; another splinter, the SLA/ Peace Wing, is also pro-DPA but observers suggest that its main role is to impede non-signatories' progress, as there are still tensions with SLA/ Minni and SLA/ Free Will.<sup>66</sup> The SLA/ Abdel-Gasim Imam reportedly receives GoS funding and its leader was rewarded

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<sup>60</sup> see Ibid., 25.

<sup>61</sup> see Ibid.

<sup>62</sup> see "Handbook for Darfur Peace Negotiations."

<sup>63</sup> see Tanner and Tubiana, *Divided They Fall*, 43.

<sup>64</sup> see Ibid., 44.

<sup>65</sup> S/2008/647, 16.

<sup>66</sup> see Tanner and Tubiana, *Divided They Fall*, 46.

with the post of *wali* of West Darfur, but was unable to staunch defections and control his men.<sup>67</sup> In 2007, JEM further split into JEM, JEM/ Eastern Command and JEM/ Collective Leadership.

A similar process is happening among the non-signatory rebels. The SLA/ unity and the SLA/ classic split from the SLA/ Wahid, leading to open clashes between the groups. Attempts at unification of the non-signatory SLA factions in December 2006 failed because there remain too many differences, e.g. Abdel Wahid demands to be chairman.<sup>68</sup> Further, the National Redemption Front (NRF) came together as an umbrella for the non-signatory groups in June 2006 in Asmara/ Eritrea, which provided a forum for the groups to coordinate for some months with the support of Eritrea, Chad and Libya<sup>69</sup>, but in late 2006 because of internal tensions, they broke off their alliance. Although a “leadership structure and political program were non-existent, the leadership was hotly contested and the group was seen as too Zaghawa-dominated and equaled with JEM”.<sup>70</sup> Abdel Wahid for example refuses to work with JEM on principles, accusing it as being part of the Islamist movement.<sup>71</sup> Current estimates report the existence of 27 rebel groups in Darfur in the summer of 2008.<sup>72</sup>

## **5. The roadmap and the Sirte talks**

The AU/ UN mediation team strategy<sup>73</sup> was initially to promote the implementation of the DPA, hoping that the non-signatories would eventually join. But they soon realized that a new negotiation process was needed, as the DPA “continues to be largely ignored by the parties on the ground”.<sup>74</sup> The

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<sup>67</sup> see Ibid., 47.

<sup>68</sup> see Ibid., 50f.

<sup>69</sup> see Ibid., 53f.

<sup>70</sup> see Ibid., 57.

<sup>71</sup> see Ibid., 59.

<sup>72</sup> see A. S. Natsios, “Beyond Darfur,” *FOREIGN AFFAIRS-NEW YORK*- 87, no. 3 (2008): 77.

<sup>73</sup> see “Darfur’s New Security Reality, ICG Africa Report N° 134,” 21.

<sup>74</sup> *S/2008/443*, July 7, 2008, 10,

<http://daccessdds.un.org/doc/UNDOC/GEN/N08/409/84/PDF/N0840984.pdf?OpenElement>.

first attempt was to simply expand the DPA, but a “long-term solution must deal with all the conflict’s root causes and incorporate many views, not just of those with arms”.<sup>75</sup>

In 2007, the international community tried another time to bring together the multitude of initiatives and tried to unify the rebel factions as laid out in a road map for peace by the mediation team: in August, all groups were invited to Arusha/ Tanzania to unify their positions. Abdul Wahid refused to attend, while smaller groups were invited, thus gaining un-proportionate legitimacy. After that, a follow-up meeting in N’Djamena/ Chad in September was plagued by absences, and so were the actual peace negotiations held in Sirte/ Libya which were opened on October 27, 2007. The reason “all major factions boycotted”<sup>76</sup> the talks were plenty, and seemed to have little to do with the actual concerns of the Darfuri population or even of the rebel fighters. Some did not come because of the Khartoum government crisis<sup>77</sup>, while others – wanted to continue their unification discussions. Abdul Wahid refused to attend until UNAMID had improved security on the ground, JEM-leader Khalil Ibrahim refused to participate in anything expect talks with the original DPA-non-signatories (JEM and a unified SLA). Additionally, the “period leading to talks was marred by continuous attacks from both rebels and government”.<sup>78</sup>

## **6. Doha Agreement**

In the summer of 2008, a AU/ UN Joint Chief Mediator for Darfur, Mr Djibrill Bassolé, was appointed, to replace the two Special Envoys Ian Eliasson (for the UN) and Salim Ahmed Salim (for the AU), and arrived in Darfur in late August 2008.<sup>79</sup> Hoping that the presence of one mediation focal point will

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<sup>75</sup> see “Darfur's New Security Reality, ICG Africa Report N° 134,” 21.

<sup>76</sup> see Ibid., 13.

<sup>77</sup> “Sudan: End To Crisis?,” *Africa Research Bulletin: Political, Social and Cultural Series* 44, no. 12 (2008): 17340A-17340C: in October 2007, the SPLM left the Government of National Unity in protest of the deployment of government troops in some southern states and ownership of the oil-rich Abyei state, but returned to its government positions in December 2007.

<sup>78</sup> see “Darfur's New Security Reality, ICG Africa Report N° 134,” 22.

<sup>79</sup> see *S/2008/659*, October 17, 2008, 9,  
<http://daccessdds.un.org/doc/UNDOC/GEN/N08/553/95/PDF/N0855395.pdf?OpenElement>.

help facilitate the process, he keeps on reaching out to the different rebel movements in anticipation of the resumption of direct negotiations.<sup>80</sup>

At the moment, it is not clear where the peace negotiations will be going. After an escalation of hostilities towards the end of 2008 and a unilateral ceasefire announced by al-Bashir, the security situation further deteriorated due to clashes between government and rebel troops, but also infighting between the armed movements.<sup>81</sup> A Security Council Report portrayed the situation in an even darker light: “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.”<sup>82</sup>

The current positions of the movements are: “SLA/Abdul Wahid continued to reject the possibility of dialogue with the Government of the Sudan”<sup>83</sup>; JEM declared its readiness to engage in direct talks with the government under the conditions that the other movements were excluded<sup>84</sup>; and finally there was recent fighting between the government and SLA/ Minnawi which “could jeopardize the security and political arrangements between the Government of the Sudan and SLA/MM”.<sup>85</sup>

A first small success was the Declaration of Goodwill, signed on February 17 2009 in Doha, Qatar, under the auspices of the government of Qatar and mediator Bassolé, signed by the government of Sudan and JEM. Both parties agreed generally to exchange prisoners, refraining from attacks on civilians and allowing humanitarian aid.<sup>86</sup>

Preliminary analyses conclude that while possibly a first step, the agreement is only laying the groundwork for further negotiations<sup>87</sup>, while risking the unification of the other movements against JEM and raising suspicions regarding JEM’s Islamist connections.<sup>88</sup>

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<sup>80</sup> see Ibid., 10.

<sup>81</sup> S/2009/83, 6.

<sup>82</sup> S/2008/647, 3.

<sup>83</sup> S/2009/83, February 10, 2009, 9, <http://allafrica.com/peaceafrica/resources/view/00011741.pdf>.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Sharon Otterman, “Sudan and Darfur Rebel Group Agree to Peace Talks,” *The New York Times*, February 18, 2009, sec. International / Africa, <http://www.nytimes.com/2009/02/18/world/africa/18sudan.html?scp=2&sq=darfur&st=cse>.

<sup>87</sup> Ibid.

On the positive side, the deal might be a signal that there is a moment of ripeness, with international pressure on al-Bashir in the context of the possible ICC arrest warrant rising, and JEM suffering from military defeats by the government. However, after the actual ICC arrest warrant for Al-Bashir in February 2009, all parties seem to have returned to a confrontational course.

Having introduced the background of the conflict and the parties in Darfur, in the remains of this paper, the two major obstacles to concluding an agreement will be presented – the ICC arrest warrant and the fragmentation of the armed opposition. The analysis includes their impact on the incentives and interests of the parties, and an examination in how far the intervention of the international community contributed to their emergence.

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<sup>88</sup> "A step forward for Darfur peace?," *BBC*, February 17, 2009, sec. Africa, <http://news.bbc.co.uk/2/hi/africa/7895733.stm>.

## **B. Obstacle 1: The ICC<sup>89</sup>**

This chapter is going to argue that by choosing to get the ICC involved in the Darfur peace process, the SC on behalf of the international community did not only use the wrong instrument to pursue its goals, but also create a potential obstacle to peace.

First, I am going to present some background about the ICC and its legal framework. Then I am going to analyze the utility of criminal justice in an ongoing conflict, drawing from deterrence and coercive diplomacy theory, and by looking at historical examples. Finally, I am going to describe the goals the international community is supposedly pursuing by involving the ICC in Darfur and will make the argument that the ICC is the wrong instrument to achieve this by analyzing the impact the ICC arrest warrant has on the negotiation process.

### **I. The utility of criminal justice in ongoing conflict**

#### **1. General background legal framework ICC**

The principal objective of the “ICC is to put an end to impunity and thus to contribute to the prevention of genocide, war crimes, and crimes against humanity”.<sup>90</sup>

In terms of jurisdiction, the ICC is based on the “concept of “complementarity” between the jurisdiction of the ICC and that of the domestic courts of State Parties”<sup>91</sup>, meaning that the ICC only deals with cases that are not being dealt with on the national level. ICC jurisdiction encompasses “persons who commit genocide, crimes against humanity, or war crimes.”<sup>92</sup> Further, the “crime of

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<sup>89</sup> All articles of the Rome Statute are quoted from: “Rome Statute of the International Criminal Court,” [http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf).

<sup>90</sup> Paul Seils and Marieke Wierda, *The International Criminal Court and Conflict Mediation*, Occasional Paper Series (International Center for Transitional Justice, June 2005), 3, Google Scholar, <http://www.hdcentre.org/files/ICCandconflictmediation.pdf>.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid., 4.

aggression also will be included once it is defined.”<sup>93</sup> Jurisdiction may be exercised if these crimes “(1) occurred in the territory of a State Party or (2) were perpetrated by a national of a State Party, or (3) the Security Council may refer the matter to the Court even if it occurred in a state that is not a party to the treaty or allegedly was carried out by nationals of a non-State Party.”<sup>94</sup> Investigations can be triggered either by referral by a state party, the Prosecutor beginning an investigation on his or her own initiative, or by referral from the Security Council acting under Chapter VII.<sup>95</sup> Following one of these triggers, the Prosecutor can choose whether or not to investigate or proceed to trial when he or she determines that it would not be “in the interests of justice” to do so<sup>96</sup> (Art. 53). Because this regulation is of particular relevance to the argument presented here that the ICC should be used as a bargaining chip, there will be a more detailed discussion in the section on mediation and the ICC below.

Generally an independent organ from the United Nations, the ICC has nevertheless a complex relationship with the Security Council, which “can both refer situations and seek to defer investigations.”<sup>97</sup> Furthermore, there is an Relationship Agreement<sup>98</sup> between with the United Nations, including a “general commitment by the United Nations to cooperate with the ICC, including allowing its officials to testify and responding to requests for information”<sup>99</sup>. This goes so far as to relaxing the confidentiality of UN officials<sup>100</sup> - the political consequences for the perceived impartiality of the UN in circumstances where the ICC is investigating remains to be seen.

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<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> see Ibid.

<sup>96</sup> Ibid., 12.

<sup>97</sup> Ibid., 3.

<sup>98</sup> see “Negotiated Relationship Agreement between the International Criminal Court and the United Nations,” [http://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1_English.pdf).

<sup>99</sup> Seils and Wierda, *The International Criminal Court and Conflict Mediation*, 15f.

<sup>100</sup> see Art. 16 (1) Negotiated Relationship Agreement between the International Criminal Court and the United Nations: “If the Court requests the testimony of an official of the United Nations or one of its programs, funds, or agencies, the United Nations undertakes to cooperate with the Court and, if necessary and with due regard to its responsibilities and competence under the Charter and subject to its rules, shall waive that person’s obligation of confidentiality.”

## 2. Tension between ICC and mediation process

Without wanting to go deeply into the peace vs. justice debate within this paper, it is a fact that an ICC investigation “presents a significant new complexity for negotiators”<sup>101</sup>. Therefore, in a short summary, some of the main arguments regarding ICC involvement in an ongoing mediation are going to be presented.

First, the “existence of an external body with both the will and the means to achieve accountability means that negotiators are no longer hostage only to domestic realities”<sup>102</sup>, while the threat of an prosecution might also prevent further abuses. This internalization of a peace process has also the potential to bring additional attention and hence dedication and resources to the negotiations.

Moreover, an investigation can “assist in allowing negotiators a stronger hand in deciding which parties can sit at the table”<sup>103</sup>. Once someone is identified as a suspect, mediators “may be able to point to this as a factor that might dissuade those individuals from participating, at least directly, in negotiation”.<sup>104</sup> This is problematic in two ways: first, it is based on the assumption that there is a moral distinction between negotiating with “indicted war criminals (...) [or] continuing to deal with known criminals who have not faced the formality of indictment”.<sup>105</sup> And even more importantly, it might make it difficult to impossible for a mediator to bring in a prosecuted party whose inclusion is crucial for the sustainability of any agreement.

Third, an indictment issued during a peace process serves to “highlight the nature of this trade-off [between amnesty deals/ peace and justice], encouraging political actors and the public to which they are accountable to consider more deeply whether moral considerations truly justify forsaking

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<sup>101</sup> Ibid., 18.

<sup>102</sup> Ibid., 19.

<sup>103</sup> Thomas Unger and Marieke Wierda, “Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice,” in *Building a Future on Peace and Justice* (Springer, 2009), 267, [http://dx.doi.org/10.1007/978-3-540-85754-9\\_11](http://dx.doi.org/10.1007/978-3-540-85754-9_11).

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.



prosecution in particular instances”.<sup>106</sup> Hence, investigations help crystallizing the policy choices and their moral implications, although as will be discussed below, pursuing criminal justice is not always the uncontested morally superior choice. Yet, in such conflicts formal or de facto amnesties are often granted or exile arrangements made in order to “advance the bargaining process”<sup>107</sup> as it is impossible to “simultaneously to criminalize them [the leaders] and to try to solicit their voluntary co-operation”.<sup>108</sup> A high ranking UN official remarked:

“So many leaders of these conflicts have committed abuses, crimes, and the killing and the suffering of innocent civilians continues as long as the conflict continues. So you have two choices. You can consider them criminals, bring them to face justice, and get them out of the way, or invite them to negotiate for a peaceful settlement. When there is neither the internal capacity nor the external will to do the first, there is no other choice but to invite them to negotiate, often for power sharing in a transitional arrangement to stop the wars”.<sup>109</sup>

It has to be kept in mind however, that UN mediators are “in any case bound not to ratify agreements that allow for amnesties for genocide, war crimes and crimes against humanity”<sup>110</sup>, therefore at least on the official side, the ICC does not promote much more far-reaching restrictions than that. For non-UN mediators and unofficial talks, on the other hand, criminal indictments pose a major challenge.

Generally, it is being criticized that the “debate on international justice has tended to focus on the somewhat narrow justifications of deterrence and retribution, ignoring developments in criminal punishment theory and practice”<sup>111</sup>, such as the debate about retributive vs. restorative justice.

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<sup>106</sup> Ibid., 269.

<sup>107</sup> K. A. Rodman, “Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court,” *Leiden Journal of International Law* 22, no. 01 (2009): 102.

<sup>108</sup> Ibid., 110.

<sup>109</sup> Haile Menkerios (former head of DPKO Africa division) in: Ibid.

<sup>110</sup> Unger and Wierda, “Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice,” 290.

<sup>111</sup> Seils and Wierda, *The International Criminal Court and Conflict Mediation*, 3.

Further, while one of the main arguments in favor of international criminal justice is their deterrent effect on potential perpetrators, this “remains under-theorized for lack of empirical evidence”.<sup>112</sup>

Hence, it is argued that there is an inherent tension between criminal investigations during an ongoing peace process, and the mediation efforts during that process, with some mediators finding the “ICC an unwelcome intrusion of albeit laudable ideals on a terrain that requires some very hard and unpalatable bargains to be driven”.<sup>113</sup> In order to facilitate a dialogue between mediators and the ICC, the Center for Humanitarian Dialogue has hosted a number of conversations to help senior mediators to understand the ICC better, and for the ICC to develop its understanding of the concerns and techniques used by senior mediators”, but beyond that, “there exists little opportunity for direct interaction between the ICC and mediators, particularly in the context of specific negotiations.”<sup>114</sup>

### **3. Mixing objectives and conflict termination strategies**

In the context of an ongoing war, the pragmatic question that is far more important than the moral-philosophical debate about the purity of justice is whether the pursuit of criminal justice is an effective strategy to achieve the goals one wants to achieve.

To determine the correct strategy, two variables have to be determined: the objective of the intervention and the relationships one envisions to have with the enemy after the intervention.

#### **a. Objectives**

First of all, before choosing a tool, it has to be clear what the exact objective of international action is. Usually the objective that is cited in the context of the ICC is to end atrocities against civilians and

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<sup>112</sup> Castillo, “Rethinking Deterrence,” 168.

<sup>113</sup> Seils and Wierda, *The International Criminal Court and Conflict Mediation*, 18.

<sup>114</sup> Unger and Wierda, “Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice,” 290.

the protection of human lives<sup>115</sup>. This means that the goal is to make whoever is committing these atrocities change their behavior.

To theoretically understand this, it has to be distinguished between two concepts from the security studies literature, deterrence and compellence.

Deterrence is “aimed at dissuading someone from initiating proscribed behavior”<sup>116</sup> and is used to “threaten an adversary with unacceptable damage in order to prevent him from doing that he might otherwise be tempted to do but that one does not want him to do”<sup>117</sup>. Hence, deterrence is “the threat of retaliation whose purpose is to prevent something undesirable from happening”.<sup>118</sup>

On the other hand, there is the concept of compellence as the “act of preventing someone from continuing actions on which he has already embarked”.<sup>119</sup> It therefore is utilized to “either to stop an adversary from doing something he has already undertaken or to force him to do something not yet undertaken”.<sup>120</sup>

Having clarified this difference, it becomes very clear that the “key to ending criminal violence in an ongoing war is not deterrence”<sup>121</sup>, as the “threat of prosecution is unlikely to deter because, by the time a tribunal asserts jurisdiction, large-scale crimes have already taken place and in most cases, as was the case in Bosnia and is the case in Darfur, responsibility lies with top political and military leaders”.<sup>122</sup> As stated above, the concept of deterrence is “designed to prevent someone from initiating criminal activity”.<sup>123</sup> As a result, it can only be effectively applied before the “large-scale atrocities have already occurred”<sup>124</sup>, which would then nullify any deterrent impact. Unfortunately,

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<sup>115</sup> This paragraph is going to focus only on ending violence during conflict and will not take into account the long-term deterrent effect of a consistent application of international criminal justice, as the author believes that it will take several years of consistent and successful arrests and trials to create this effect.

<sup>116</sup> K. A. Rodman, “Darfur and the Limits of Legal Deterrence,” *Human Rights Quarterly* 30, no. 3 (2008): 531.

<sup>117</sup> R. Art, “The Role of Military Power in International Relations,” *National Security Affairs* (1982): 28.

<sup>118</sup> Ibid.

<sup>119</sup> Rodman, “Darfur and the Limits of Legal Deterrence,” 531.

<sup>120</sup> Art, “The Role of Military Power in International Relations,” 29.

<sup>121</sup> Rodman, “Darfur and the Limits of Legal Deterrence,” 531.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid., 535.

<sup>124</sup> Ibid.

this is usually the stage in which an international criminal tribunal steps in, when those they are supposed to deter – “the top leadership of governments and rebel groups”<sup>125</sup> – have already done their deed and “Judicial scrutiny does not create any new incentive to desist”.<sup>126</sup>

Consequentially, a legal prosecution does “not create an incentive to refrain from criminal activity”<sup>127</sup> and the real “challenge is to prevent the continuation of crimes that have already been set in motion, and that requires compelling the target to change its behavior”<sup>128</sup> and to stop and reverse actions already taken.<sup>129</sup> The reason for this is that “the real source of impunity in places like Bosnia (or Darfur) is that the perpetrators believe that the internal balance of forces on the ground enables them to impose their will without meaningful resistance, and the lack of international political will to stop them means that they can do so without incurring significant external costs”<sup>130</sup>, which leads over to the next variable.

#### **b. Conflict termination strategies**

There are three potential conflict termination strategies. Compellence can take two forms that translate into two different war termination strategies<sup>131</sup>: brute force and the complete defeat of a regime, or coercion and working out a negotiated peace agreement, either “taking what you want (...) [or] making someone give it to you”.<sup>132</sup> Additionally, there is also the alternative of a pacific settlement through negotiations only without any coercive element.

When brute force is used to physically “defeat the perpetrators, this can take place through internal forces, as when the Rwandan Patriotic Front ousted the genocidal Hutu regime, or through external

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<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid., 531.

<sup>128</sup> Ibid.

<sup>129</sup> see Ibid., 535.

<sup>130</sup> Ibid.

<sup>131</sup> on the distinction between brute force and coercion, see T. C. Schelling, *Arms and influence* (Yale University Press), 2.

<sup>132</sup> Ibid.

intervention, as when British troops assisted a UN force in defeating the Revolutionary United Front (RUF) in Sierra Leone”<sup>133</sup>, but it is always “designed to defeat the adversary or reduce its capability to a point where its cooperation is unnecessary”.<sup>134</sup>

Using coercion, the “goal is not to defeat the perpetrators, but to use the threat or the demonstrative infliction of punishment to change their behavior by convincing them that it is in their interest to comply with the coercer’s demands”<sup>135</sup> and convincing the target to “change its behavior through the threat of punishment”<sup>136</sup>, seeking to “elicit its cooperation through the threat or limited use of violence”.<sup>137</sup> Therefore, coercion does not attempt to “incapacitate an opponent, but rather to “erode his motivation to continue what he is doing” by the “expectation of costs of sufficient magnitude.”<sup>138</sup>

The “kind of criminal justice approach that is feasible in the aftermath of mass atrocity is dependent on the strategies that are used to put it to an end”.<sup>139</sup>

Least problematic is criminal justice in the case of robustly defeating a regime, because “if the perpetrators have been physically defeated, their leaders can be put on trial because they lack the power to prevent it”<sup>140</sup>, meaning that if regime change by force is the strategy in place, while not able to deter any crimes, there are no obstacles to the pursuit of criminal justice.

However, “if one relies instead on [coercive diplomacy], this is more problematic because success involves persuading leaders to put an end to criminal violence for which they are probably complicit”,<sup>141</sup> because strategies of coercion “seek not to incapacitate an opponent, but rather to erode his motivation to continue what he is doing by the expectation of costs of sufficient

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<sup>133</sup> Rodman, “Darfur and the Limits of Legal Deterrence,” 531.

<sup>134</sup> Ibid., 535.

<sup>135</sup> Ibid., 531.

<sup>136</sup> Ibid., 535.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid., 536.

<sup>139</sup> Ibid., 531.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

magnitude”.<sup>142</sup> Additionally, it has to be cautioned that “coercion is likely to be successful if threats are accompanied by reassurances and if the coercer’s demands do not impinge on the vital security or survival interests of the regime.”<sup>143</sup> Mixing coercive diplomacy with criminal justice is doomed to fail because, when the strategy includes “the criminal prosecution of its leaders, then this amounts to a demand for regime change, making the target’s compliance all but impossible”.<sup>144</sup> In such a scenario, “the coercer is then confronted with the choice of acquiescing to a morally intolerable status quo or escalating the use of force to a point where the target is defeated and its cooperation is no longer necessary”.<sup>145</sup> Coercive diplomacy is based on a continuation of the relationship with the target, while “if one refuses to engage criminal leaders in an ongoing war, the premise underlying that choice is the belief that the continuation of the war is likely to lead to a better outcome than a negotiated compromise”.<sup>146</sup> Therefore, when used to execute international criminal justice, coercive diplomacy becomes very problematic “because its purpose is to alter the way a target calculates its interests”<sup>147</sup>, while those interests certainly do not include a trial in The Hague. “Because perpetrators are unlikely to want a prison cell as a reward for their hard-won peace agreement, mediators have frequently used amnesties as an incentive”<sup>148</sup>, but when international criminal justice prohibits that, the diplomacy part becomes irrelevant and no option but real coercion is left.

Most difficult it is when international criminal justice is being combined with negotiations. According to Zartman, one of the main conditions for successful peace negotiations is the occurrence of a “mutually hurting stalemate, where the countervailing power of each side, though insufficient to make the other side lose, prevents it from winning”.<sup>149</sup> However, the “protracted nature of internal

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<sup>142</sup> Ibid., 535.

<sup>143</sup> Ibid., 531.

<sup>144</sup> Ibid., 537.

<sup>145</sup> Ibid.

<sup>146</sup> Ibid., 539.

<sup>147</sup> Ibid., 537.

<sup>148</sup> N. Grono and O. O’Brien, “Justice in Conflict? The ICC and Peace Processes,” *Courting Conflict? Justice, Peace and the ICC in Africa*, Waddell/ Clark (ed.) (2008): 113f.

<sup>149</sup> William Zartman, “The Unfinished Agenda: Negotiating Internal Conflicts,” in Licklider, Roy (ed.), *Stopping the Killing. How Civil Wars End* (New York University Press, 1993), 24.

conflicts”<sup>150</sup> already by itself complicates the occurrence of such a stalemate and the “nature of internal conflict works against the component conditions for a ripe moment for negotiation”.<sup>151</sup> Even “if ever the parties do become involved in negotiation, usually through the insistent efforts of a third party, they continually look for ways of seizing an opportunity to escalate their way out of the stalemate”.<sup>152</sup> At the same time, when mixed with criminal justice, negotiation meets with all the additional complications mentioned under coercive diplomacy.

This analysis has shown that there are different strategies how to end a conflict, and that the success and execution of criminal justice has to depend on which one is chosen in a particular situation.

### **c. Ways to reconcile ICC and diplomacy**

Having demonstrated that the pursuit of criminal justice without negative side effects is only possible when the goal is to defeat an enemy by force, and that prosecutions have negative consequences for both coercive and pacific diplomatic approaches, there are still several legal options how politics can be taken into account during a prosecution.

Investigations and prosecutions can be ended or deferred, and although none of these was originally designed to facilitate mediation or enable a peace process, future practice is going to show whether they will be applied in such a way. Once an investigation has started and the “ICC has issued arrest warrants, the only possibilities for a temporary or permanent discontinuation of the proceedings are found in Articles 16, 19 and 53 of the Rome Statute”<sup>153</sup>:

First, “mediators concerned about the negative consequences of ICC activity should raise these concerns directly with the Prosecutor provided that doing so does not call into question their own

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<sup>150</sup> Ibid.

<sup>151</sup> Ibid., 27.

<sup>152</sup> Ibid.

<sup>153</sup> Unger and Wierda, “Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice,” 271.

impartiality.”<sup>154</sup> Instead of asking for a complete end of the investigation, mediators could suggest a deferral of the case.<sup>155</sup> Legally, the Prosecutor is “given limited discretion to apply to the Pre-Trial Chamber to halt an investigation or prosecution”<sup>156</sup> either in the interests of justice or in the interests of the victims<sup>157</sup>, although it is the Pre-Trial Chamber that makes the final decision.

There is an ongoing legal debate about the exact interpretation of the meaning of “interests of justice” and “interests of the victims”, and whether the “concept of the interests of justice would appear to include the notion that trials that directly contribute to an increase in or prolongation of political instability can be deferred until such time as the risk has significantly receded.”<sup>158</sup> Supporters of this view argue that “if it is highly probable that the investigation and prosecution of individuals creates a substantial risk of provoking the same kinds of widespread and dreadful acts that may be the subject of investigations, the ICC naturally would be hesitant to proceed.”<sup>159</sup> Hence, if interrupting a peace process posed the risk of an increase in human rights violations and atrocities against the civilian population, the ICC deferred the situation “for both practical and ethical reasons”.<sup>160</sup>

Further, regarding the interests of the victims, the claim is made that an “ethical prosecutorial policy should be informed (but not bound) by the views of victims”.<sup>161</sup> In a policy paper by the OTP, an interpretation is presented that includes the “victims’ interest in seeing justice done, but also includes other essential interests such as their protection, (...) safety, physical and psychological

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<sup>154</sup> Seils and Wierda, *The International Criminal Court and Conflict Mediation*, 15.

<sup>155</sup> see *Ibid.*

<sup>156</sup> Unger and Wierda, “Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice,” 270.

<sup>157</sup> see Art. 53 (3c) Rome Statute: “If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because: (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.”

<sup>158</sup> Seils and Wierda, *The International Criminal Court and Conflict Mediation*, 12.

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*

<sup>161</sup> Unger and Wierda, “Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice,” 2724



well-being, dignity and privacy “.<sup>162</sup> This view differs greatly from “certain human rights organizations, which have argued that the interests of victims referred to in Article 53 is in justice and justice alone”.<sup>163</sup> Again, only the future practice of the court will show which interpretation will be dominant.

Secondly, the “Security Council can choose to defer an investigation for a period of 12 months, renewable under Article 16<sup>164</sup>.”<sup>165</sup> This possibility has the advantage of “removing the difficult question of peace and justice to another actor and recognizing that this is a political decision, beyond the scope of the law”<sup>166</sup> that is best dealt with by the highest body dealing with questions of international peace and security. Although clearly sacrificing the absolutist claims of justice and potentially setting a “negative precedent for future conflicts in terms of becoming part of the regular demands of fighting factions before signature of any agreement”<sup>167</sup>, such a deferral can “create “breathing space” for the implementation of a peace agreement”<sup>168</sup> without which the complete peace process might be doomed for failure.

Finally, “admissibility challenges can still be made under Article 19<sup>169</sup> if a peace process results in a change in the situation whereby a State finds itself in the position to be able to investigate genuinely or prosecute, and embarks on that course”.<sup>170</sup> Often states have chosen other methods than prosecution in transitions or conflict, “particularly when those accused of criminal violence retain

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<sup>162</sup> “Policy Paper on the Interests of Justice,” September 2007, 5, [http://www2.icc-](http://www2.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf)

[cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf](http://www2.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf).

<sup>163</sup> Unger and Wierda, “Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice,” 275.

<sup>164</sup> see Art. 16 Rome Statute: “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”

<sup>165</sup> *Ibid.*, 270.

<sup>166</sup> *Ibid.*, 281.

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

<sup>169</sup> see Art. 19 (2b) Rome Statute: “Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by: (...) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted.”

<sup>170</sup> *Ibid.*, 270.

significant power and negotiation is the most viable strategy of political change”.<sup>171</sup> Alternative instruments often include “non-penal forms of justice, such as truth commissions, reparations, or lustration”.<sup>172</sup> In many conflicts, “amnesties and reconciliation were the favored approach”<sup>173</sup>, like in southern Sudan and in Mali, and they seem to be “preferred by many tribal leaders in Darfur today.”<sup>174</sup> The question arises whether those would qualify as alternatives to ICC prosecution.

With the ICC currently in the process of its first trials, “it is too early to state conclusively whether the idea of proceeding with criminal proceedings and peace negotiations on parallel tracks can succeed in practice”<sup>175</sup>, but “it is not so clear that its presence is necessarily always an inhibiting factor”.<sup>176</sup>

#### **4. Historical examples: the utility of criminal justice during war**

Although the ICC itself is a very new instrument, there have been similar cases where another international criminal tribunal indicted a party or even a head of state during a peace process. The main lesson that can be drawn from history so far is that the “feasibility of prosecution and its impact on peace are shaped and constrained by the political strategies designed to end a conflict.”<sup>177</sup> But these indictments also demonstrate that “if the international community stands resolutely behind efforts to promote accountability for genocide and crimes against humanity, the pursuit of justice can be a catalyst for peace”.<sup>178</sup>

##### **a. Milosevic**

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<sup>171</sup> Rodman, “Is Peace in the Interests of Justice?,” 102.

<sup>172</sup> Ibid.

<sup>173</sup> Castillo, “Rethinking Deterrence,” 177.

<sup>174</sup> Ibid.

<sup>175</sup> Unger and Wierda, “Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice,” 271.

<sup>176</sup> Seils and Wierda, *The International Criminal Court and Conflict Mediation*, 18.

<sup>177</sup> Rodman, “Is Peace in the Interests of Justice?,” 111.

<sup>178</sup> Enough Team, *What the warrant means. Justice, Peace, and the Key Actors in Sudan*, 1.

## Creating obstacles to peace – the international involvement in Darfur

Viola Erdmannsdoerfer

MALD Thesis Spring 2009

The first case is the indictment of Slobodan Milosevic by the International Criminal Tribunal for Yugoslavia (ICTY) in the middle of NATO's military intervention in Serbia, which was the "first ever international indictment of a sitting head of state".<sup>179</sup>

The particularity here is the timing of the warrant, which was not issued in 1995 during the Dayton Peace Conference where his accomplices Mladic and Karadzic were indicted, but years later in 1999 during the Kosovo war.

The reason for that was that "indicting Milosevic was impractical in 1995 was because his co-operation was necessary both to negotiate and to maintain Dayton"<sup>180</sup>, whereas the Bosnian Serbian leadership was characterized as "useless interlocutors' who had reneged on every commitment made to international mediators"<sup>181</sup> by US Envoy Holbrooke. The political strategy to end the conflict at that time was negotiation, while the option of defeating the regime was not palatable to the US and NATO who at Dayton "dealt with Milosevic through a bargaining paradigm rather than a criminal justice paradigm".<sup>182</sup> Hence, in Dayton the mediator's strategy was to rely on Milosevic to deliver the Bosnian Serbian leadership. On the other hand, the "indictments of Karadzic and Mladic did not derail the Dayton peace process",<sup>183</sup> but actually assisted that strategy.<sup>184</sup> On the other hand, it is quite likely that "indicting Milosevic by contrast, would likely have had the same impact on Dayton that unsealing the arrest warrant for Charles Taylor had on the collapse of the Accra talks".<sup>185</sup>

This is in accordance with the theoretical conclusions above about the limited utility of criminal justice during coercive diplomacy. In NATO's strategy in Bosnia in 1995, the "purpose of force was not to defeat the Serbs militarily, but to convince Milosevic that he was overextended, that time was not on the side of the Bosnian Serbs, and that it was in his interest to compromise and end the

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<sup>179</sup> Unger and Wierda, "Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice," 267f.

<sup>180</sup> Rodman, "Is Peace in the Interests of Justice?," 110.

<sup>181</sup> Ibid.

<sup>182</sup> Rodman, "Darfur and the Limits of Legal Deterrence," 537.

<sup>183</sup> Ibid.

<sup>184</sup> see Rodman, "Is Peace in the Interests of Justice?," 110.

<sup>185</sup> Ibid.

war”.<sup>186</sup> This demonstrated in practice that “if the central goal of coercive bargaining with an abusive government is to end a war whose principal victims are civilians, success depends on whether threats and punishments can convince the target that compliance is necessary for its long-term security”.<sup>187</sup>

One of the reasons why “the threat of prosecution had little influence during the Bosnian war was the failure to meet the formal requirements for effective deterrence”.<sup>188</sup>

Then four years later in the Kosovo war in 1999, the strategy had changed from negotiation and coercive diplomacy to robust regime change, and therefore Milosevic’s indictment could not “prevent a resolution of the Kosovo war”.<sup>189</sup> NATO had actually started using force and “concluded that Milosevic was not only no longer the key to the peace process, he was now the main source of instability in the region”.<sup>190</sup> The execution of the warrant turned out to be rather difficult, and “it took both a domestic revolution and extraordinary international pressure to deliver Milosevic to The Hague”.<sup>191</sup>

This example also demonstrates the hypothesis from above that “international criminal justice cannot end impunity in an ongoing war as long as states and intergovernmental organizations are unwilling to take enforcement actions”, as “the ICTY had little impact on the murder and forced displacement of civilians when the UN and NATO were unwilling to move beyond neutral peacekeeping and mediation” and “it was only when NATO was willing to use force, both directly and via proxy, that the attacks on civilians ended and the ICTY was able to prosecute anyone of significance.”<sup>192</sup>

#### **b. Taylor**

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<sup>186</sup> Rodman, “Darfur and the Limits of Legal Deterrence,” 535.

<sup>187</sup> *Ibid.*, 537.

<sup>188</sup> *Ibid.*, 535.

<sup>189</sup> *Ibid.*, 537.

<sup>190</sup> Rodman, “Is Peace in the Interests of Justice?,” 111.

<sup>191</sup> Unger and Wierda, “Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice,” 267f.

<sup>192</sup> Rodman, “Darfur and the Limits of Legal Deterrence,” 531.

Another example is Charles Taylor, who was indicted by the Special Court for Sierra Leone while at peace talks in Ghana, marking the first warrant against an “African head of state before an international tribunal”<sup>193</sup>. Also here, the main political strategy at that point was negotiation.

The official release of the indictment was seen by most West Africans “in political and regional terms, a dynamic that was under-appreciated by some of the Court’s backers.”<sup>194</sup> The refusal of the Ghanaian authorities to hand Taylor over demonstrates that “Africans would never have allowed Europeans and Americans to come to Africa and arrest a sitting president”.<sup>195</sup> Furthermore, the release of the warrant “either risked or caused considerable further violence and killing in Monrovia and throughout Liberia” with the rebels “shelling the capital, striking the heart of downtown Monrovia on the day following the indictment”.<sup>196</sup> Next to “triggering the collapse of the peace talks”<sup>197</sup>, which meant that an “opportunity to end the violence earlier was effectively vetoed by the Prosecutor”<sup>198</sup>, “roughly 1,000 people died in stepped-up political violence between the breakdown of the talks in Accra and Taylor’s eventual resignation”.<sup>199</sup>

Hence, releasing the indictment during the peace negotiations caused additional violence and civilian deaths. Furthermore, “the actual likelihood of such attacks if Taylor had been arrested cannot be known, as Taylor returned home later that same day and the militia immediately calmed down.”<sup>200</sup>

This directly raised the question outlined above whether the “interests of justice” of Art. 53 Rome Statute should be “construed sufficiently broadly to include the interests of peace”<sup>201</sup> and whether

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<sup>193</sup> Rodman, “Is Peace in the Interests of Justice?,” 99.

<sup>194</sup> P. B. Hayner, *Negotiating peace in Liberia: preserving the possibility for justice* (Geneva: HD Centre for Humanitarian Dialogue), 8.

<sup>195</sup> Ibid.

<sup>196</sup> Ibid., 9f.

<sup>197</sup> Rodman, “Is Peace in the Interests of Justice?,” 100.

<sup>198</sup> Ibid.

<sup>199</sup> Ibid.

<sup>200</sup> Hayner, *Negotiating peace in Liberia*, 10.

<sup>201</sup> Rodman, “Is Peace in the Interests of Justice?,” 100.

the Prosecutor should hold back “from criminal proceedings if he is persuaded that prosecution could interfere with negotiated transitions”.<sup>202</sup>

On the other hand, there is the belief that “the unsealing of the indictment had a largely positive effect on the actual negotiations”.<sup>203</sup> It cost Taylor legitimacy both “domestically and internationally”<sup>204</sup> and “effectively removed any last support for him from international partners”.<sup>205</sup> Taking away his main supporters, it effectively pushed him to accept that he “would have to leave the presidency”.<sup>206</sup>

The process has been seen as “an important step in ending the culture of impunity in which tyrants and rebel leaders believe they will never be held accountable for their crimes”.<sup>207</sup>

However, before agreeing to sign the peace deal and handing over power, an exile agreement guaranteed Taylor’s safe exile in Nigeria<sup>208</sup> on the condition to stay out of Liberian politics, and only two-and-a-half years later was he transferred from Nigeria to the Court<sup>209</sup> after a direct intervention by Liberia’s newly elected President Ellen Johnson-Sirleaf.

Therefore, within a strategy of pacific negotiation, the indictment had a positive impact insofar as it demonstrated to Taylor that it was not feasible for him to stay in power. However, this came at the price of more violence; and in the end, a negotiated settlement was only possible when a side deal was made that ensured Taylor’s safety. The way he was then later extradited might even serve as a threatening example to others to not give up power voluntarily.

### c. Kony

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<sup>202</sup> Ibid.

<sup>203</sup> Hayner, *Negotiating peace in Liberia*, 9.

<sup>204</sup> Ibid.

<sup>205</sup> Ibid.

<sup>206</sup> Ibid.

<sup>207</sup> Rodman, “Is Peace in the Interests of Justice?,” 99.

<sup>208</sup> see Unger and Wierda, “Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice,” 268.

<sup>209</sup> Hayner, *Negotiating peace in Liberia*, 24.

A third case that deserves mentioning is the indictment in 2005 of LRA leader Joseph Kony by the ICC. Although not a sitting head of state like the other two, it also demonstrates two problems of prosecution during ongoing negotiations:

First, the “reduction of outside support, combined with the threat of prosecution, increased the pressure on the LRA to negotiate its own safety”<sup>210</sup>, to which the LRA responded by an increase in violence, mainly against civilians. Hence, “while the arrest warrants might serve as a prod to negotiations, insisting on their execution is likely to prevent their completion”.<sup>211</sup>

Secondly, if justice is pursued for its own sake, it has to be done “by applying criminal law evenhandedly”<sup>212</sup>, meaning that both sides of a conflict should be equally subject to investigation. In the Ugandan case, the focus on the LRA rather than the government’s military was justified by the Prosecutor by the fact that “the crimes committed by the LRA are of dramatically higher gravity”.<sup>213</sup> The ICC does not have a general obligation to investigate as case comparable to national criminal justice (except if the SC refers it), which makes it seem very biased.

## **II. The ICC in Sudan**

### **1. Background of the involvement**

On an initiative by the US, the SC had set up an International Commission of Inquiry into Darfur (ICID), “whose mandate was to investigate violations of international humanitarian law and human rights law, to determine whether genocide has taken place, and “to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.”<sup>214</sup> The Commission’s

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<sup>210</sup> Rodman, “Is Peace in the Interests of Justice?,” 113f.

<sup>211</sup> Ibid.

<sup>212</sup> Ibid., 112.

<sup>213</sup> Ibid.

<sup>214</sup> Rodman, “Darfur and the Limits of Legal Deterrence,” 5434

report in February 2005, “found that the government and the militias were responsible for widespread and systematic attacks on the civilian population that constituted war crimes and crimes against humanity, but not genocide,(...) because the government’s intent in attacking civilians was to fight a counter-insurgency war, not to exterminate a protected group.”<sup>215</sup> Following the report, on March 31 2005, the UN Security Council referred the situation in Darfur to ICC in resolution 1593. By evoking Chapter VII of the UN Charter, the Council “made it a legal obligation for Sudan, which is not a state party to the treaty establishing the ICC, to cooperate with this court”.<sup>216</sup> This was a major development, as “there was no recent precedent for the UNSC deciding to pursue justice in advance of any workable peace process”.<sup>217</sup>

On 1 June 2005, the “Prosecutor accepted the case and initiated a formal investigation.”<sup>218</sup> Two warrants were issued against high ranking government officials in 2007: One of them is “Ahmed Mohamed Haroun, who had served as a Minister of State for the Interior during 2003 and 2004, and was especially involved in recruiting and deploying militia in Western Darfur”.<sup>219</sup> Allegedly, he is responsible for “recruiting, funding and arming the Janjaweed”.<sup>220</sup> Despite that, Haroun had been appointed Minister of State for Humanitarian Affairs. The other indicted leader was “Mohamed Abdel Rahman Kushayb, a militia leader who worked closely with Ahmed Haroun and is alleged to have been involved in many of the same crimes”.<sup>221</sup> The NCP reacted with “promptly hardened its stance of non-cooperation”<sup>222</sup>, e.g. “keeping Haroun in humanitarian affairs was a deliberate snub to the many western diplomats and humanitarian workers who were obliged to interact with him”<sup>223</sup>

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<sup>215</sup> Ibid.4

<sup>216</sup> C. A. Williamson, “Justice empowered or justice hampered: The International Criminal Court in Darfur,” *African Security Review* 15, no. 1 (2006): 22.

<sup>217</sup> De Waal, “Darfur and the failure of the responsibility to protect,” 1041f.

<sup>218</sup> Rodman, “Darfur and the Limits of Legal Deterrence,” 546.

<sup>219</sup> Alex De Waal, “Darfur, the Court and Khartoum:

*The Politics of State Non-Cooperation,” Courting Conflict? Justice, Peace and the ICC in Africa, Waddell/ Clark (ed.) (2008): 30f.*

<sup>220</sup> Ibid.

<sup>221</sup> Ibid.

<sup>222</sup> Ibid., 31.

<sup>223</sup> Ibid.



and then even appointing him “to head an inquiry into allegations of human rights abuses in Darfur”.<sup>224</sup>

Escalating the situation ICC Prosecutor Moreno-Ocampo indicted President Al-Bashir himself in July 2008 for genocide, crimes against humanity, and war crimes; in February 2009 the judges issued an arrest warrant for war crimes, while the charge of genocide was dropped.

With regard to Sudan as a whole, there was “muted criticism from some Southern Sudanese, who wanted to know why the comparable violations visited upon them were not of interest to the ICC, and why the 2005 Comprehensive Peace Agreement (CPA) was silent on accountability for these violations.”<sup>225</sup>

## **2. Impact of arrest warrant**

This chapter is going to look at the reactions of the different parties to the ICC process and arrest warrant, and then analyze the probability of several possible scenarios from the coercive diplomacy/pacific negotiations perspective. Finally, the utility of the ICC involvement in this case for the objective of ending the violence will be evaluated.

### **a. The concept of BATNA**

In order to better understand the impact of the ICC arrest warrant on the negotiation strategy of the different parties, the concept of the Best Alternative to a Negotiated Agreement (BATNA) has to be introduced. It is based upon the notion that the “reason for entering negotiation is to produce something better than the results obtainable without negotiating”.<sup>226</sup> Further, the “relative negotiating power of two parties depends primarily on how attractive to each is the option of not

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<sup>224</sup> Ibid.

<sup>225</sup> Ibid.

<sup>226</sup> R. Fisher, W. Ury, and B. Patton, *Getting to Yes: Negotiating Agreement Without Giving in* (Houghton Mifflin, 1991), 100.

reaching agreement”<sup>227</sup>, meaning that the less unattractive the alternative is, the less concessions will that party be willing to make. Finally, sometimes a BATNA might be better for some parties than “any fair solution imaginable”<sup>228</sup>, in which case entering negotiations is pointless and would only achieve something if accompanied by other action that before and parallel to the negotiations weakens the BATNA. In the case of peace negotiations, this can be done either by raising the costs of continuing war or raising the benefits from peace.

## b. Reactions NCP

### i. Feeling of threat

Most prominently, the reaction to the ICC investigations is a feeling of being threatened among the NCP leadership, who sees “the ICC as the gravest threat to its survival it has ever faced and a matter of life and death. It is a national issue, not one confined to Darfur.”<sup>229</sup> That is quite a natural reaction, as “a hypothetically successful ICC prosecution of those most responsible for Darfur entails regime change.”<sup>230</sup>

This changes the scene for those who “argue that only punitive measures will coerce the NCP to change its actions”.<sup>231</sup> E.g. the “Enough Project and the Save Darfur Coalition recommend that the United States impose a no-fly zone over Darfur, enact targeted sanctions against Sudanese officials, and expand the arms embargo against Sudan.”<sup>232</sup> Yet, “al-Bashir is unlikely to respond to sanctions and threats if he believes that the US intends that he share the fate of Saddam Hussein.”<sup>233</sup> Hence, the indictment eliminated the possibility of making the regime change course with further threats, as it is already facing the ultimate threat. Consequentially, the ICC arrest warrant “has put the NCP on

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<sup>227</sup> Ibid.2

<sup>228</sup> Ibid.5

<sup>229</sup> Alex De Waal, “Dangerous weeks ahead,” *Making sense of Darfur*, January 25, 2009, <http://www.ssrc.org/blogs/darfur/2009/01/25/dangerous-weeks-ahead/>.

<sup>230</sup> Castillo, “Rethinking Deterrence,” 170.

<sup>231</sup> Stephanie Hanson, “Sudan's fractures internal policies” (Council on Foreign Relations Backgrounder, March 4, 2009), [http://www.cfr.org/publication/18519/sudans\\_fractured\\_internal\\_politics.html](http://www.cfr.org/publication/18519/sudans_fractured_internal_politics.html).

<sup>232</sup> Ibid.

<sup>233</sup> De Waal, “Powers of Persuasion.”

the defensive”<sup>234</sup>, and now the NCP leadership “just wants to cling to power”<sup>235</sup> at literally all cost. That is why others “call for a strategy of engagement that offers a road map for normalizing U.S.-Sudan relations while pressing for CPA implementation” acknowledging that “unless the NCP retains a role in the Sudanese government, it is likely to provoke conflict and contribute to continued instability”.<sup>236</sup>

## **ii. Loss of trust in negotiation process**

This feeling of being essentially threatened is accompanied by a loss of trust in the negotiation process. This has two dimensions: one the one hand, it means that it leads the NCP to believe that any negotiated agreement will leave them worse off than their BATNA, and moreover, it questions the good faith of the international community.

Regarding the first dimension, the ICC warrant does not directly strengthen the NCP’s BATNA, but it makes any negotiated outcome (which incorporates sending Al-Bashir to The Hague and potentially a change of the whole regime) much less attractive than the already existing BATNA. This means that the NCP supposes that stalling the peace process and taking an isolationist position will serve their interests better (keep them in power longer) than a negotiated solution – which theoretically has to include the extradition of President Al-Bashir and other officials.

Already during the CPA negotiations, the Sudanese government had felt deeply betrayed when the ICID report was released two months after the signing of the CPA, raising the question whether this was the “international community’s reward for the Sudanese government, after it had at last made all the concessions demanded of it to bring peace to the South.”<sup>237</sup> The report provided “evidence that crimes against humanity and crimes of war had taken place in Darfur” and also a “secret list of

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<sup>234</sup> Hanson, “Sudan's fractures internal policies.”

<sup>235</sup> Julie Flint and Alex de Waal, “Julie Flint and Alex de Waal - Justice Off Course In Darfur,” *The Washington Post*, <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/27/AR2008062702632.html>.

<sup>236</sup> Hanson, “Sudan's fractures internal policies.”

<sup>237</sup> De Waal, “Justice in Conflict?,” 32.

names linked to these alleged crimes (...) to the Security Council”<sup>238</sup>, after the “US reportedly promised the NCP that it could be rehabilitated by signing the CPA”.<sup>239</sup>

Again during the peace negotiations leading to the DPA, Sudan felt that especially the US was negotiating in bad faith.<sup>240</sup> Having used “normalizing relations with Sudan, including lifting long-standing bilateral sanctions, providing development assistance, and probably also bringing a US major oil company to Sudan and facilitating debt relief”<sup>241</sup> as incentives for Khartoum to cooperate, the US had not been able to deliver because of the “enormous public outrage in America caused by the Darfur war”.<sup>242</sup> Khartoum, despite feeling betrayed, understood the domestic dynamics and agreed “to the AU ceasefire monitors and later to an expanded AU mission, to participate in the Abuja talks and to sign the DPA.”<sup>243</sup> The international community under US leadership however reacted with “a range of financial sanctions targeted at specific corporations with close links to the NCP and security agencies”<sup>244</sup>; “coming on top of a drop in oil production and a crisis in the banking sector, the inability of Khartoum to transact its oil sales through any international banks that used dollars (virtually all banks) led to a financial squeeze on the government budget”.<sup>245</sup>

The lesson learned from these experiences is that the West and “Washington can never be trusted” and that “whatever concession is made as part of a deal, the US will scorn it and simply demand more, until the ultimate objectives such as forcible regime change or partition of the country are achieved.”<sup>246</sup> This is a major obstacle for a negotiated solution, at least with western involvement, and moreover in this situation of “near complete collapse in confidence between Khartoum and major western governments, principally the US (...), the ICC is seen as one such instrument of

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<sup>238</sup> Thomas, “Against the gathering storm. Securing Sudan's Comprehensive Peace Agreement,” 32.

<sup>239</sup> Ibid.

<sup>240</sup> De Waal, “Justice in Conflict?,” 32.

<sup>241</sup> De Waal, “Powers of Persuasion.”

<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

<sup>244</sup> Ibid.

<sup>245</sup> Ibid.

<sup>246</sup> De Waal, “Justice in Conflict?,” 34.

pressure and punishment, rather than an independent body”.<sup>247</sup> Hence, in order for a pacific approach to solving the conflict to have any chance, the “Prosecutor’s most important considerations is that his activities should not lead to Khartoum’s retreating into self-imposed isolation and refusal to cooperate with the international community on a range of issues in Sudan.”<sup>248</sup>

### iii. Symbolic steps to get domestic and international support

Even at the very first stage of the ICC involvement in Sudan, long before Al-Bashir himself was indicted, the regime tried to implement “cosmetic and deceptive measures to escape jurisdiction”.<sup>249</sup> As outlined above, the ICC jurisdiction is based on the principle of complementarity. To invoke this limitation, “Khartoum set up the Darfur Special Criminal Court”<sup>250</sup>, which granted immunity from prosecution to “the president and his cabinet, the members of the National Assembly, and the top-ranking members of the armed forces and police”.<sup>251</sup> Up until now, “the Special Court has heard few cases, and handed less convicting sentences –one of the harshest ones went to a man convicted of stealing 80 sheep”<sup>252</sup>, while “it has not tried a single individual connected to the atrocities”.<sup>253</sup>

In anticipation of the ICC indictment of Al-Bashir himself, the “NCP took some important symbolic steps”<sup>254</sup>, presumably to prevent the situation from escalating. These included a “presidential acknowledgment of the suffering in Darfur”.<sup>255</sup> Further, a Peoples of Sudan Forum was set up in November 2008, roping in “political partners from the SPLM and the Northern opposition parties and the durable but malleable representatives of the tribal system in Darfur, but no rebels”.<sup>256</sup> The

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<sup>247</sup> Ibid., 29.

<sup>248</sup> Ibid., 32.

<sup>249</sup> Castillo, “Rethinking Deterrence,” 177.

<sup>250</sup> Ibid.

<sup>251</sup> Ibid.

<sup>252</sup> Ibid.

<sup>253</sup> Ibid.

<sup>254</sup> Thomas, “Against the gathering storm. Securing Sudan's Comprehensive Peace Agreement,” 32.

<sup>255</sup> Ibid.

<sup>256</sup> Ibid.

Forum went even so far as to concede some demands from the armed opposition, such as “the establishment of a compensation fund, the unification of the three states of Darfur and (subject to the approval of CPA partners) the creation of an additional Vice-President in the Presidency, representing Darfur”.<sup>257</sup> The creation of this Forum also revealed first splits within the NCP itself, where hardliners “publicly rejected some of these demands shortly before the talks concluded”.<sup>258</sup> However, the ceasefire was already violated after only two days.<sup>259</sup>

Next to that, “senior regime figures began a desperate campaign to defer or evade the indictment, but were not able to mobilize allies in the Security Council.”<sup>260</sup> In a direct attempt to present the NCP as reliable and willing participants in the peace process, a confidence-building agreement to start talks with the JEM was signed in Doha, a “clear last-minute dash to stall the inevitable”.<sup>261</sup>

This might be a positive indicator that the NCP still tries to maintain some positive reputation and therefore is open to carrots and sticks in that respect.

### **c. Impact on rebel calculus**

The international responses to the crisis in Darfur and particularly the indictment have also had a major impact on the strategic considerations of the rebel factions. The armed opposition should be conscious of the fact that the military balance in Sudan is very different than in both Liberia, where the “rebels were approaching the capital, Monrovia” and prepared to “take power by force”<sup>262</sup>, and also Kosovo, where there was NATO military involvement; in Sudan, the government is much stronger relative to the rebels.

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<sup>257</sup> Ibid.

<sup>258</sup> Ibid.

<sup>259</sup> see Ibid.

<sup>260</sup> Ibid.

<sup>261</sup> “Sudan’s Bashir Tries To Stall Darfur Genocide Ruling,” *Christian Science Monitor*, February 24, 2009, <http://www.csmonitor.com/2009/0224/p01s02-woaf.html?page=2>.

<sup>262</sup> Hayner, *Negotiating peace in Liberia*, 7.

In the context of the negotiations, the main consequence of the ICC arrest warrant is that it has changed their BATNA in a way that “emboldened the rebels not to return to the negotiating table”<sup>263</sup>, allowing them “to hope that the international community would change the Sudanese regime for them”.<sup>264</sup> Hence, they believe that their interests can be better met by waiting for an international intervention and continuing war until then. This is quite a dangerous assumption, particularly regarding the fact that “the international community was mainly committing rhetorical weapons to that objective”<sup>265</sup>, and it has a very negative effect on the peace process itself, with the rebels holding out for the international community to intervene with force on their behalf and until then, stalling the peace process in the hopes of higher benefits – expecting that then they will get a preferable package to any concession the government could make now. Using De Waal’s marketplace for loyalty analogy, the opposition anticipates that the NCP will be willing to secure domestic support at a higher cost, using “the resources of its dynamic and flexible security-finance nexus to create incentives for former opponents”.<sup>266</sup>

From the lens of spoiler management (see more below in party 2), this has substantial consequences. While the opposition knows that they cannot (yet) bargain for an end to NCP rule, “clever opponents can bargain for more”.<sup>267</sup> This encourages the greedy spoiler type and poses in itself an obstacle to peace, with the opposition gambling for ever higher pay-offs. An example for this is the SLA/ Wahid which started holding the population of Kama refugee camp hostage.<sup>268</sup> According to UN officials, the rebel leadership prohibits the refugee camp from touching international food aid under the false pretense that it has been poisoned by the government and being unwilling to compromise with the UN about the modes of a safe delivery of aid. The intention behind that is to make the refugees starve, hoping that would bring in the media and re-establish the charges of genocide against Al-

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<sup>263</sup> Thomas, “Against the gathering storm. Securing Sudan's Comprehensive Peace Agreement,” 32.

<sup>264</sup> Ibid.

<sup>265</sup> Ibid.

<sup>266</sup> Ibid., 33.

<sup>267</sup> Ibid.

<sup>268</sup> “UNAMID official, Nyala,” April 1, 2009.

Bashir with the consequence of an international humanitarian intervention – which of course is unrealistic.

To summarize, the arrest warrant “alters the context for Darfur’s rebel groups, presenting a rare opportunity for the more politically savvy groups in the region to gain some legitimacy at the expense of the regime.”<sup>269</sup>

In direct reaction to the warrant, both main opposition groups, JEM and the SLA support the warrant<sup>270</sup>, ignoring the fact that the ICC “is pursuing cases against the rebels”<sup>271</sup>, with JEM trying to “position themselves as the Sudanese champions of the ICC”.<sup>272</sup> It remains to be seen whether the possibility of prosecutions will be a sufficient deterrent for the “leaders of the JEM and the various factions of the SLA (...) to weigh their support of a warrant for Bashir against the possibility that they are potentially subject to a similar fate”<sup>273</sup> and in a rally behind the flag effect resume negotiations; or if they entertain the illusion that their friends of the Save Darfur lobby are going to protect them.

#### d. Impact on North-South peace process

There are fears that the ICC indictment might also have an impact way beyond Darfur itself, severely impacting the North-South peace process and the implementation of the CPA, and “many government officials now spend much of their time trying to figure out how to handle the International Criminal Court, to the detriment of work on the CPA”.<sup>274</sup>

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<sup>269</sup> Enough Team, *What the warrant means. Justice, Peace, and the Key Actors in Sudan*, 4.

<sup>270</sup> Marlise Simons and Neil Macfarquhar, “Court Issues Arrest Warrant for Sudan’s Leader,” *The New York Times*, March 5, 2009, sec. International / Africa, [http://www.nytimes.com/2009/03/05/world/africa/05court.html?\\_r=1&hp](http://www.nytimes.com/2009/03/05/world/africa/05court.html?_r=1&hp).

<sup>271</sup> Enough Team, *What the warrant means. Justice, Peace, and the Key Actors in Sudan*, 4.

<sup>272</sup> Thomas, “Against the gathering storm. Securing Sudan’s Comprehensive Peace Agreement,” 33.

<sup>273</sup> Enough Team, *What the warrant means. Justice, Peace, and the Key Actors in Sudan*, 4.

<sup>274</sup> Hanson, “Sudan’s fractures internal policies.”



While the conflict in Darfur “consumed the greater part of international attention”<sup>275</sup>, “the centre of political gravity in Sudan remains the CPA and its provisions for electoral democracy and self-determination for south Sudan”.<sup>276</sup> However, the situation remains extremely fragile and it is widely recognized that it needs “much international attention and leverage if it were to be faithfully implemented”.<sup>277</sup> The international community has to be aware that the CPA is “holding a fragile peace between North and South after decades of bloodshed”<sup>278</sup>, which means that the stakes at risk are extremely high and include the dissolution of Sudan as well as turning it into the biggest failed state on the African continent.

The South’s main party, the SPLM, is currently “in reactive mode, and senior officials within the party disagree on the possible effect of the arrest warrant” and on the one hand is “deeply concerned that Bashir’s indictment signals the end of the CPA”<sup>279</sup>, while also looking for opportunities to advance their own objectives.

The first reactions from the SPLM were “reservations about the application, but they have also used the NCP’s need for internal support to extract concessions”<sup>280</sup>, such as “a speeding up of the implementation of agreements on Abyei, and a green light to engage as a mediator in Darfur”<sup>281</sup> which the NCP has resisted before, fearing that it might take the opportunity to build an anti-NCP constituency there.<sup>282</sup> Therefore, the SPLM is using a twofold approach of emphasizing the “strategic interest of the south in seeing a stable and legitimate Government of National Unity”<sup>283</sup> as long as this can be used to extract concessions from the NCP, but also using the first opportunity to “short-circuit the CPA and push for unilateral independence”<sup>284</sup> in case the NCP suspends or stalls on certain

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<sup>275</sup> De Waal, “Powers of Persuasion.”

<sup>276</sup> Ibid.

<sup>277</sup> Ibid.

<sup>278</sup> Castillo, “Rethinking Deterrence,” 170.

<sup>279</sup> Enough Team, *What the warrant means. Justice, Peace, and the Key Actors in Sudan*, 4.

<sup>280</sup> Thomas, “Against the gathering storm. Securing Sudan’s Comprehensive Peace Agreement,” 33.

<sup>281</sup> Ibid.

<sup>282</sup> see Ibid.

<sup>283</sup> Ibid.

<sup>284</sup> Ibid.

CPA provisions. Because of this danger of escalation, “relations between the NCP and the SPLM will be absolutely crucial in the coming weeks and could determine the country’s fate”.<sup>285</sup>

**e. Impact for UN/ AU**

The ICC involvement and especially the indictment of Al-Bashir also had a huge impact on the work of the UN in Sudan, which is represented with the peace mission UNMIS monitoring the CPA, the UN/AU hybrid mission UNAMID monitoring the DPA, and the joint UN/AU mediation team.

While technically an independent body from the ICC, Al-Bashir “has made it clear that he considers the UN responsible for allowing the ICC Prosecutor to proceed with his application for an arrest warrant, and he will hold the Secretary General and the Security Council responsible should the warrant be issued.”<sup>286</sup> This perception the ICC is not seen as “independent of political pressures and they do not see the Court as distinct from other punitive measures imposed upon them”<sup>287</sup> is a significant difference from the historical examples and is further underlined by the fact that the ICC was mandated by the Security Council to start investigations.

Consequently, “all relations with the UN will be up for reconsideration”<sup>288</sup>, with drastic consequences for both peacekeeping missions and the mediation process. While UNAMID might still be “relatively protected because it is a joint mission with the African Union, which is opposed to the arrest warrant”<sup>289</sup>, UNMIS would have no such privilege. Asking it to leave could have a disastrous impact on the implementation of the already extremely fragile CPA. Also in general, the government

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<sup>285</sup> Ibid.

<sup>286</sup> Unger and Wierda, “Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice,” 290.

<sup>287</sup> De Waal, “Justice in Conflict?,” 32.

<sup>288</sup> Unger and Wierda, “Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice,” 290.

<sup>289</sup> Ibid.

is trying to complicate the daily tasks of the missions, by boycotting meetings, grounding vehicles and airplanes etc.<sup>290</sup>

More specifically, although the government so far confirmed its continued dedication to the peace process<sup>291</sup>, the mediation effort will be hindered in several ways. As seen above, there is an inherent tension between ongoing prosecutions and negotiations, and one of the main obstacles to a settlement will be that the ICC warrant restricts “the options that can be offered as part of an agreement”<sup>292</sup> by a mediator, especially in terms of direct or indirect amnesties and exile arrangements. Besides that, the mediators are losing their perceived neutrality and are seen as another instrument of the West, raising the question how the UN can be “a neutral monitor and implementer of a peace agreement while charging one of the parties with crimes against humanity in another conflict”.<sup>293</sup> It remains to be seen whether the appointment of an African Union chief mediator can mitigate that perception and restore the perception of impartiality.

#### f. Impact on humanitarian situation

Already before the arrest warrant, there were fears that “actors on the ground suspect international humanitarian organizations of collusion with the Court”<sup>294</sup> and that they would come under attack and “further hampered from delivering crucial services to the camps.”<sup>295</sup>

Unfortunately, this was exactly what happened, as the government had “long suspected aid organizations of collaborating with the court by providing evidence and helping prosecutors gather testimony from victims.”<sup>296</sup> In a reprisal to the arrest warrant, it decided “to expel 13 foreign aid

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<sup>290</sup> “UNAMID official, Nyala.”

<sup>291</sup> “UN Mediation Team Official, El Fasher,” March 27, 2009.

<sup>292</sup> Unger and Wierda, “Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice,” 290.

<sup>293</sup> Castillo, “Rethinking Deterrence,” 177.

<sup>294</sup> Unger and Wierda, “Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice,” 287.

<sup>295</sup> Ibid.

<sup>296</sup> Lynsey Addario and Lydia Polgreen, “Aid Groups’ Expulsion, Fears of More Misery,” *The New York Times*, March 23, 2009, sec. International / Africa, [http://www.nytimes.com/2009/03/23/world/africa/23darfur.html?\\_r=1&ref=world](http://www.nytimes.com/2009/03/23/world/africa/23darfur.html?_r=1&ref=world).

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organizations and close three local ones”<sup>297</sup>, hitting “300 foreign and 7,300 local humanitarian workers who handled more than half the foreign aid to Darfur and its neighboring regions.”<sup>298</sup>

Currently, the humanitarian situation is dire, as “UN agencies will be able to cover only a third of the gap left by the NGOs”<sup>299</sup> and “continues to deteriorate.”<sup>300</sup> Especially critical are the “distribution of adequate food, water and medical care, as well as the safety of United Nations personnel and humanitarian workers who have been subject to stepped-up attacks”<sup>301</sup>, putting at risk millions of people. On the other hand of course is the fact that the opposition groups controlling some of the refugee and IDP camps are prohibiting the population from accepting aid from anyone else than the expelled groups, severely aggravating the situation.<sup>302</sup>

### 3. Possible scenarios

There are basically three scenarios possible at this time: a removal of Al-Bashir from power with an unknown outcome, a confrontation course with the international community or a descent into large-scale civil war.

#### a. Internal coup

One possible scenario is Al-Bashir’s removal from power, either with him deciding to “peacefully step aside and cede control to a new NCP candidate, who would participate in the upcoming national

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<sup>297</sup> Neil Macfarquhar, “U.N. Official Says Darfur Continues to Crumble,” *The New York Times*, March 21, 2009, sec. International / Africa, <http://www.nytimes.com/2009/03/21/world/africa/21nations.html?scp=13&sq=darfur&st=cse>.

<sup>298</sup> Tu Thanh Ha, “Expulsion of aid workers drives Darfur to brink of catastrophe,” April 24, 2009, sec. international,

<http://www.theglobeandmail.com/servlet/story/RTGAM.20090424.wdarfuraid25/BNStory/International/home>

<sup>299</sup> Ibid.

<sup>300</sup> Macfarquhar, “U.N. Official Says Darfur Continues to Crumble.”

<sup>301</sup> Ibid.

<sup>302</sup> “UNAMID official, Nyala.”

elections”<sup>303</sup>. There are reports of Al-Bashir announcing that “he may step down if the divisions within the NCP become irreconcilable” and “some Sudanese officials have cited the possibility of exile in Saudi Arabia, which is not a party to the ICC”.<sup>304</sup>

Less optimistically, the other option was that despite Al-Bashir seeking support from all sides to “make the ICC supporters uncomfortable”<sup>305</sup>, that if a high number of countries cut their economic and diplomatic ties with Sudan “because the head of state is an indicted war criminal, the Sudanese ruling party will be thinking very hard about how long it will rally around its leader”<sup>306</sup> and rivals within the party attempted to take over power by force.<sup>307</sup> Two among the current NCP leadership, Ali OthmanTaha and Salah Gosh, who themselves “bear significant responsibility for crimes against humanity committed during the regime’s 20-year rule”<sup>308</sup>, could be potential challengers and successors. So far, they “have shown willingness to work with the international community”<sup>309</sup>: Taha was one of the main negotiators of the CPA and Gosh “has become the United States’ favored interlocutor on counterterrorism”.<sup>310</sup> If Al-Bashir lost his support from his allies in the Arab world, e.g. Egypt, further weakening his internal position<sup>311</sup>, “within a ruling party increasingly focused on its own survival, Bashir may become a sacrificial lamb for a party in search of more pragmatic leadership”.<sup>312</sup> Especially “Gosh is one of the strongest advocates for removing Bashir, and Sudan is no stranger to coup d’états.”<sup>313</sup>

Given the analysis above, neither Al-Bashir nor the members of the NCP have an interest in either abdicating or staging a coup. Al-Bashir is clinging to power at all costs to avoid further practical consequences of the arrest warrant, and as most of the NCP leadership is involved with the same

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<sup>303</sup> Enough Team, *What the warrant means. Justice, Peace, and the Key Actors in Sudan*, 3.

<sup>304</sup> Ibid.

<sup>305</sup> John Prendergast in: “Sudan’s Bashir Tries To Stall Darfur Genocide Ruling.”

<sup>306</sup> John Prendergast in: Ibid.

<sup>307</sup> see Enough Team, *What the warrant means. Justice, Peace, and the Key Actors in Sudan*, 3.

<sup>308</sup> Ibid., 2.

<sup>309</sup> Ibid.

<sup>310</sup> Ibid.

<sup>311</sup> see Ibid.

<sup>312</sup> Ibid.

<sup>313</sup> Ibid., 3.

crimes that made the prosecutor indict Al-Bashir, coming to power would not protect them from being prosecuted themselves.

#### **b. Sudan pariah state**

Therefore and less optimistically, another possibility and “much more likely is that Sudan’s leaders resign themselves to pariah status, a condition which they endured and survived during the 1990s.”<sup>314</sup>

As outlined above, the arrest warrant has “made normal incentives and threats irrelevant and thereby made their lives impossible<sup>315</sup>, which means that as long as there is not a military invasion to execute the warrant, there are no incentives for Al-Bashir and those in the government loyal to him, to cooperate in any way. That is the reason analyst De Waal had “cautioned against policies that Khartoum could interpret as the first steps toward regime change: “[P]ressure only works if there is an outcome that is ultimately acceptable to the person whom you are putting pressure on.”<sup>316</sup>

Even if the result is not a complete acceptance of international pariah status, the Sudanese government will with great probability “continue to evade its responsibilities as long as this pressure is not unified and strong enough.”<sup>317</sup> This seems very unlikely regarding “Chinese and Russian interests in the region, Washington’s security concerns, European timidity, and Arab silence, prescribe open-ended prolongation of Darfur’s plight”.<sup>318</sup> Moreover, the NCP knows that “pressure arising from the arrest warrant will eventually dissipate” and “has weathered heavy external pressure in the past and survived by exploiting the inherent divisions in the international

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<sup>314</sup> De Waal, “Justice in Conflict?,” 34.

<sup>315</sup> Thomas, “Against the gathering storm. Securing Sudan’s Comprehensive Peace Agreement,” 33.

<sup>316</sup> Alex de Waal in: Rodman, “Darfur and the Limits of Legal Deterrence,” 556.

<sup>317</sup> Thomas, “Against the gathering storm. Securing Sudan’s Comprehensive Peace Agreement,” 33.

<sup>318</sup> Ibid.

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community.”<sup>319</sup> Therefore, even if “such maximalist behavior by Bashir would only serve to further galvanize international support for decisive action against his government”<sup>320</sup>, the chances that this decisive action would actually manifest itself are extremely low, making it an incredible threat. Moreover, the Arab League is already rallied behind Al-Bashir who seemed to be their new common cause during the annual summit in Doha.<sup>321</sup>

Unfortunately, this leaves the civilian population as hostages of a government that has nothing to lose.

### c. Civil war

The next option, which can be a separate outcome as well as a result of both scenarios above, is outright civil war, triggered by either internal power struggles within the NCP if its allies support another NCP leader except Al-Bashir, or a breakdown of the CPA implementation because the NCP needs all the oil revenues to itself or cannot afford to hold democratic elections. This nightmare scenario meant the “possible collapse of the state and a more generalized conflict.”<sup>322</sup>

It is too early to speculate about the consequences of such a civil war, but basically, a renewal of the north-south war plus a return to the levels of violence during 2003/04 in Darfur are at stake.

### d. Business as usual

At least in the short-term, given the lack of enforceability of the arrest warrant, the most likely outcome is business as usual. There is also criticism that Al-Bashir’s indictment is “an attempt by

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<sup>319</sup> Enough Team, *What the warrant means. Justice, Peace, and the Key Actors in Sudan*, 3.

<sup>320</sup> Ibid.

<sup>321</sup> Michael Slackman and Robert F. Worth, “Often Split, Arab Leaders Unite for Sudan’s Chief,” *The New York Times*, March 31, 2009, sec. International / Africa,

[http://www.nytimes.com/2009/03/31/world/africa/31arab.html?\\_r=1&scp=11&sq=sudan&st=cse](http://www.nytimes.com/2009/03/31/world/africa/31arab.html?_r=1&scp=11&sq=sudan&st=cse).

<sup>322</sup> William Wallis and Andrew England, “Bashir rallies forces to fight warrant,” *Financial Times*, March 19, 2009, [http://www.ft.com/cms/s/0/dacf8fc2-14af-11de-8cd1-0000779fd2ac.html?nclick\\_check=1](http://www.ft.com/cms/s/0/dacf8fc2-14af-11de-8cd1-0000779fd2ac.html?nclick_check=1).

Ocampo – who is facing increasing pressure over the Lubanga and LRA cases and his overall failure to get ‘judicial results’ – to show that the Court is willing to prosecute the highest-ranking officials but without the practical capacity to do so”.<sup>323</sup> Allies will be continuing to be allies (if just out of fear to set dangerous precedents) and peacekeepers, humanitarians and mediators are going to compromise the implementation of justice for the sake of helping civilians in the present, and the warrant would have “little impact at all on the behavior of the Sudanese government”.<sup>324</sup>

This would mean that the arrest warrant had two impacts: first, it put the lives of many people and both Sudanese peace processes at risk for nothing, while at the same time it destroys the potential deterrent effect the ICC could have if applied and executed rigorously and consistently over time.

To conclude, yet another aspect to be considered is the unintended consequences of driving Sudan into isolation or dissolution. Sudan has very close ties to the Muslim world and has already been hosting Bin Laden in the 90s. Therefore, it is important to prevent Sudan becoming a safe haven for terrorists, which could happen either if Sudan becomes too isolated or if it is completely falling apart.

#### **4. The utility of criminal justice in Darfur**

Having examined these theories and data, the question arises whether next to all the problems and challenges the ICC involvement in Darfur created, it also has some positive impact that could justify the SC in creating such an obstacle.

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<sup>323</sup> Phil Clark, “If Ocampo Indicts Bashir, Nothing May Happen” (ICC Observers, Oxford Transitional Justice Research, July 13, 2008), [http://www.csls.ox.ac.uk/documents/Clark\\_Final.pdf](http://www.csls.ox.ac.uk/documents/Clark_Final.pdf).

<sup>324</sup> Ibid.



As mentioned above, one the main expectation of criminal justice in general is to stop atrocities, and also in Darfur one of the main arguments is the “ability of the court to deter violence against civilians in an ongoing war”<sup>325</sup> and “hence provide protection to civilians”.<sup>326</sup>

Analogically to the theoretical analysis outlined above and as the example of Kosovo has shown, “while indictments do not stop atrocities, many signs indicate that they instill a certain fear, which signifies a deterrent potential. Serbs did not stop killing in Kosovo, but they took greater care to hide the evidence”.<sup>327</sup> Yet, an “over-emphasis on the concept of short-term deterrence is of dubious analytical value (...) and should be more relevant to the cause of international justice to see if decades-long consistent jurisprudence succeeds in moving the conduct of war from a culture of impunity to a culture of accountability, in which the preventive benefits of the law would logically mirror those of domestic legal systems”.<sup>328</sup> Hence, there is no evidence or logical reasoning that a prosecution will deter violence, and even more importantly, a failure to execute the ICC warrant will destroy any potential deterrent effect in the future.

Another conclusion is that criminal justice does not work well in the absence of a commitment to the robust use of force, and the problems associated with that can be observed in the Sudan case as well. Over the last six years, the international community has made it clear that it is not willing to use force to coerce Sudan into revising its Darfur policy and the “principal instrument of conflict resolution has been impartial mediation through the good offices of the United Nations and the AU”.<sup>329</sup> Further, regarding the lack of international political action and a deadlock in the Security Council, the ICC was said to be the last option to intervene in Darfur.<sup>330</sup> This means that none of the conditions for successfully compelling the regime to change its behavior are fulfilled. This is the “reason why the ICC referral [differently from the Bosnian analogy] has had no impact on saving

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<sup>325</sup> Rodman, “Darfur and the Limits of Legal Deterrence,” 530.

<sup>326</sup> Ibid., 546.

<sup>327</sup> Castillo, “Rethinking Deterrence,” 180.

<sup>328</sup> Ibid., 181f.

<sup>329</sup> Rodman, “Is Peace in the Interests of Justice?,” 118.

<sup>330</sup> see Rodman, “Darfur and the Limits of Legal Deterrence,” 530.

lives”<sup>331</sup> so far. As seen in Kosovo, it was “only when the purported commitment to punish criminal behavior was complemented by a determination to stop and prevent it that impunity on the ground ended, and the ICTY was able to play a constructive role in removing criminal spoilers from the political scene”.<sup>332</sup> In Darfur, however, “despite the fact that both the ICC referral and UNAMID were authorized under Chapter VII, the Security Council has never moved beyond what was in practice a pacific settlement approach in which the terms of any peacekeeping mission would depend upon Sudanese consent and there would be no penalties for withholding it or for imposing conditions that amounted to obstruction”.<sup>333</sup> Hence, despite all aspirations, it will take a more robust commitment to peace and justice for the deterrent effects of the ICC to happen.

Furthermore, as the historical examples above have shown, “prosecutions have only been possible where the regime has either been militarily defeated or there has been a substantial change in the target regime’s composition or agenda.”<sup>334</sup> Another concern is that since they “convict few people, solve few social problems and grievances,(...) international courts are in reality set up to mask the inaction of rich countries”.<sup>335</sup> According to this logic, regarding the lack of political will to a more robust solution, the referral to the ICC “was a second-best option to avoid sending NATO troops, a strategy to mask the inaction”.<sup>336</sup>

As discussed above, the stick of criminal justice “loses much of its deterrent power when actually applied to those still in office”<sup>337</sup>, leading Al-Bashir to “cling to power at all costs so as to avoid arrest”.<sup>338</sup> Moreover, “the threat of prosecution has been practically the only credible threat applied to the Khartoum government over the last few years – largely because the UN Security Council has itself been unwilling to take the tough decisions, and has instead been happy to outsource the ‘bad

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<sup>331</sup> Ibid., 547.

<sup>332</sup> Ibid.

<sup>333</sup> Ibid., 548.

<sup>334</sup> Castillo, “Rethinking Deterrence,” 179.

<sup>335</sup> Ibid.

<sup>336</sup> Ibid.

<sup>337</sup> Grono and O’Brien, “Justice in Conflict?,” 17.

<sup>338</sup> Ibid.

cop' role to the ICC".<sup>339</sup> The idea of changing state behavior without meeting the requirements of "capability, commitment, and credibility"<sup>340</sup> to enforce the warrant, predestines a failure and even humiliation of international criminal justice. The real source of impunity in Sudan therefore is "Khartoum's confidence that it will not be penalized for its actions" and "until that changes, the Darfur referral to the ICC is no less criminal justice in a political vacuum than was the ICTY for its first two-and-one-half years".<sup>341</sup>

Besides the considerations of criminal justice, using a pacific negotiations approach is "incongruent with conditions on the ground".<sup>342</sup> As outline above, for negotiations to succeed, a mutually hurting stalemate has to occur that makes all parties recognize "that they cannot achieve their objectives militarily and that the continuation of the war will make them all worse off".<sup>343</sup> In Sudan however, the NCP, aggravated by the arrest warrant and criminal investigations, "believes that maintaining its power is better served by the continuation of the war than by a negotiated settlement".<sup>344</sup>

As a result, subjecting the Sudanese government to criminal scrutiny can have "no discernible impact on the level of violence against civilians in Darfur and, if the past is any indication, is unlikely to do so unless there is international political will for tough action, either within or outside the Security Council".<sup>345</sup> Hence, the only way the ICC can have an "impact on ending criminal violence in Darfur" is if "the judicial process serves as a catalyst to a change in the political strategies of conflict resolution used by powerful states and intergovernmental organizations"<sup>346</sup> and increases their willingness to act robustly.

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<sup>339</sup> Ibid.

<sup>340</sup> Christopher Rudolph in: Rodman, "Darfur and the Limits of Legal Deterrence," 533.

<sup>341</sup> Ibid., 554.

<sup>342</sup> Rodman, "Is Peace in the Interests of Justice?," 118.

<sup>343</sup> Ibid.

<sup>344</sup> Ibid.

<sup>345</sup> Rodman, "Darfur and the Limits of Legal Deterrence," 530.

<sup>346</sup> Rodman, "Is Peace in the Interests of Justice?," 118.

**Conclusion Obstacle 1: The ICC as a bargaining chip**

The analysis above demonstrated that without the political will to enforce an ICC arrest warrant, the warrant has no impact on the government's behavior towards its citizens as well as very severe negative consequences on the negotiations, developing into a major obstacle to any thinkable settlement. In Darfur, a principled approach to criminal justice which would effectively mean a "demand for regime change, since the Prosecutor and major UN and NGO studies have attributed responsibility not only to President Bashir, but also to Sudan's most influential political and military officials"<sup>347</sup>, "would only be feasible if international intervention resulted in the removal of the regime (...) [by robust enforcement action] or if the civilian protection mandate does not require the active co-operation of the Sudanese government"<sup>348</sup>. Consequentially, "in situations like Darfur, where the government is the most important part of the problem, the solution lies in politics, not law".<sup>349</sup>

Consequentially by involving the ICC in this ongoing war, the international community, represented by the SC, has created three problems instead of a solution: first, the lives of many civilians have been put at risk; second, a precedent undermining international criminal justice is being set; and third and most importantly, a major obstacle for peace in Sudan has been created. By strengthening the rebels' BATNA and making a negotiated agreement unattractive for the NCP, the ICC provided disincentive for all parties in the conflict that prevents them from searching a pacific solution: the government no longer has an interest in cooperating with the international community in the peace process and other things, as one of their demands must be the extradition of Al-Bashir; and all the opposition movements are encouraged to maximize their demands in the belief that the international community will force a regime change.

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<sup>347</sup> Ibid., 121.

<sup>348</sup> Ibid., 120.

<sup>349</sup> Rodman, "Darfur and the Limits of Legal Deterrence," 559.

However, there is another way for the SC to engage the ICC in a constructive contribution to the peace process. Having chosen a pacific settlement strategy, there still exists “a bargaining relationship to which international criminal justice must adapt”.<sup>350</sup> Therefore, the role of the ICC has to be adapted from an isolated instrument pursuing justice for the sake of justice itself. This means to bring back the ICC into the political arena as “a source of leverage in negotiations, whose successful completion will probably require compromises with criminal justice”<sup>351</sup> with the objective of using the ICC as a bargaining chip with the purpose to “increase the costs and risks of the war for Khartoum to a point where ending it serves its interests”.<sup>352</sup>

This means that some compromise with criminal justice will be necessary and that as long as the peace process is “dependent on the continuing cooperation of these actors, criminal cases against them will have to be held in abeyance”.<sup>353</sup> Such a compromise could be e.g. the “use of Article 16 by the Security Council to suspend criminal proceedings on renewable 12-month periods, restrictions on UN peacekeepers in enforcing arrest warrants, or the Prosecutor exercising his discretion and lowering his profile if genuine progress is being made”.<sup>354</sup> Especially the former option seems like an excellent way for the SC to give leverage to the mediator, by making the first and potential follow-up deferrals dependent on the mediator attesting the NCP to negotiate in good faith. Hence, the mediator would be enabled to use the ICC as a bargaining chip towards the NCP, sometimes as a stick to threaten the punishment of continued prosecution, and sometimes as the carrot of deferring the prosecution for another one year period. As seen above, the regime is not completely immune to the pressure of criminal investigation and therefore, it seems probable that the NCP would try to create the conditions for the deferral.

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<sup>350</sup> Ibid., 557.

<sup>351</sup> Rodman, “Is Peace in the Interests of Justice?,” 115.

<sup>352</sup> Ibid.

<sup>353</sup> Rodman, “Darfur and the Limits of Legal Deterrence,” 557.

<sup>354</sup> Rodman, “Is Peace in the Interests of Justice?,” 120.

Regarding the purity of criminal justice, the peril of this is that in order for the ICC to “establish itself as a legitimate and independent actor on the international stage” which has a long-term deterrent effect, “it must avoid being manipulated by particular political interests”.<sup>355</sup> If the AU, Arab League and China succeed in deferring the case, it would set a precedent and “undoubtedly represent a victory for impunity and political power over accountability and judicial independence”.<sup>356</sup> On the other hand, this would “not make the Prosecutor a political actor who takes instructions from others”<sup>357</sup> because while maintaining some independence, the Prosecutor also “needs to acknowledge the interdependence of politics and law, the boundaries the former sets for the latter, and the risks of trespassing across them”<sup>358</sup>, particularly for the civilian population.

In the end, it comes down to a trade-off between the purity of international criminal justice in the long-term, and increasing the chances of ending the violence in Darfur in the short-term. To conclude, if used as a bargaining chip in the negotiation process, the ICC could find a new and more constructive role to play in the pursuit of protecting civilians, which should be the highest moral standard for deciding such a trade-off.

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<sup>355</sup> Zachary Manfredi, “The Perils of an Article 16 Deferral for Bashir” (ICC Observers, Oxford Transitional Justice Research, March 6, 2009), <http://iccobservers.wordpress.com/2009/03/06/icc-observers-commentary-the-perils-of-an-article-16-deferral/>.

<sup>356</sup> Ibid.

<sup>357</sup> Rodman, “Is Peace in the Interests of Justice?,” 122.

<sup>358</sup> Ibid.

### **C. Obstacle 1: The fragmentation of the armed opposition**

In the second part, I am going to analyze the second major obstacle to a peace agreement – the fragmentation of the armed opposition – and how again the international intervention itself is partially responsible for its occurrence.

Having analyzed the ICC prosecution with the help of security studies based compellance and coercion theory, the fragmentation will be studied from the perspective of economics principal agency theory. This means to examine the negotiation process through the lens of the two-level game of an agency-relationship on the side of the opposition movements: The first agency relationship are the rebel groups as agents of the Darfuri population, earning their place at the negotiation table because they are thought to be the legitimate representative of the people's interest; and the second agency relationship are the rebel leaders the agents of the rebel groups with the actual authority to commit to peace for their group. Therefore, the negotiations fail because they are neither taking the interests of the Darfurians into account nor those of the potential spoilers, the rebel fighters. Finally, it will be concluded that by this neglect, the international community failed to create an effective spoiler management strategy and moreover, contributed to the emergence of the fragmenting spoiler problem by rewarding spoiling with leverage and inclusion.

#### **I. Overview agency theory**

Originally developed in organizational economic theory to study the internal dynamics of firms, agency theory provides a “concise way to address the topic of organizational control”.<sup>359</sup> The basic model includes two parties engaged in a hierarchical relationship with one party – the principal –

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<sup>359</sup> J. M. Parks and E. J. Conlon, “Compensation Contracts: Do Agency Theory Assumptions Predict Negotiated Agreements?,” *ACADEMY OF MANAGEMENT JOURNAL* 38 (1995): 822.

giving the other party – the agent – the authority to act on his behalf.<sup>360</sup> Therefore, agency theory is first of all a “general social theory of relationships of ‘acting for’ or control in complex systems”.<sup>361</sup> It centers on the assumption that “complex organizational structures and networks can be reduced to dyads of individuals”, and that “individuals are rational and self-interested utility maximizers prone to opportunism”.<sup>362</sup> In economics, an agency relationship between two such individuals mainly deals with one party (the principal/ employer) delegates work to another party (the agent/ employee/ contractor) who performs that work, describing the relationship using the “metaphor of a contract”.<sup>363</sup>

This agency relationship has two sides: the “activities and problems of identifying and providing services for ‘acting for’” (agent side), as well as the “activities and problems of guiding and correcting agent actions” (principal side).<sup>364</sup>

The problem arising from this type of relationship, called the agency problem, derives from different goals and divisions of labor between the cooperating parties.<sup>365</sup> Both principal and agent have conflicting desires and goals, and hence different utility functions, while “acting so as to maximize their expected utility”.<sup>366</sup>

With regard to negotiations, an agent is defined as an individual “appointed by a principal to conduct negotiations on the principal’s behalf, excluding the authority to bind the principle to a final settlement, fiduciary and obligated to act only in the interest of one principal, to be compensated by the principal for his services”.<sup>367</sup> As in the economics related agency theory, complications arise from the agent’s potential opportunistic actions: the agent may hamper important lines of

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<sup>360</sup> Ibid.

<sup>361</sup> B. M. Mitnick, “The theory of agency,” *Public Choice* 24, no. 1 (1975): 272.

<sup>362</sup> S. P. Shapiro, “Agency Theory,” 266.

<sup>363</sup> K. M. Eisenhardt, “Agency theory: An assessment and review,” *Academy of Management Review* 14, no. 1 (1989): 58.

<sup>364</sup> Mitnick, “The theory of agency,” 275.

<sup>365</sup> Eisenhardt, “Agency theory,” 58.

<sup>366</sup> S. Ross, “The Economic Theory of Agency,” *American Economic Review* 63, no. (May) (1973): 134.

<sup>367</sup> N. E. Fassina, “Direct and Representative Negotiation: A Principal-Agent Authority Continuum:” 5.



communication, or have different goals than the principal.<sup>368</sup> Therefore, ways have to be found to “minimize the potential for the agent to exhibit self-interested behaviors and maximize the probability of an optimal settlement for the principal”.<sup>369</sup>

Another interesting feature of international negotiations using agents is its quality as a two-level game, one taking place on the international level where governments (as the agents of their countries) negotiate, and one taking place on the national level, where domestic groups lobby for their interests.<sup>370</sup> Therefore, the “unitary-actor assumption is often radically misleading”<sup>371</sup>, as the needs and limitations of these two levels have to be kept in mind. One of the main consequences is that when “negotiators representing two organizations meet to reach an agreement between them, they are subject to the constraint that any tentative agreement must be ratified by their respective organization”.<sup>372</sup> Therefore, negotiations with agents as a two-level game can be sequentially decomposed “into a negotiation phase and a ratification phase”.<sup>373</sup> Because of this caveat, the “credibility of an official commitment may be low (...) for the negotiator may be unable to guarantee ratification.”<sup>374</sup> Additionally, there is the “assumption that this individual has no independent policy preferences but seeks simply to achieve an agreement that will be attractive to his constituents”.<sup>375</sup> As will be shown below, this does not always prove to be the case though.

## **II. Agency relationships in the Darfur negotiations**

Assuming that the rebel groups actually represent the interests of the Darfuri population and that the rebel leaders represent the interests of their groups, the international community chose to negotiate with the rebel leaders in the hope of creating a viable solution for peace that satisfies all.

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<sup>368</sup> Ibid., 6.

<sup>369</sup> N. E. Fassina, “Constraining a Principal's Choice: Outcome versus Behavior Contingent Agency Contracts in Representative Negotiations,” *Negotiation Journal* 20, no. 3 (2004): 437.

<sup>370</sup> R. D. Putnam, “Diplomacy and Domestic Politics,” *International Organization* 42, no. 3 (1988): 434.

<sup>371</sup> Ibid., 433.

<sup>372</sup> Ibid., 435.

<sup>373</sup> Ibid., 436.

<sup>374</sup> Ibid., 439.

<sup>375</sup> Ibid., 435.

Therefore, the negotiation includes two potential agency relationships – the rebel groups as agents of the Darfuri people, and the rebel leaders as agents of their groups. The following analysis is going to show that both assumptions do not hold true and that the peace negotiations have no chance at success unless including the constituencies into the process.

### **1. Rebel groups as agents**

The AU/ UN mediation team is working under the supposition that the rebel groups are representing the interests of the Darfurians, and the factions' leadership makes an effort to "portray their armed movements and civilian populations as inseparable".<sup>376</sup>

#### **a. The interests of the Darfurian population**

As all rebels claim to represent the interests of the Darfuri people, first it has to be analyzed what the population wants. Information on that is rather limited, but it seems clear that there was a major shift since the beginning of the rebellion, when

"most of the Darfur people interviewed [for the research], rich and poor, Arab and African, victimized and not—and most of them supportive of the rebels' agenda for change—stated both their opposition to armed rebellion, and their belief that the current violence escalated in response to the insurgency (which is not, of course, to say that they excused the violence)."<sup>377</sup>

By the second half of 2006, after the DPA had been signed, the situation was very different and people were desperate for security, a chance to return and increasingly critical of the rebels:

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<sup>376</sup> see P. Johnston, "Negotiated Settlements and Strategic Incentives in Civil Wars: Evidence From Darfur," *Northwestern University. Unpublished manuscript* (2007): 21.

<sup>377</sup> Tanner and Tubiana, *Divided They Fall*, 38.

## Creating obstacles to peace – the international involvement in Darfur

Viola Erdmannsdoerfer

MALD Thesis Spring 2009

“We parents want a peace accord. The rebels come to take our children. They speak to them in secret, they tell them, “When we win, you will have a position, a rank in the Sudanese army.” We parents don’t agree. We don’t trust them.”<sup>378</sup>

Although there is still some popular support solidified in face of the brutality of the government’s repression, many people come to the conclusion that the government’s violence is a reaction to the insurgency and cast Darfur back several decades in its development:

“After their military successes of June–October 2006, the non-signatory factions splintered, and sometimes fought amongst themselves. Many Darfurians seem less sanguine about the prospects of future rebel victories, and some even blame them for some of the abuses and suffering that civilian populations continue to endure.”<sup>379</sup>

Especially following the attack on Omdurman in May 2008 by JEM, there was a significant escalation in the intensity of the conflict between the GoS and the non-signatory rebel movements, with the government targeting villages in the rebel-held areas.<sup>380</sup>

Therefore, it can be put on record that the Darfuri population wants peace and an end to violence as soon as possible.

### **b. The interests of the opposition movements**

The official rebel position is completely in line with the above mentioned demands, and in a joint statement of several non-signatory groups (NRF, JEM/ Idris Azraq, SLA/ Wahid, SLA/ Nour, SPDF) in February 2007 where they formulated their position in a meeting outside the official AU/ UN mediation effort<sup>381</sup>, the rebels claim that “achieving peace and security, halting human rights

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<sup>378</sup> Ibid.

<sup>379</sup> Ibid.

<sup>380</sup> see *S/2008/558*, August 18, 2008, 2, <http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/2008/558&Lang=E&Area=UNDOC>.

<sup>381</sup> see “An Initiative to Develop a Negotiation Framework among Armed Darfuri Movements Helps Pave the Way for a Just Settlement of the Conflict and an End to the Humanitarian Crisis in Darfur. Joint Press Statement

violations and stabilizing the Darfur region are the top priorities of Darfur's armed movements."<sup>382</sup>

They further demand power and wealth sharing, compensation for the victims of the conflict, justice and accountability, and halting human rights violations, providing protection for civilians and ensuring the unhindered distribution of humanitarian assistance.<sup>383</sup>

Despite this rhetoric, there seems to be a major gap between what goals the armed movements claim to pursue, and their actual behavior.

On the ground, "persistent failure of peace negotiations coupled with ongoing attacks – including against the international community – leaves scant confidence that the parties to the conflict are working in good faith towards its resolution".<sup>384</sup> Although the rebels claim legitimacy as movements representing the interests of Darfur<sup>385</sup>, the significant amount of violence and human rights violations committed by all parties to the conflict leaves doubts about their commitment to peace.

Examples for behavior contradicting the interests of the population are plentiful. Many contested areas and local communities have suffered repeated and brutal attacks by janjaweed, as well as by signatory rebels.<sup>386</sup> After the DPA, the SLA/ Minni committed so many atrocities that it became known locally as the Janjaweed II, although these groups are allegedly not under control of Minni anymore, but had defected and created their own militias.<sup>387</sup> Additionally, the SLA/ Minni forces are unwilling to defend Darfurians from attack.<sup>388</sup> Although all groups are involved in forced recruitment, SLA/ Minni is the group most consistently accused of it.<sup>389</sup> But also the other groups are guilty of violations of international humanitarian law and human rights law, including the "recruitment of

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by Darfur Center for the Strengthening of Peace and Cairo Institute for Human Rights Studies," February 2007, <http://www.wmd.org/documents/mar07demnews11.pdf>.

<sup>382</sup> see Ibid.

<sup>383</sup> see Ibid.

<sup>384</sup> see Clea Kahn, *Conflict, Arms and Militarization. The Dynamics of Darfur's IDP camps.*, Small Arms Survey (Geneva Institute of International and Development Studies, September 2008), 54.

<sup>385</sup> see "Darfur's New Security Reality, ICG Africa Report N° 134," 1.

<sup>386</sup> see Tanner and Tubiana, *Divided They Fall*, 43.

<sup>387</sup> see "Darfur's New Security Reality, ICG Africa Report N° 134," 11.

<sup>388</sup> see Tanner and Tubiana, *Divided They Fall*, 40f.

<sup>389</sup> see Kahn, *Conflict, Arms and Militarization. The Dynamics of Darfur's IDP camps.*, 39.

children, arbitrary arrest and detention, maltreatment and torture”.<sup>390</sup> Hence, “civilians continue to bear the brunt of internal fighting between different rebel factions and abuses carried out in territory under their control”.<sup>391</sup> Moreover, leaders like Abdul Wahid pursue a “policy of obstructionism and together with a complete refusal to attend any talks”<sup>392</sup> that might lead to an actual solution.

The rebels are characterized by “opportunism, greed and factionalism”<sup>393</sup>, and have continued to fight among themselves, regardless of whether they were in favor or the DPA or not.<sup>394</sup> Next to the larger factions, there are an increasing “number of small, autonomous armed factions who answer to no one and can turn on anyone, and pursue their fortunes at the expense of local communities”,<sup>395</sup> preying upon IDPs and residents alike.<sup>396</sup> “Many armed splinter groups appear to be motivated primarily by opportunistic private interests without following coherent political agendas, but simply trying to secure a place at peace negotiations”.<sup>397</sup> Furthermore, all the rebel movements have engaged in “banditry, criminality and extortion”.<sup>398</sup>

The factions have also been accused of putting civilians further at risk by “failing to maintain a sufficient distinction between civilian and military space, making civilians a target of the conflict”.<sup>399</sup> While each group controls a relatively limited geographical area, they are highly dependent on alliances with Chad, Libya or Eritrea for weapons, vehicles and supplies.<sup>400</sup> Also, the SLA/ Wahid and JEM refused to sign the DPA despite the fact that they were militarily the two weakest insurgent factions at the time, and “despite the fact that these two groups’ co-ethnic populations would suffer the most severe retaliation by the government’s massive counterinsurgency”.<sup>401</sup>

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<sup>390</sup> S/2008/647, 17.

<sup>391</sup> Ibid., 78.

<sup>392</sup> see “Darfur's New Security Reality, ICG Africa Report N° 134,” 13.

<sup>393</sup> see Tanner and Tubiana, *Divided They Fall*, 65.

<sup>394</sup> see Ibid.

<sup>395</sup> see Ibid., 66.

<sup>396</sup> see Kahn, *Conflict, Arms and Militarization. The Dynamics of Darfur's IDP camps.* , 41.

<sup>397</sup> S/2008/647, 53.

<sup>398</sup> Ibid., 17.

<sup>399</sup> see Kahn, *Conflict, Arms and Militarization. The Dynamics of Darfur's IDP camps.* , 42.

<sup>400</sup> see “Darfur's New Security Reality, ICG Africa Report N° 134,” 15.

<sup>401</sup> see Johnston, “Negotiated Settlements and Strategic Incentives in Civil Wars,” 26.

Finally as already mentioned above, especially the SLA/ Wahid has been taking advantage of their position in the refugee camps and intentionally pushed the people towards starvation to get more international attention.<sup>402</sup>

Summarizing, rebel factionalism along ethnic and tribal lines remains a major obstacle to a sustainable settlement, with the larger factions upset at inclusion of smaller groups, fighting between the different groups even if they officially share the same interests, and a complete lack of a common vision for the people of Darfur. This game for power and influence makes the connection to the civilian population increasingly shaky, and with the “constant fragmentation and no clear program, the rebels risk becoming little more than weaponized groups seeking gains on a tribal and personal basis”.<sup>403</sup> Put in the words of a Darfurian human rights activist who is in principal supportive to the movements - “many rebel factions have dissociated themselves from Darfurian society and fought in the war without consideration for civil society and the rights of civilians”.<sup>404</sup>

This indicates that there is a major gap between the rhetorical position of representing the Darfurians and their interests, and the real interests revealed by the actions of the rebel groups, which the negotiation effort has not sufficiently taken into account yet. Despite of pretending to have the best interest of Darfur in mind, the unwillingness to engage in a meaningful process betrays their ambition to “extract political gains from the ongoing crisis as they continue to hold out for greater political and economic gains”.<sup>405</sup>

### **c. Positions do not equal interests**

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<sup>402</sup> “UNAMID official, Nyala.”

<sup>403</sup> see “Darfur's New Security Reality, ICG Africa Report N° 134,” 15.

<sup>404</sup> *S/2008/647*, 78.

<sup>405</sup> see Johnston, ““Negotiated Settlements and Strategic Incentives in Civil Wars,” 22.

The wrong assumption regarding the rebel groups representing the Darfurians derives from the perception that positions equal interests. However, negotiation positions often obscure what the parties really want, and it is therefore necessary to overcome the drawback of focusing on people's stated positions when the "object of a negotiation is to satisfy their underlying interests".<sup>406</sup> By "focusing on interests, not positions"<sup>407</sup> it is possible to deal with the fact that the basic problem in a negotiation lies "not in the conflicting positions, but in the conflict between each side's needs, desires, concerns and fears".<sup>408</sup> However, it has to be kept in mind that behind opposed positions lie "shared and compatible interests as well as conflicting ones".<sup>409</sup> This is the case in Darfur, where the position of the opposition movements and the Darfurians is an agenda of peace for Darfur, when their interests of the former are very diverse and involve personal profit.

This divergence between what the rebel groups state as their official interest and what they are really trying to achieve has to be recognized by the international community. Currently, the rebels benefit from the mainstream perception of them being the de facto representatives of the civilians against whom atrocities have been committed and who "most in the international community rightfully view as entitled to assistance and protection".<sup>410</sup>

To conclude, the positions of the rebel groups are not in accordance with their actual interests. As demonstrated above, they claim that their goal is to protect the people of Darfur from genocide and marginalization as well as increase their influence in national power sharing. However, their actions clearly do not reflect these objectives and even seem to have the intention of prolonging the fighting to maximize personal gains. Hence, there is a gap between the official rhetoric and the actual interests at stake. In this case, negotiations cannot work or ever achieve the goal of creating lasting

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<sup>406</sup> Fisher, Ury, and Patton, *Getting to Yes*, 11.

<sup>407</sup> *Ibid.*, 10.

<sup>408</sup> *Ibid.*, 40.

<sup>409</sup> *Ibid.*, 42.

<sup>410</sup> see Johnston, "Negotiated Settlements and Strategic Incentives in Civil Wars," 21.

peace, as the negotiations do not really address the interests behind the scenes. Secondly, the divergence between interests and positions on the side of the opposition movements also reveals that they are not acting on behalf of the civilian population they claim to represent and as whose agents they were given a say in the peace process.

## **2. Rebel leaders as agents**

The second agency relationship is between the rebel leaders who attend the peace negotiations and the rebel group rank and file members.

Traditionally, it is assumed that the leader of the armed movement who attends peace negotiations bargains on behalf of the rest of the group, representing their interests as their agent. However, the crucial insight is that there might be a significant divergence between the interests of the leaders and the group members<sup>411</sup>; as third-party interveners tend to negotiate with the rebel leaders, treating them as agent or representatives of the group, it is not sufficiently taken into account that the leaders might attempt to negotiate deals that benefit themselves directly rather than the group at large, e.g. by getting political offices, money etc.<sup>412</sup>

### **a. Failing to align interests of leadership and rank and file**

The core of this problem lies in the fact that the self-interested economic agenda of these wars does not provide any mechanism to align the interests of principals and agents.

When using agents, a way has to be found to deal with the agency problem – the fact that agents may have interests of their own, which poses the “risk of allowing the entry of additional parties

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<sup>411</sup> J. Nzelibe, “Courting Genocide: The Unintended Effects of Humanitarian Interventions:” 21 Nzelibe states that the divergence of interest is between rebel leaders and non-rebel members of a group threatened by genocide, but the same holds true for rebel leaders and the rebel group members.

<sup>412</sup> Ibid.



whose interests may be at odds with those of the clients they are there to represent”.<sup>413</sup> Usually, the unifying element that brings the interests within an insurgent or rebel group together is a group identity that harmonizes their individual agendas and subsumes them to one common goal. It is assumed that internal conflict occurs when groups are “disadvantaged, deprived or discriminated”<sup>414</sup> and popular perceptions see rebellions as a protest “motivated by genuine and extreme grievance”.<sup>415</sup> However, economic analysis sees rebellion as more like a “form of organized crime”<sup>416</sup> and states that grievances are not the main cause of these wars.<sup>417</sup> When there is “no more separation of the use of force and commercial activities”<sup>418</sup>, military force becomes commercialized and “war established itself as an independent presence on the periphery of zones of prosperity as new mode of income generation”.<sup>419</sup> In this situation of “bellum se ipse alet”<sup>420</sup> (war feeds war), the interest becomes “not to end the war but its endless continuation”.<sup>421</sup> Therefore, wars normally last the longer the more access participants have to resources of world economy<sup>422</sup>, and wars don’t end when “one side achieved their political goal but one side has no more access to further resources”.<sup>423</sup> On the other side, the “need for certain romanticization of landscapes of violence contributed to overemphasis on ideological, ethnic and religious dimensions”<sup>424</sup>, creating ideological facades, whereas the new wars are “little more than the result of economically purposive rationality”.<sup>425</sup> Despite the neglect of the impact of legitimate political concerns and grievances of the economic analysis of internal conflict, protracted conflict situations all over the world demonstrate that even if

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<sup>413</sup> see Jeffrey Rubin, “The Actors in Negotiation,” in *Kremenyuk, Victor (ed.), International Negotiation. Analysis, Approaches, Issues*, 2nd ed. (Jossey-Bass, 2002), 101.

<sup>414</sup> see Zartman, “The Unfinished Agenda: Negotiating Internal Conflicts,” 28.

<sup>415</sup> see P. Collier and World Bank, *Economic Causes of Civil Conflict and Their Implications for Policy* (World Bank, 2000), 2.

<sup>416</sup> see *Ibid.* 2.

<sup>417</sup> see H. Munkler, *The New Wars* (Cambridge: Polity Press, 2005), 2.

<sup>418</sup> see *Ibid.*, 16f.

<sup>419</sup> see *Ibid.*, 22.

<sup>420</sup> see *Ibid.*, 45.

<sup>421</sup> see *Ibid.*, 23.

<sup>422</sup> see *Ibid.*, 46.

<sup>423</sup> see *Ibid.*

<sup>424</sup> see *Ibid.*, 90.

<sup>425</sup> see *Ibid.*, 90.

a conflict was originally political – the longer wars last, the “political dimension is increasingly overlaid and the economics of violence determine the actions”.<sup>426</sup>

In the type of war described above, in the absence of a salient identity that harmonizes goals, each member of the rebel group pursues their own individual agenda of maximizing profit. This breaks with the assumption of most of the civil war literature, particularly used for a game theory economic analysis, that armed groups behave as “unitary actors”.<sup>427</sup>

In Darfur, e.g. one of the main concerns of all factions was “cementing their own gains from the last years of war before the peacekeepers arrived”.<sup>428</sup> These gains include wealth in form of “expropriated land, military hardware and ammunition, vehicles and political influence”.<sup>429</sup> Additionally, the messages especially from the non-signatory groups are becoming more fragmented and less representative of the constituencies they claim to speak for<sup>430</sup>, revealing the lack of a common internal agenda of the respective groups.

Therefore, especially during a peace process, the rebel leaders who claim to negotiate as the agents of the group cannot really do that as there is no common group interest. The result is that the leaders are mainly negotiating on behalf of themselves, and the “peace process generally sharpens the divergence of interests between the leaders and their followers even more”<sup>431</sup>: while the leaders can expect prestigious government positions and financial compensation, the best the fighters can hope for is the participation in a more or less successful DDR program. In this situation, demobilized soldiers often “confess their feeling of having been abandoned by their superiors”.<sup>432</sup>

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<sup>426</sup> see Ibid., 93.

<sup>427</sup> see Patrick Johnston, “The Geography of Insurgent Organization and its Consequences for Civil Wars: Evidence from Liberia and Sierra Leone,” *Security Studies* 17, no. 1 (2008): 111.

<sup>428</sup> see “Darfur's New Security Reality, ICG Africa Report N° 134,” 2.

<sup>429</sup> *ibid.*, 2.

<sup>430</sup> see *Ibid.*, executive summary.

<sup>431</sup> see B. Pouligny, “The Politics AND Anti-Politics OF Contemporary" Disarmament, Demobilization & Reintegration" Programs,” *Centre d'études et de recherches internationales and Secrétariat général pour la défense nationale, Paris* (2004): 9.

<sup>432</sup> see *Ibid.*

When the peace agreement is reduced to “political bargaining among prominent actors for lucrative political or military positions in government”<sup>433</sup>, this becomes a major obstacle to peace. “Either warlords end up quarrelling with other entrepreneurs of war or some of their junior leaders, believing they have not had their face share of the booty, starting new wars to get their hands on the big pot of power and riches”<sup>434</sup>.

#### **b. Government strategy towards fragmentation**

Next to the enabling environment in Darfur, the government has also successfully contributed to the fragmentation. One of the NCP’s strategies in the negotiations has been to divide and rule the opposition, “creating spoilers to advance their political objectives.”<sup>435</sup> Having to choose between political concessions and keeping the costs of war as cheap as possible, governments often use “negotiated settlements as a tool of divide-and-rule”.<sup>436</sup> They provide incentives, “often government posts, money, cars, and other perks”<sup>437</sup> for a group or factions of a group. As a result, the “defection of these factions from an incumbent group leaves the incumbent group divided and weakened.”<sup>438</sup> Naturally, this approach only works with opponents who are more salient about these economic incentives than their political goals or concerns of the population.

In such a situation, the government gets a number of benefits “from the emergence of spoilers”<sup>439</sup>: The groups are left divided and suspicious of each other and might even provide “intelligence and/or counterinsurgency support”<sup>440</sup>, weakening the “non-signatory groups at low cost”.<sup>441</sup> Further, regarding future negotiations, “governments prevent rebels from making unified political claims at

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<sup>433</sup> see M. Debos, “Fluid Loyalties in a Regional Crisis: Chadian 'Ex-Liberators' in the Central African Republic,” *African Affairs* 107, no. 427 (2008): 233.

<sup>434</sup> see Munkler, *The New Wars*, 80.

<sup>435</sup> Johnston, “Negotiated Settlements and Strategic Incentives in Civil Wars,” 361.

<sup>436</sup> Ibid.

<sup>437</sup> Ibid.

<sup>438</sup> Ibid.

<sup>439</sup> Ibid.

<sup>440</sup> Ibid.

<sup>441</sup> Ibid.

the bargaining table, mounting a unified military challenge that could defeat the government, and divert the focus of the conflict from the national to the local level.”<sup>442</sup> This strategy is “especially attractive to government decision-makers who face international pressure to negotiate”<sup>443</sup> – while offering concessions and appearing cooperative, the government at the same time succeeds in weakening the opposition.

The NCP has played this strategy masterfully in the Darfur peace process and particularly the DPA negotiations, and “there is indeed increased fighting between and among communities”.<sup>444</sup> Instead of including Darfur into the CPA, the north-south peace process was turned “into one of a string of bilateral deals with the centre”<sup>445</sup>, further undermining the “possibility of a comprehensive approach to Sudan’s problems, entrenching the dominance of the centre and aggravating its imbalance with the periphery”.<sup>446</sup> Later, after signing the DPA and satisfying the demands of the international community, Minnawi “assisted the government in counterinsurgency against remnants of the SLA/AW and JEM”<sup>447</sup>, including attacks on “former SLM comrades and civilians”.<sup>448</sup> Another example was Wahid’s chief negotiator Abdel Rahman Musa who defected directly after the talks and joined the government.<sup>449</sup> Similarly, in the Doha talks, only one group was included (JEM), consolidating the fragmentation and mistrust between the groups and factions.

Applying this strategy, the NCP has managed to “contain the chaos in Darfur and export it to Chad with minimal disruption to its main business: Hoarding Sudan’s growing oil wealth while it undermines the landmark 2005 Comprehensive Peace Agreement with the SPLM.”<sup>450</sup> In a situation of no peace, no war, “episodes of intense brutality and mass displacement are followed by longer

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<sup>442</sup> Ibid.

<sup>443</sup> Ibid., 362.

<sup>444</sup> Prendergast and Thomas-Jensen, *Echoes of Genocide in Darfur and Eastern Chad*, 1.

<sup>445</sup> Thomas, “Against the gathering storm. Securing Sudan’s Comprehensive Peace Agreement,” 34f.

<sup>446</sup> Ibid., 32.

<sup>447</sup> Johnston, “Negotiated Settlements and Strategic Incentives in Civil Wars,” 371.

<sup>448</sup> Ibid.

<sup>449</sup> see Ibid., 372.

<sup>450</sup> Prendergast and Thomas-Jensen, *Echoes of Genocide in Darfur and Eastern Chad*, 3.

periods of anarchic internecine fighting, ably exploited by the government<sup>451</sup> with the result being a “fractured and demoralized society in which every group is armed and most leaders cut opportunistic alliances to preserve their power bases.”<sup>452</sup> As mentioned above, the lack of clear political goals leaves the opposition vulnerable and divided on this marketplace for loyalties, turning Darfur “into this murky world of tribes-in-arms and warlords who serve the highest bidder”<sup>453</sup> while violence is their only bargaining chip.

### **c. Consequences of negotiating with self-interested agents**

The consequence of negotiating with the rebel leaders as representatives has severe consequences. The negotiated agreement does not have any value, as the agent signing does not command the necessary authority to make his men implement it. This is the situation of the above mentioned two-level game, where agreements made on the first level between rebel leaders and government fail in the ratification phase on the second level because it did not meet the interests of the domestic constituency or this case the rank and file. Therefore, even if there was an agreement reached by the rebel leaders, there was still a high risk of continued war as the leaders would have problems to ensure the implementation of the agreement. E. g .the divisions between the rebel movements and the “partial signing of the DPA had disastrous consequences”<sup>454</sup> - the insurgent movements have never been able to forge lasting coalitions or to coalesce into large blocks at negotiation table and additionally, when a “peace agreement is signed, factions of the armed movement often reject it”<sup>455</sup>, found a splinter movement or join another group. Another example is Minni Manawa, who became the senior assistant to the Sudanese president after he signed the DPA, which officially is the fourth

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<sup>451</sup> Alex De Waal and Julie Flint, “In Darfur, From Genocide to Anarchy,” *The Washington Post*, August 28, 2007.

<sup>452</sup> Ibid.

<sup>453</sup> Ibid.

<sup>454</sup> see Debos, “Fluid Loyalties in a Regional Crisis,” 232.

<sup>455</sup> see Ibid.

highest executive in GoS. Despite this personal gain, he lost commanders, fighters, territory, vehicles and popularity by signing<sup>456</sup> and large numbers of his forces joined non-signatory groups, while others answer to nobody else than themselves<sup>457</sup> or created their own militias.<sup>458</sup>

When leaders cannot effect compliances from their subordinates if they feel that they were not adequately compensated in the peace settlement, consequentially they are “prone to become spoilers”.<sup>459</sup> With no incentives to implement the peace agreement signed by their leaders, and “horizontal links with fellow men in arms”<sup>460</sup>, it is very easy and attractive for combatants to join another group or form a new faction. Used to a so-called Kalashnikov-lifestyle where violence gives them not only a living but social status, “ex-combatants are ready to resort to violence even after a peace agreement is signed”<sup>461</sup>, threatening the success of the negotiations.

#### **d. The significance of the spoiler problem**

While there seems to be a general consensus that in order for a peace agreement to be sustainable, “all parties concerned should be included”<sup>462</sup>, in order to fully understand the magnitude of the destructive effect spoilers can have to the peace process and the importance of including spoiler management strategies in the negotiations, the impact on and threat to the peace process of the individual fighter turned spoiler has to be assessed.

The war in Darfur is characterized by the “predominance of light weapons and the ability to use almost untrained fighters”<sup>463</sup>, which is an enabling factor for fragmentation. Where “no state executive is powerful enough to impose the will of the majority”<sup>464</sup> (which is usually peace) and the costs of entering the war are so low that basically all that is necessary to derail the peace process are

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<sup>456</sup> see Tanner and Tubiana, *Divided They Fall*, 40f.

<sup>457</sup> see *Ibid.*, 42.

<sup>458</sup> see “Darfur's New Security Reality, ICG Africa Report N° 134,” 11.

<sup>459</sup> see Johnston, “The Geography of Insurgent Organization and its Consequences for Civil Wars,” 135see.

<sup>460</sup> see Debos, “Fluid Loyalties in a Regional Crisis,” 234.

<sup>461</sup> see *Ibid.*

<sup>462</sup> see Frank Pfetsch, *Negotiating Political Conflicts* (Palgrave Macmillan, 2007), 180.

<sup>463</sup> see Munkler, *The New Wars*, 76.

<sup>464</sup> see *Ibid.*

a couple of untrained men with guns, the “ones who actually decide on war or peace are those most prepared to resort to violence”.<sup>465</sup> Indeed in Darfur, some groups consist simply of a “commander, a satellite phone, and a few armed men in a Toyota pick-up truck”.<sup>466</sup>

In this thriving environment for fragmentation, these small groups still pose a threat to the security of civilians, stability in the region and the peace process, whose main challenge is the dealing with all the splinter groups. Trying to deal with that phenomenon, the mediators are torn between whom to include at the negotiation table and whom to exclude. So for example they recognized the SLA as two independent factions in the DPA negotiations – hoping that would solve the internal bickering which hamstrung earlier efforts get the SLA to explicate and commit to coherent, unified political goals; but the creation of new faction further complicated bargaining.<sup>467</sup> The more parties are involved in the negotiation, the more the range of possible agreements that all would prefer to warfare shrinks. Moreover, the “overlapping range of mutually acceptable bargains decreases as the number of parties with differing preferences increases”.<sup>468</sup> To summarize, the varying preferences of an increasing number of parties in Darfur make it “difficult to settle on a mutually agreeable bargain”<sup>469</sup> and hence have a negative impact on the negotiation process.

Summarizing, this means that a peace agreement in this context can be compared with voting on peace vs. war requiring a consensus, hence every group (and individual) capable of violence must be won over for peace.<sup>470</sup> The international community needs to recognize the fact that the leaders of the armed movements who attend the peace negotiation are wrongly perceived as the group’s agents and do neither represent the interests of the group members nor have the authority to

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<sup>465</sup> see *Ibid.*, 13.

<sup>466</sup> see “Sudan: Rebels' Divided Response,” *Africa Research Bulletin: Political, Social and Cultural Series* 44, no. 11 (2007): 17315C-17316C.

<sup>467</sup> see Johnston, “Negotiated Settlements and Strategic Incentives in Civil Wars,” 25.

<sup>468</sup> see *Ibid.*, 10.

<sup>469</sup> see *Ibid.*, 26.

<sup>470</sup> see Munkler, *The New Wars*, 13.

subsequently implement what they agree on. This means that the second critical issue is choosing carefully who to invite to the negotiation table, keeping in mind that agents might not represent the interests of those whose support is crucial to implementing peace. But next to ignoring the real stakeholders, there are several unintended consequences of this strategy that actually encourage further fragmentation.

### **III. Consequences of inappropriate response to fragmentation**

The analysis above showed that because of the dual agency problem in the Darfur, the negotiation efforts were not successful at formulating a spoiler management strategy that would serve to restrict fragmentation. Hence, the lack of understanding of the different interests at the different levels of population, rebels and rebel representatives led to policies and incentives that encouraged spoiling even more.

#### **1. Dealing with spoilers**

A very good framework for classifying spoilers and tailoring specific strategies for spoiler management is provided by Stedman, who defines spoilers as “leaders and parties who believe that peace emerging from negotiations threatens their power, worldview and interests, and use violence to undermine attempts to achieve it”<sup>471</sup> and suggests that the crucial difference between the success and failure of spoilers is the role played by “international actors as custodians of peace”.<sup>472</sup> He distinguished between limited spoilers (who have limited goals such as recognition and redress of a grievance, a share of power, basic security), total spoilers (who pursue total power and exclusive recognition of authority and hold immutable preferences) and greedy spoiler (who holds goals that

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<sup>471</sup> see S. J. Stedman, “Spoiler Problems in Peace Processes,” *International Conflict Resolution After the Cold War* (2000): 5.

<sup>472</sup> see *Ibid.*, 6.



expand or contract based on calculations of cost and risk).<sup>473</sup> While total spoilers are “irreconcilably opposed to any compromise peace”, limited spoilers can be included if their “limited nonnegotiable demands can be accommodated” by the other parties to the conflict; greedy spoilers can only be accommodated if their “limited goals are met and additionally high costs constrain them from making added demands”.<sup>474</sup>

Stedman proposes three strategies of how to deal with spoilers<sup>475</sup>: inducement (giving the spoiler what they want), socialization (changing the behavior of the spoiler to adhere to a set of established norms) and coercion (punishing spoiler behavior or reducing the capacity of the spoiler to destroy the peace process). He further matches the appropriate strategy with each type of spoiler<sup>476</sup>. In his view, total spoilers are best dealt with by coercion, while limited spoilers usually can be induced. Regarding greedy spoilers, a long-term strategy of socialization has to be applied. An important additional point to keep in mind is that the one of the main “limitations of the custodian of peace are states who are patrons of the spoiler”.<sup>477</sup>

Ultimately, an effective spoiler management strategy is characterized by changing the spoiler’s BATNA in a way that supporting the negotiations is the most attractive option. If a party’s BATNA is so strong that it is better than any negotiated solution, entering negotiations is pointless and would only achieve something if accompanied by other action that before and parallel to the negotiations weakens the BATNA. This can be done either by raising the costs of continuing war or raising the benefits from peace.

## **2. Spoilers in the Darfur negotiations**

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<sup>473</sup> see *Ibid.*, 10f.

<sup>474</sup> see *Ibid.*

<sup>475</sup> see *Ibid.*, 12f.

<sup>476</sup> see *Ibid.*, 15f.

<sup>477</sup> see *Ibid.*, 16.

**a. Negotiations provide incentives to become a spoiler**

The analysis of what motivations drive rebel leaders and fighters has demonstrated that rebel fighters in Darfur fall into the category of greedy spoilers, who try to maximize their own individual gains by all means. Therefore, the most important unintended consequence of missing a spoiler management strategy is that it exacerbates the effects of a strategic environment that encourages fragmentation and the emergence of spoilers. The “inclusive nature of negotiated settlements’ payoff structure”<sup>478</sup> encourages greedy spoilers even more by providing unintended incentives for factions within insurgent groups to splinter into multiple independent groups. These spoilers become disruptive enough to the general order that outside negotiators wrongly conclude that they must be bought off by concessions, which entitles them to seek power in a national government as part of a negotiated settlement.<sup>479</sup> Rewarding them with inclusion in peace agreements sets further precedent that threatens to “reinforce the entrepreneurs’ beliefs about the payoffs of spoiler violence”.<sup>480</sup> By choosing this approach, the mediation effort has “given priority to military rather than civilian leaders”<sup>481</sup> and “valorized and reinforced the use of force”.<sup>482</sup> Moreover, in a situation where the fragmentation of groups and interests is so pronounced that it is difficult even to identify interlocutors for talks<sup>483</sup>, instead of applying strategies of managing greedy spoilers,

“Much effort has been spent on encouraging Darfur’s rebels to transform themselves from field commanders into political leaders, which has led to a heavy focus on armed actors and too little attention on civil society. Those with an interest in gaining power respond by collecting weapons, vehicles, and soldiers—often at the expense of humanitarian organizations—to ensure that they are taken seriously.”<sup>484</sup>

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<sup>478</sup> Johnston, “Negotiated Settlements and Strategic Incentives in Civil Wars,” 4.

<sup>479</sup> see *Ibid.*, 7.

<sup>480</sup> see *Ibid.*

<sup>481</sup> see Kahn, *Conflict, Arms and Militarization. The Dynamics of Darfur's IDP camps.*, 13.

<sup>482</sup> see *Ibid.*, 23.

<sup>483</sup> see *Ibid.*

<sup>484</sup> see *Ibid.*

It seems obvious that the international community “institutionalizing conflict management strategies that encourage spoilers by accommodating them”<sup>485</sup> is not productive in such an environment, but on the opposite incentivizes defective behavior.

b. Raising the costs of violence

Besides indirectly rewarding spoilers, the lack of a spoiler management strategy also has the result that nothing has been done to weaken the spoilers’ BATNA by raising the costs of violence.

In Darfur presently the costs of war are not high for the rebel rank and file members. In a context where war has become a lifestyle and form of income generation, there is little incentive to seek peace. This means concretely that the individual fighters’ BATNA allows them to stay indifferent regarding the progress of the peace process, as they can meet their interests of maximizing individual monetary benefits easily by perpetuating the war.

War is a strong BATNA for two reasons: first, the actual physical danger of being at war is comparatively low, and second, war provides them with better access to income than peace.

The – maybe surprising – fact that war does not pose the rebel fighters at greater risk for their physical safety derives from the strategy of the new wars, where the civilian population is the main target of attacks, while a “decisive confrontation with enemy avoided at all costs”.<sup>486</sup> When force is mainly directed at civilians, not the enemy’s forces<sup>487</sup>, most casualties are civilians, not actual fighters. Furthermore, even though there are some casualties among the rebel movements, especially as results of government attacks, the danger is still not higher (rather lower) than being a civilian in the same area. Hence, instead of a “mutually hurting stalemate”<sup>488</sup> that would increase either side’s or individual’s motivation to engage in negotiations, the only ones who are constantly being in danger are the civilians, while the rebels can continue fighting as long as they wish.

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<sup>485</sup> see Johnston, “Negotiated Settlements and Strategic Incentives in Civil Wars,” 11.

<sup>486</sup> see Munkler, *The New Wars*, 12.

<sup>487</sup> see *Ibid.*, 14.

<sup>488</sup> see Zartman, “The Unfinished Agenda: Negotiating Internal Conflicts,” 24.

More importantly, continued war is an efficient way for fighters to meet their interests. The sources of income from war are threefold: first, war legitimizes looting the civilian population on grounds of them being traitors to the other side. Secondly, the continuation of war “ensures a continuing flow of international aid”<sup>489</sup> which the strategies of these wars now include as a “logistical element in their operational planning”.<sup>490</sup> The aid makes its way into the hands of the rebel fighters through different ways, such as looting the civilians, through refugee and IDP camps which are “part of local war economy<sup>491</sup>”, or directly as a price to for humanitarian access. In Darfur, IDPs and refugees are routinely exposed to extortion by a variety of armed actors<sup>492</sup>, and e.g. the “SLA/ Minni humanitarian affairs commissioner requested aid agencies to distribute food to soldiers as well as to civilians in areas they controlled”.<sup>493</sup> Some scholars even go so far as to suggest that the international aid community has a vested interest in keeping conflicts alive in order to secure their own jobs<sup>494</sup>, but even just the delivery of truly altruistic aid makes it easy for those in possession of arms to take more than their fair share and have a lucrative source of income. Finally, income is also generated by support from external actors who have an interest of their own in the prolongation of the conflict. This enables “factions who continue the armed struggle and are so small that they might seem harmless to forge new alliances and find external sponsors, while dormant groups are often based in neighboring countries”.<sup>495</sup> In the case of Darfur, the armed groups are highly dependent on alliances with Chad, Libya or Eritrea for weapons, vehicles and supplies.<sup>496</sup> Particularly Chad has been extremely active in supporting the Darfur’s armed opposition, as Sudan and Chad have been in conflict via rebel groups and proxy militias intensively since the end of 2005.<sup>497</sup> It has provided a safe haven for Darfuri rebel groups and supported some via the “provision of weapons by elements within

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<sup>489</sup> see Munkler, *The New Wars*, 18.

<sup>490</sup> see *Ibid.*, 88.

<sup>491</sup> see *Ibid.*, 18.

<sup>492</sup> see Kahn, *Conflict, Arms and Militarization. The Dynamics of Darfur's IDP camps.*, 15.

<sup>493</sup> see *Ibid.*, 40.

<sup>494</sup> see e. g. E. N. Luttwak, “Give War a Chance,” *Foreign Affairs* 78, no. 4 (1999): 36-44.

<sup>495</sup> see Debos, “Fluid Loyalties in a Regional Crisis,” 232f.

<sup>496</sup> see “Darfur’s New Security Reality, ICG Africa Report N° 134,” 15.

<sup>497</sup> see J. Tubiana, “The Chad–Sudan Proxy War and the ‘Darfurization’ of Chad: Myths and Reality:” 12.

or affiliated with the security services in Chad".<sup>498</sup> Particularly JEM has the vast majority of its forces based in eastern Chad, receives the majority of its support and resupply on Chadian territory and continues to enjoy close relations with the Government of Chad.<sup>499</sup>

Summarizing, these examples show that the rebel fighters have plenty of opportunity to fulfill their interests outside a peace agreement; therefore their situation without a negotiated agreement leaves them better off than what they can usually expect from a peace agreement. E.g. the DPA provided for some ex-combatants to be integrated into the national security forces (DPA Art. 399ff<sup>500</sup>) and also had some general provisions regarding Demobilization, Disarmament and Reintegration (DDR, DPA Art. 417ff<sup>501</sup>), but did not offer something to the rank and file that was comparable to the easy lifestyle they could have as fighters. Additionally, the best way to have one's voice heard, is violence, which additionally is often rewarded with concessions and better bargains. In this situation, it would be irrational for the rank and file members to support the negotiations because they can easily fulfill their interests otherwise and might even be rewarded with a better bargain by continuing violence.

### **Conclusion Obstacle 2: Mediator with a muscle needed**

The most important factor in succeeding to weaken a spoiler's BATNA is a unified strategy by the international community to accompany the negotiation process, giving the mediation team a muscle to make its proposals more attractive and act as a true guardian of peace, based on fairness, consistence and the power to back up its threats.

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<sup>498</sup> see *S/2007/584*, October 3, 2007, 17, <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Sudan%20S2007%20584.pdf>.

<sup>499</sup> *S/2008/647*, 55.

<sup>500</sup> *Darfur Peace Agreement*, 2006, [http://www.unmis.org/english/2006Docs/DPA\\_ABUJA-5-05-06-withSignatures.pdf](http://www.unmis.org/english/2006Docs/DPA_ABUJA-5-05-06-withSignatures.pdf).

<sup>501</sup> *Ibid.*

Yet, there are several indicators that the international community did not have the political will to provide this muscle, even if there was a coordinated spoiler management strategy. So far, it has failed to devise a comprehensive, coordinated strategy toward Sudan and its different actors. Instead, next to the significant fragmentation and lack of coordination between international and regional peace initiatives<sup>502</sup>, it has pursued multiple agendas - for example, oil for some, purported co-operation on counterterrorism for others - that have allowed Khartoum and the rebels to “play actors against each other.”<sup>503</sup>

Regarding the situation of the opposition movements, the international community has been as inconsistent: nothing has been done to stop the flow of arms into Darfur itself, despite the arms embargo.<sup>504</sup> At the same time, the main actors in the international community have not sufficiently used their leverage to stop the mutual proliferation of rebel groups by Chad and Sudan across the borders, which is one of the principal enablers of continued violence. And aid keeps on flowing, even when it is clear that the majority of it will be used to finance the rebels. Peacekeepers have not been adequately equipped to pose any serious threat to marauding fighters from all sides who keep on committing human rights violations with impunity.

Therefore, the international community has failed to back up the mediator with “clear and focused incentives for and pressures on all key actors”<sup>505</sup> which would be essential to give peace a chance.

To conclude, in the second part of this analysis it has been examined how the second largest obstacle to a peaceful settlement – the fragmentation of the armed opposition – has been partially created by

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<sup>502</sup> see *S/2007/584*, 16: as of May 2007, the UN/AU joint mediation effort, the Government of Libya, the Government of Eritrea, the Government of Southern Sudan and the Government of South Africa were all driving concurrent and sometimes competing initiatives.

<sup>503</sup> see Caroline Flintoft, “Our silence on Sudan shames us,” *The Globe and Mail*, June 16, 2008, [http://www.theglobeandmail.com/servlet/Page/document/v5/content/subscribe?user\\_URL=http://www.theglobeandmail.com%2Fservlet%2Fstory%2FLAC.20080616.COSUDAN16%2F%2FTPstory%2FComment&ord=21644424&brand=theglobeandmail&force\\_login=true](http://www.theglobeandmail.com/servlet/Page/document/v5/content/subscribe?user_URL=http://www.theglobeandmail.com%2Fservlet%2Fstory%2FLAC.20080616.COSUDAN16%2F%2FTPstory%2FComment&ord=21644424&brand=theglobeandmail&force_login=true).

<sup>504</sup> see “Darfur's Political Process in Troubles State of Affairs, New Generation in Sudan May Be Doomed to Life in Conflict, Security Council Warned; Security Council 5922nd Meeting,” June 24, 2008, <http://un.org/News/Press/docs/2008/sc9370.doc.htm>.

<sup>505</sup> see John Prendergast and Jerry Fowler, “Creating a Peace to Keep in Darfur. A Joint Report by the ENOUGH Project and the Save Darfur Coalition,” 2, <http://www.enoughproject.org/files/reports/%20Sudan%20peace%20process%20.pdf>.

## **Creating obstacles to peace – the international involvement in Darfur**

Viola Erdmannsdoerfer

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the international community. Failing to understand the discrepancy between whose agents the representatives in the talks are, whose interests they represent and their limited implementation authority, no effective spoiler management strategy has been put in place with a number of unintended consequences, such as incentivizing further fragmentation and violence.

#### D. The way forwards – recommendations

After this gloomy analysis it has to be noted that probably at this point, a comprehensive peace agreement is out of reach. Therefore, the most immediate goal should be a roadmap similar to the Doha agreement, but including all the main parties plus at least some representation from Darfur's civil society. This agreement should lay out a framework for the process to move forwards.

Having seen that one of the tragedies of Darfur is that "Western pressure based on distorted facts has set back attempts within Sudan and within Africa to reach a peace settlement in Darfur"<sup>506</sup>, there are several recommendations from the analysis above, some of which are specific to the Darfur context, whereas other might also be transferable to other peace processes.

##### 1. Protect

The most important lesson to be learned from the international intervention in Darfur is a reminder that the international community's involvement can have a very negative impact if not consistently designed and executed. Therefore, it might be time to officially endorse into the responsibility to protect the notion that not only does national sovereignty derive from how a government protects the rights of its citizens, but also international legitimacy comes from providing this protection, and that international interference should be held accountable to these same standards.

Unfortunately, this seems not to be the case in Darfur and it seems that "more than anything else, 'the responsibility to protect' is a right to punish but without being held accountable".<sup>507</sup> Despite the claim that "prosecutions must be in the interests of the victims" and the fact that "few would dispute that their interests are served today by strengthening the protection and peacekeeping force of the joint U.N.-African Union mission" while "the interests of all Sudanese are served by working with the

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<sup>506</sup> Easterly, "Did 'Save Darfur' lose Darfur?."

<sup>507</sup> Mahmood Mamdani, "Saviors and survivors," *Making sense of Darfur*, April 12, 2009, <http://www.ssrc.org/blogs/darfur/2009/04/12/saviors-and-survivors/>.



government to sustain the north-south peace agreement and trying to ensure that democratic elections are held next year to return a government with genuine popular support”<sup>508</sup>, the ICC is still supported by many in its decision to interfere with these chances at peace. Therefore, the question arises whether the ICC and with it the international community is “really pursuing justice for victims or for itself”<sup>509</sup>.

Under no circumstances should the international community be allowed to risk lives for experimenting with a comfortable intervention mechanism that does not cost them anything. Much has been written about the responsibility of the international community to intervene; now it seems time to think about for accountability of these interventions.

## 2. Do not experiment

Secondly, in ongoing wars and peace negotiations, the peace vs. justice debate is not a useful way of framing the situation. What it comes down to is the question “what should be done when a warring party (or parties) insists that a prospective peace deal is conditional on a halt to international criminal prosecutions”<sup>510</sup>. Therefore, instead of discussing abstractly about the value of peace or justice, concretely the debate should be about “whether the important but uncertain prospect of deterring future perpetrators and reducing future conflicts takes precedence over more certain benefits of an immediate end to an ongoing conflict.”<sup>511</sup> While the “Save Darfur lobby demands, above all else, justice (...), even if it be at the cost of more bloodshed and a diminished possibility of reconciliation”<sup>512</sup>, referring back to the first point made above, the international community’s responsibility to protect should be interpreted as a duty to prioritize the needs of the civilian

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<sup>508</sup> Flint and Waal, “Julie Flint and Alex de Waal - Justice Off Course In Darfur.”

<sup>509</sup> Luke Moffett, “In the Interest of Victims: The Role of the International Criminal Court in Providing Justice to Victims,” *SSRN eLibrary* (March 3, 2009): 16, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1329028](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1329028).

<sup>510</sup> Grono and O’Brien, “Justice in Conflict?,” 18.

<sup>511</sup> *Ibid.*

<sup>512</sup> Mamdani, “Saviors and survivors.”

population over abstract notions. “In this context, the “never-ending debate over whether the Darfur crisis is genocide or not (...) has obscured more than it has clarified”.<sup>513</sup>

### 3. Bargain

The international community also has to be careful about not further escalating the situation. Now after the arrest warrant, the “logical next international counter-move is military, on the logic that the bigger the threat to the Sudan Government, the nicer it will be to western governments, aid agencies, and Darfurian IDPs. Western governments are on the brink of becoming parties to the Sudanese conflict”.<sup>514</sup> Therefore, the best way out was to use an Art. 16 deferral as a bargaining chip. This solution would prevent the ICC from becoming irrelevant, which is a realistic danger if an arrest warrant has no consequences an instead use it in a constructive way that allowed the SC to take its responsibility as a guardian of peace and security .

### 4. Push

Also it is very important to rethink the approach towards the rebel groups. There has been a tendency to “play down rebel responsibility because it is easier to build support for stopping genocide than for becoming entangled in yet another messy civil war”.<sup>515</sup>

However, exactly this interventionist rhetoric – and that is nothing more than rhetoric has also been demonstrated – and the hopes for military regime change raised in the rebels have “actually worsened the violence”.<sup>516</sup> In Darfur, the rebel movements are relatively weak compared to the government, and hence according to DeWaal’s marketplace for loyalties metaphor, “would logically

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<sup>513</sup> Castillo, “Rethinking Deterrence,” 170.

<sup>514</sup> Alex De Waal, “Don’t do anything: stop and think for a moment,” *Making sense of Darfur*, March 7, 2009, <http://www.ssrc.org/blogs/darfur/2009/03/07/dont-do-anything-stop-and-think-for-a-moment/>.

<sup>515</sup> Alan J. Kuperman, “Strategic Victimhood in Sudan,” *The New York Times*, May 31, 2006, sec. Opinion, <http://www.nytimes.com/2006/05/31/opinion/31kuperman.html>.

<sup>516</sup> Ibid.

have sued for peace long ago.”<sup>517</sup> In the meantime, encouraged by western advocacy groups, the opposition movements are wasting “resources fighting each other rather than protecting their people.”<sup>518</sup> As elaborated on earlier, this rewards violence with inclusion in peace talks and the prospect of political influence.

One of the keys to “rescuing Darfur is to reverse these perverse incentives. Spoiler rebels should be told that the game is over, and that further resistance will no longer be rewarded but punished by the loss of posts reserved for them in the peace agreement.”<sup>519</sup> Therefore, the simple black and white division into the evil government and the brave rebels has to be thoroughly revised and policy adjusted to realities of the armed movements.

## 5. Exclude

Moreover, the inclusive approach towards the armed opposition has to be revised, as an “internationally sponsored peace process generates legitimacy, but sectarian violence should not be rewarded with such recognition”.<sup>520</sup> Many analysts have come to the conclusion that only a limited number of the groups – between three<sup>521</sup> and four<sup>522</sup> - are relevant to the negotiations because of either their military strength or their support from the Darfurian population<sup>523</sup>, while “the differences between them owe more to personal and ethnic rivalries than substantive disagreements over the issues central to most Darfuris”.<sup>524</sup> Most of the other factions - “which in most cases consist of little more than a dissident commander with a satellite phone and perhaps a website—are neither

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<sup>517</sup> Ibid.

<sup>518</sup> Ibid.

<sup>519</sup> Ibid.

<sup>520</sup> K. Aggestam, *Internal and External Dynamics of Spoiling: A Negotiation Approach* (Spoilers and Peace Processes: Conflict Settlement and Devious Objectives. Tokyo: UN University Press, 2006), 28.

<sup>521</sup> Anonymous UN Official

<sup>522</sup> Omar Ismail and Maggie Fick, *Darfur rebels 101* (Enough Project, January 29, 2009), 1,

[http://www.enoughproject.org/files/publications/darfur\\_rebels101.pdf](http://www.enoughproject.org/files/publications/darfur_rebels101.pdf).

<sup>523</sup> “UN Mediation Team Official, El Fasher.”

<sup>524</sup> Ismail and Fick, *Darfur rebels 101*, 1.

militarily nor politically significant.”<sup>525</sup> It cannot be stressed enough that these “armed bandits masquerading as rebels [who] (...) lack real military capabilities but contribute to the already poor security situation on the ground (...) should not be dealt with in the context of a peace process, as a place at the negotiating table would grant them undeserved political legitimacy [but] should be viewed as security hazards rather than representatives of the Darfuri people.”<sup>526</sup>

The general approach of mediation seems to favor inclusive solutions that attempt to give everyone a voice, but the situation in Darfur demonstrates that sometimes, exclusion can be a more successful approach that focuses on the key actors and does not provide incentives and rewards for spoilers.

## **6. Include**

The failure of the DPA and the initiatives in its aftermath also have shown that still “the CPA is the linchpin for peace throughout Sudan-[and] Darfur must be resolved within this context.”<sup>527</sup> While the CPA itself “marginalized Darfur, and at the negotiations for the DPA (...) [and] was used to limit the ambitions of rebel negotiators, now there needs to be a return to the notion of comprehensive peace.”<sup>528</sup>

Comprehensive peace also means the inclusion of issues such as power sharing, “addressing the contradictions of land ownership, national reconciliation and fair allocations of wealth to the periphery, including development funding for conflict-affected states”<sup>529</sup> within Sudan.

The NCP, the SPLM and the international community have each respectively preferred to treat Darfur and the north-south conflict as different issues. Sustainable peace however is only possible with an agreement that addressed all these problems in Sudan in its entirety.

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<sup>525</sup> Ibid.

<sup>526</sup> Ibid., 6.

<sup>527</sup> Hanson, “Sudan's fractures internal policies.”

<sup>528</sup> Thomas, “Against the gathering storm. Securing Sudan's Comprehensive Peace Agreement,” 34f.

<sup>529</sup> Ibid.

## 7. Expand

The links between Chad and some of the Darfuri rebel groups, although well documented, still seem to not have been translated into increased engagement of Chad in the peace process. As some of the groups get most of their financial and logistical support from Chad, and some even recruit the majority of their fighters from there<sup>530</sup>, it is obviously crucial to include the Chadian government in the talks to find a solution to end the ongoing proxy war.

## 8. Let be

According to DeWaal's marketplace for loyalties metaphor, in a negotiation impacted by international interference, "the best outcome falls short of stability because all loyalties are provisional pending shifts in the value of allegiances in the political marketplace."<sup>531</sup> Consequentially, the best interference into the bargaining process would be "one that supports the most inclusive and robust buy-in—one that is sufficiently well grounded in the relative value of the parties to survive the withdrawal of its international sponsors."<sup>532</sup> Otherwise, the intervention "runs the risk of artificially distorting the price of loyalty: either lowering it by supporting the dominant buyer (usually the government) or inflating it by backing the sellers (usually rebels or former rebels)."<sup>533</sup> If this condition is not met and one of the parties feels that it has been manipulated in paying too high or being paid too low a price, the agreement is not stable and will be challenged at the first opportunity and can only be contained by "endless peacekeeping".<sup>534</sup>

For Darfur this means that the international community has intervened on behalf of the relatively weaker armed opposition, however without ever having a real intention of actually doing something substantive. Therefore, in the spirit of the international community's responsibility to protect and

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<sup>530</sup> "UN Mediation Team Official, El Fasher."

<sup>531</sup> De Waal, "Mission without end?," 102.

<sup>532</sup> Ibid.

<sup>533</sup> Ibid.

<sup>534</sup> Ibid.

feeding back to the first conclusion, for the sake of the Sudanese population, instead of raising such false hopes in one side and threatening the other without credibility, western governments should be honest about their lack of political will and at least let those local dynamics play itself out to create a stable solution. This looks very much like Luttwak's call to give war a chance<sup>535</sup>, but unfortunately, while "international tribunals can be important complements to humanitarian interventions", they are "are poor substitutes for them".<sup>536</sup> Therefore, sometimes less harm is done by staying out than by choosing the wrong instruments, and the international community has to begin taking responsibility for their own failures and their consequences.

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<sup>535</sup> see Luttwak, "Give War a Chance."

<sup>536</sup> Rodman, "Darfur and the Limits of Legal Deterrence," 560.

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