CHAPTER 4

# SUDAN: COMPLEMENTARITY IN A STATE OF DENIAL

> *All perfumes of Arabia will not clean this dirt . . .*
> *For us the ICC doesn't exist . . . and we are in no way going to cooperate with it.*
> Sudan's Ambassador to the United Nations[1]

Upon landing in Khartoum in 2008, the visitor was given a literal illustration of Sudan's official response to the ICC. Along the avenue from the airport into town, one was greeted by rows of enormous billboards showing the President, with accompanying texts like 'Ocampo's plot: A malicious move in the siege', 'Protect the International Law from Ocampo's illusions' and 'No for the oppression of peoples under the name of international law!'

The Government of Sudan's official response to the ICC's proceedings in relation to Darfur has been one of rejection and denial. It has rejected the Security Council's referral, the Prosecutor's opening of an investigation and, most vociferously, the Prosecutor's application for an arrest warrant for President Bashir. It has denied the applicability of the Rome Statute and the relevance of the principle of complementarity. As explained by the (at the time of the interview) Minister of State for Humanitarian Affairs – and ICC suspect – Ahmad Harun:

> Theoretically, complementarity is recognised by the Rome Statute . . . [W]e have our own legal position: we completely reject the ICC. So complementarity is not applicable.[2]

With the Sudanese Government's officially approaching complementarity as inapplicable, it seemed unlikely that the principle would catalyse many effects. It was particularly unlikely that complementarity would catalyse effects that require government action.

But it did and, as in Uganda, it did so indirectly.

[1] 'Sudan's UN envoy invokes Macbeth to condemn ICC' 2009.
[2] Interview with Ahmad Harun, Khartoum, December 2008.



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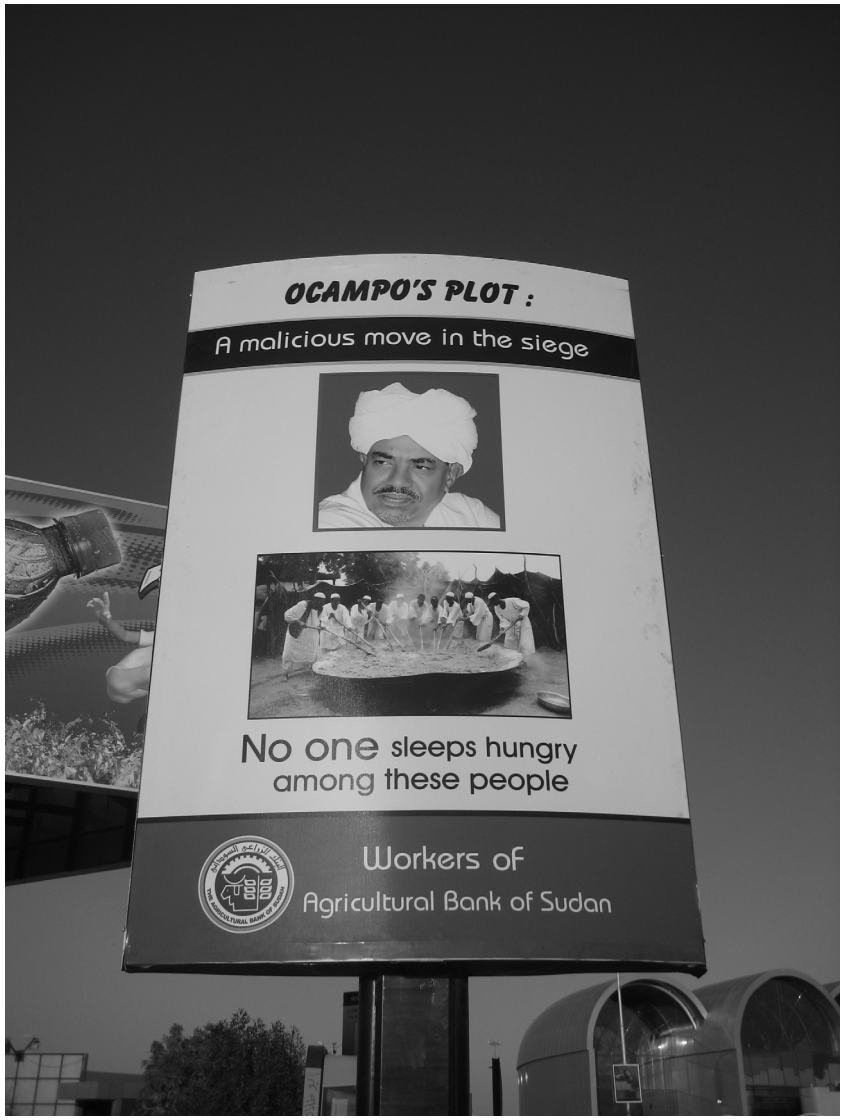



Figure 4.1 'Ocampo's plot: A malicious move in the siege'

## THE CONTEXT FOR CATALYSIS

Context matters for complementarity's catalysing effect. In Sudan, of particular relevance is the ICC–Government of Sudan relationship. This relationship rapidly deteriorated after the Office of the Prosecutor



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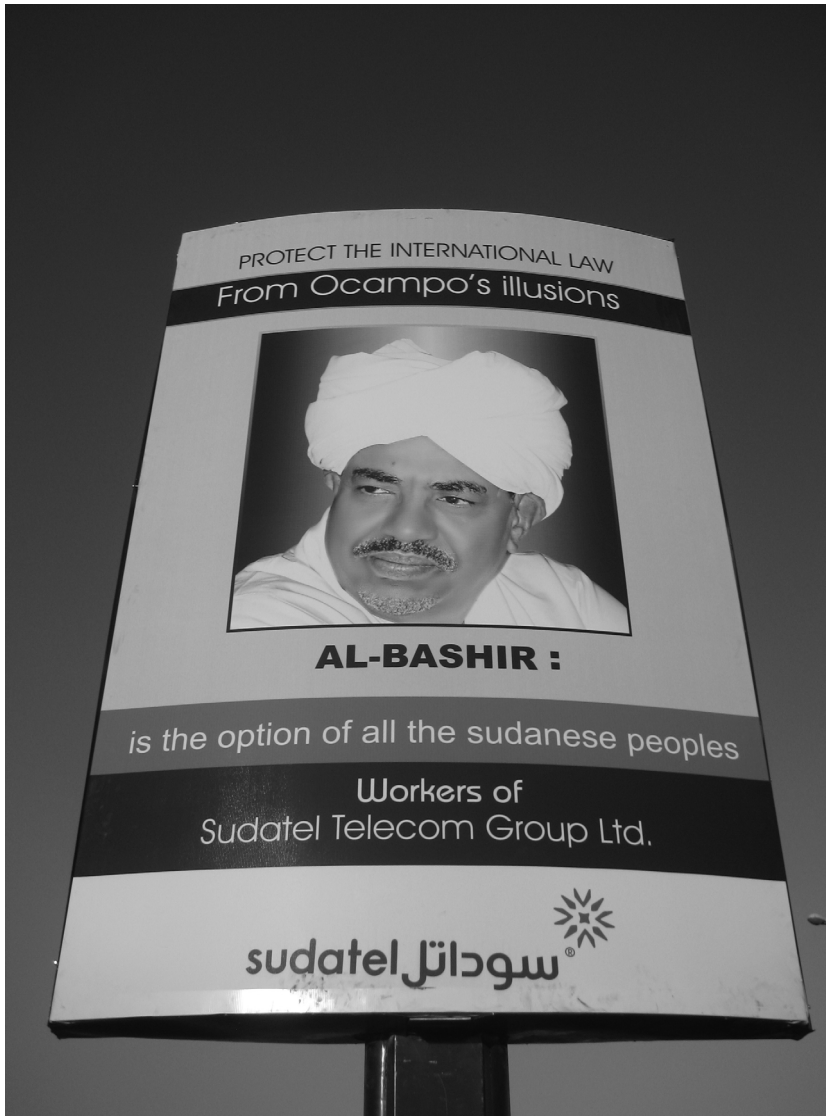



Figure 4.2 'Protect the International Law from Ocampo's illusions'

(OTP) brought its first case with respect to the situation in Darfur. The Government of Sudan's response was primarily political. To the extent that it was legal, it focused on the Court's jurisdiction with respect to Sudan, not on the admissibility of its cases. And yet, international actors, including the International Commission of Inquiry into Darfur



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and the International Criminal Court, gave complementarity more attention in the situation of Darfur than in that of northern Uganda.

**Sudan and the ICC: souring relations**

Sudan has not always rejected the ICC. Before the establishment of the ICC, Sudan welcomed the idea of an international court that respected sovereignty[3] and was based on complementarity.[4] With a divided delegation in Rome, it ultimately abstained on account of disagreement with various provisions, such as the subject-matter jurisdiction over crimes committed during non-international armed conflict, the power of the Security Council to refer situations to the Prosecutor of the Court and the prohibition on reservations.[5] Yet, during a closed symposium in Khartoum in 1999, Sudanese scholars and legal counsel of government ministries unanimously recommended joining the Court, as this would do credit to the Government of Sudan (GoS).[6] Some Sudanese lawyers advised the government to become party to the Statute even if it was not convinced of the ICC's worth. 'Accede to escape',[7] they argued, pointing to provisions in the Statute that benefit only states parties,[8] for instance the possibility to exclude war crimes from the Court's jurisdiction for a period of eight years.[9]

[3] Yassin 1998.

[4] During the negotiations of the Statute, the Sudanese representative stressed the importance of complementarity, which he interpreted to mean that '[t]he role of the court should be to exercise its jurisdiction when the concerned State no longer existed or when its judicial system became ineffective' (UN Doc. A/C.6/52/SR.11 (1997):[65]). The principle of 'complementarity' initially caused some concern among Arab states, Sudan included, as it was inappropriately translated by the Arabic word for 'integration', suggesting processes as in the European Union. This word is at times still being used to translate 'complementarity' (see e.g. Sudan Bar Association 2008e:3 and El-Gizouli 2009:270).

[5] Interview with a former Minister of Justice, Khartoum, December 2008; UN Doc. A/CONF.183/C.1/SR.4 (1998):[76] (Mr Fadl) and L/ROM/22 (1998). See also Roach 2005:151.

[6] Interviews with a senior legal advisor in the Ministry of Justice, November 2008, and with a representative of a humanitarian organisation, Khartoum, December 2008.

[7] See also Sudan Bar Association 2008d:5.

[8] Discussion with a senior legal advisor in the Sudanese Ministry of Justice, UK, January 2007.

[9] Rome Statute, art. 124. This provision does not exclude war crimes from the Court's jurisdiction in the event of a referral by the Security Council, since it is an exception to art. 12(1) and (2), which does not apply in case of a referral by the Security Council pursuant to art. 13(b).



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Guided by a diplomat rather than the Minister of the Interior, who strongly opposed becoming a party, President Bashir signed the Rome Statute during the 2000 Millennium Summit Treaty Event.[10] Subsequently, the Ministry of Justice pushed for ratification, yet the Ministry of Foreign Affairs, wishing to follow other Arab states that advised against becoming parties to the Statute, won the battle.[11] The calculation was that ratification of the Statute would not change Sudan's status as an international pariah, while it would increase the risk of hostile Western states using the instrument against the GoS.

And so they did, in the ruling party's perspective. In January 2005, the International Commission of Inquiry on Darfur (ICID), which the Security Council had established to investigate the reports of gross violations of international humanitarian and human rights law,[12] argued that it would 'be consistent for the Security Council, the highest body of the international community responsible for maintaining peace and security, to refer the situation of Darfur and the crimes perpetrated there, to the highest criminal judicial institution of the world community'.[13] Two months later, on 31 March 2005, the Security Council adopted resolution 1593 under Chapter VII of the UN Charter, referring 'the situation in Darfur since 1 July 2002' to the ICC.[14] The ICC Prosecutor also received the list of fifty-one individuals that the ICID had named as suspects in relation to crimes allegedly committed in Darfur.[15]

For the Court, the referral was in itself a legal milestone and a political victory. For the first time, its jurisdiction was extended to a state not party to the Statute. Moreover, adopted by eleven in favour to none against, the resolution was an international vote of confidence in the ICC. The US, which had been campaigning against the ICC since its creation precisely because of the Court's potential jurisdiction over nationals of states not parties to its Statute, had initially lobbied the other Security Council members to refer the situation in Darfur to

[10] Signed on 8 September 2000; see www.un.org/millennium/law/sept800.htm.
[11] Interview with a former Minister of Justice, Khartoum, December 2008.
[12] UN Doc. S/RES/1564 (2004):[12].
[13] UN Doc. S/2005/60 (2005):[589].
[14] UN Doc. S/RES/1593 (2005):[1].
[15] Of these, there were ten high-ranking central government officials, seventeen government officials operating in Darfur, fourteen militia members, seven members of rebel movements and three members of foreign armies (UN Doc. S/2005/60 (2005):[531]). The Prosecutor emphasised that the list did not bind him (ICC-OTP 2005a).



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another jurisdiction, for instance a joint African Union/United Nations Special Court for Darfur. But ultimately the US and even China, Sudan's largest trading partner, did not veto the Council's first referral to the ICC.[16]

But the US's acquiescence in the resolution came at a price. First, explicitly recognising that states not parties to the Rome Statute had no obligations under it, the Council required only the GoS and other parties to the conflict in Darfur to cooperate with the Court. Other states and international organisations were merely urged to cooperate fully.[17] Secondly, the Council decided that 'nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State'.[18] For Sudan, these provisions were and would remain evidence of the Council's 'double standards'.[19]

Publicly, Sudan rejected the Security Council's referral and the Prosecutor's opening of an investigation into the situation in Darfur.[20] President Bashir swore 'thrice in the name of Almighty God ... never [to] hand any Sudanese national to a foreign court'.[21] But, outside the view of the Sudanese gallery, the GoS extended some cooperation to the Court. On 2 October 2005, it signed an agreement with the ICC to cooperate with the Court in its case against the LRA.[22] With respect to the Darfur situation, the GoS allowed five diplomatic ICC missions to visit Khartoum to assess questions of admissibility. It made some attempts to convince the OTP that Sudan has a functioning justice system – at one stage, Sudanese postgraduate theses were collected 'to show that Sudan has able

[16] For the US considerations, see Kaufman 2006.
[17] UN Doc. S/RES/1593 (2005):[2]. [18] *Ibid.*:[6].
[19] UN Doc. S/PV.5158 (2005):12 (Mr Erwa). Not just for Sudan: for Brazil they were a reason to abstain instead of vote in favour: 'the referral should not be approved at any cost' (*ibid.*:11, the President, speaking in his capacity as representative of Brazil).
[20] *First Darfur Report*:5. See also ICC-OTP 2005b.
[21] Hoge 2005. See also Baldo 2007:3.
[22] *Request for a Finding of Non-cooperation in Harun and Kushayb*:[45].



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judges, who are academically qualified'.[23] Sudan never officially denied ICC criminal investigators access to Darfur, simply because the ICC Prosecutor, arguing that it would be too dangerous for ICC staff and for witnesses cooperating with the Court,[24] in fact never sent them.[25]

All cooperation came to an abrupt end, however, when, nearly two years after the referral, the ICC Prosecutor applied for summonses to appear, or in the alternative warrants of arrest, for Ahmad Muhammad Harun and Ali Muhammed Abd-al-Rahman, also known as Ali Kushayb.[26] The then Minister of State for Humanitarian Affairs and the militia leader, respectively, were alleged to bear criminal responsibility in relation to fifty-one counts of crimes against humanity and war crimes. According to the Prosecutor, Harun, as Minister of State for the Interior and head of the 'Darfur Security Desk' at the time, recruited, funded, armed and incited militias, knowing that they would commit crimes such as murder, rape, torture, pillaging and forcible transfer of civilian populations.[27] He was alleged to have committed these crimes together with Kushayb, the 'colonel of colonels' of the militias in West Darfur.[28]

In response to the OTP's charges against Harun and Kushayb, Sudan broke off all communication with the ICC. The Sudanese Embassy in The Hague literally refused to open the door to accept the arrest warrants.[29] No more ICC delegations were welcome in Sudan. In 2010, when three years after their issuance the Court's warrants for Harun and Kushayb remained unexecuted, the ICC Pre-Trial Chamber (PTC) informed the Security Council of Sudan's lack of cooperation.[30]

[23] Interview with a senior legal advisor in the Ministry of Justice, Khartoum, November 2008.

[24] See, *inter alia*, *First Darfur Report*:4, *Third Darfur Report*:1, and *Fourth Darfur Report*:3.

[25] According to an ICC official in a phone discussion in June 2009, there has been one interview of potential relevance to criminal investigations, which took place with a senior army officer during a visit by the OTP's Jurisdiction, Complementarity and Cooperation Division (JCCD) to Khartoum.

[26] *OTP Application Harun and Kushayb*. [27] *Ibid.*:4–5. [28] *Ibid.*:5–6.

[29] *Decision Arrest Warrant Bashir PTC*:[229].

[30] *Decision Non-cooperation Sudan in Harun and Kushayb*. The decision lacks an operative paragraph actually finding non-cooperation by Sudan. On the poor drafting of the decision, see Sluiter 2010.



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But the nadir in Sudan–ICC relations was reached when, on 14 July 2008, the Prosecutor requested an arrest warrant against the Sudanese President. The Prosecutor's allegations that Omar Hassan Ahmad al-Bashir had committed, through the state apparatus, crimes against humanity, war crimes and genocide,[31] turned the Court, and particularly Prosecutor Ocampo, into the arch-enemy of the Sudanese state.[32] The Sudanese National Assembly resolved that the signing of the Rome Statute by the GoS was 'considered not to have taken place'[33] and Sudan 'unsigned' the Rome Statute,[34] ironically following the precedent set by Sudan's ultimate political foes, the US and Israel.

Sudan's 'unsigning' did not prevent the ICC judges from issuing in 2009, for the first time in the Court's history, a warrant for an incumbent head of state, on counts of war crimes and crimes against humanity.[35] After instructions from the Appeals Chamber to use a different standard of proof,[36] the PTC in 2010 also issued, equally for the first time in the Court's history, a warrant of arrest in respect of the crime of genocide.[37] Arrest warrants notwithstanding, President Bashir won the 2010 presidential elections and travelled to various countries, including states parties to the Rome Statute, without being apprehended.

In 2008, while the judges were considering the Prosecutor's request for an arrest warrant against the Sudanese head of state, the Prosecutor also brought a case against three members of armed movements fighting the Sudanese Government. He accused them of war crimes committed during an attack on the African Union Mission in Sudan in the Darfurian village of Haskanita.[38] In the opinion of a

[31] *Application Arrest Warrant Bashir* and ICC-OTP 2008a.

[32] Sudanese authorities have described the ICC Prosecutor as, among other things, 'the mercenary of death and destruction' ('Sudanese ambassador to UN lashes at Ocampo' 2009), 'a fugitive of Sudanese justice' and someone practising 'criminal tourism' ('Sudan says ICC prosecutor "messenger of destruction"' 2009).

[33] Decision No. 2 of the Emergency Session of the National Assembly to Refuse to Ratify the Rome Statute of the International Criminal Court 2008. See also Decision No. 1 of the Emergency Session of the National Assembly: Rejection of the Accusations of the Prosecutor of the ICC against Leading Officials of the State headed by the President of the Republic 2008.

[34] It did so by a notification to the UN Secretary-General of 27 August 2008 (see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en).

[35] *Decision Arrest Warrant Bashir (PTC).* [36] *Judgment Arrest Warrant Bashir (AC).*

[37] *Second Decision Arrest Warrant Bashir (PTC).*

[38] *Summary Prosecutor's Application Haskanita.*



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government legal advisor, the Prosecutor brought this case only because he 'wanted to convince the world that he is neutral'.[39] But he did not convince the GoS. Indeed, the facts that all three suspects voluntarily cooperated with the Prosecutor and obeyed summonses to appear, that the judges declined to confirm the charges against one of them on grounds of insufficient evidence linking him to the alleged crimes,[40] and that the other two suspects reached agreements with the prosecution on undisputed facts,[41] only increased the Sudanese Government's suspicion that the case against its opponents was a put-up job.

In 2011, the ICC Prosecutor's request for an arrest warrant for the then Minister of Defence, Abdel Raheem Muhammed Hussein, on the ground that, in his previous position as Minister of the Interior and the President's Special Representative in Darfur, he had made 'essential contributions to the Common Plan' that led to the crimes of which Ahmed Harun and Ali Kushayb had been accused[42] did not elicit any strong response from the Sudanese government. Nor did the PTC's issuance of the requested warrant in March 2012.[43] ICC accusations against its officials had become business as usual.

## Complementarity: less than a secondary response

Sudan's total rejection of the Court has been accompanied by a total rejection of its Statute, including the principle of complementarity. In the eyes of the GoS, the ICC is just another international political instrument that Western powers in the Security Council use selectively to topple governments of which they do not approve[44] – an

[39] Interview with an NCP lawyer, Khartoum, July 2011. Another political consideration could have been the need to convince the African Union, which had been very critical of the Prosecutor's request for an arrest warrant against President Bashir, that the Court also prosecutes crimes committed against AU personnel.

[40] *Decision Confirmation of Charges Abu Garda*. The Prosecutor's request for leave to appeal this decision has been declined (*Leave to Appeal Decision Confirmation Abu Garda*).

[41] *Joint Submission Confirmation Banda and Jerbo* and *Joint Submission Trial Banda and Jerbo*.

[42] *Summary Prosecutor's Application Hussein*.

[43] *Decision Arrest Warrant Hussein*.

[44] See e.g. Sudan Bar Association 2008e:2 ('[T]here are two states who are permanent members of the Council who adopt negative policies against the Sudanese government and who consider such government as being unworthy to exist.') and an interview with a senior legal advisor to the NCP, Khartoum, July 2011 ('Why does the West want to diminish us? This is a clash of civilisations. Since the collapse of the Soviet Union there is Islamophobia.').



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instrument which engages in regime change by arrest warrant.[45] Its political character became impossible to deny, in the GoS's view, when the Prosecutor brought charges against the Sudanese head of state. Confronted with this political measure, Sudan had to address its 'ICC crisis' politically, so the Sudanese government and its legal advisors reasoned.[46] According to an Arabic saying quoted by one National Congress Party lawyer, Sudan must stab the elephant (the political move by the Security Council) rather than the shadow (the legal niceties of the ICC framework).[47] In other words, instead of pursuing inadmissibility of the Prosecutor's cases on grounds of complementarity in the ICC, the GoS pursued political decisions in the Security Council. It wanted the Security Council to 'withdraw' the referral, suspend the ICC proceedings 'indefinitely' or 'cancel' the arrest warrants, powers for which the Statute does not provide.[48] As a second best, it aimed for a deferral of ICC proceedings by the Security Council pursuant to article 16 of the Statute and Chapter VII of the UN Charter, although it preferred not to state this publicly, as reference to article 16 could be taken to suggest recognition of the applicability of the Rome Statute.[49]

It was the desire to obtain goodwill in the Security Council, more than complementarity, that catalysed all kinds of GoS action. However, while the Rome Statute is relatively clear on what a state should do to render a case inadmissible before the ICC, the Western permanent members of the Security Council did not indicate specific measures that Sudan must take for them not to veto a potential resolution deferring the ICC proceedings. At most, they specified that Sudan would have to make 'meaningful steps',[50] take 'bold, concrete action

[45] At the same time, GoS officials argue, the Security Council refuses to do justice in Iraq, Afghanistan and Israel and exempts the US and peacekeepers from the Court's jurisdiction (interview with a former Minister of Foreign Affairs, Khartoum, November 2008, interview with a former Chief Justice, Khartoum, December 2008, interview with a former Minister of Justice, December 2008 and Sabderat 2008:[11]; see also El-Gizouli 2009:261 and Tisdall 2011).

[46] See e.g. Sudan Bar Association 2008d:4.

[47] Interview with an NCP lawyer, Khartoum, November 2008.

[48] See e.g. Mirghani 2009 ('Al-Bashir . . . call[ed] for the revoking of his indictment and warrant for arrest, and not just its suspension, "otherwise it is up to them to cancel it and drink its water" [an Arab insult]' (second insertion in original).

[49] Interview with an NCP legal advisor, Khartoum, November 2008.

[50] Van Oudenaren 2008, citing the US Special Envoy for Sudan.



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for peace in Darfur, reflected in real change on the ground'[51] and implement a 'radical and immediate change'[52] in its policies. In response, the GoS agreed to set up a human rights forum with the UN; announced a new policy for internally displaced persons; committed extra money to the Darfur compensation fund; stated its willingness to re-open the Darfur Peace Agreement; declared a unilateral ceasefire (but violated it within a few days); improved its facilitation of deployment of UN peacekeepers in Darfur; launched the 'Sudanese People's Initiative', a meeting for Sudanese of all political colours to brainstorm solutions to the Darfur conflict; expressed support for a Qatari peace initiative; appointed a long-overdue civilian administration for the contested area of Abyei; and extended the moratorium on restrictions on humanitarian aid two months before it expired (while in previous years this was done only at the last moment).[53] All these measures, announced soon after the Prosecutor had requested an arrest warrant for the Sudanese President, were political responses to what the GoS considered political demands, and aimed at obtaining international political credit.

To the limited extent that Sudanese officials did respond in legal terms to the ICC's involvement, the main argument has been that the Court lacks jurisdiction. The following legal reasoning can be sifted from the writings of the Sudanese Bar Association, which does not hide the fact that it writes on behalf of the GoS,[54] as well as from official statements and interviews with government officials.[55]

The first prong of the GoS's objections focuses on the Rome Statute. The argument is that, as a treaty, the Rome Statute cannot bind states that are not parties to it.[56] For support, the GoS points to Security Council resolution 1422 (2002),[57] because it implicitly

[51] Response of the UK Secretary of State for Foreign and Commonwealth Affairs, Seventh Report from the Foreign Affairs Committee Session 2008–09, Annual Report on Human Rights 2008, Cm 7723, cited in UKMIL 2010:872.
[52] Bouwknecht 2008, quoting French President Sarkozy.
[53] See also Polgreen and Gettlemen 2008.
[54] Sudan Bar Association 2008c and interview with an NCP lawyer, Khartoum, November 2008.
[55] Not discussed here is the other (obviously unsuccessful) argument that the Prosecutor could not charge the President with genocide since the ICID had found that no genocide had been committed (Sudan Bar Association 2008e:1).
[56] Sabderat 2008:[9] and Sudan Bar Association 2008b:11, referring to the Vienna Convention on the Law of Treaties, art. 34.
[57] Sudan Bar Association 2008e:3 and Sabderat 2008:[10].



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provides, in the context of international peacekeeping, that only states parties have accepted the Court's jurisdiction.[58] The Rome Statute, GoS lawyers submit, must be interpreted in accordance with the fundamental – according to some Sudanese lawyers even peremptory[59] – rule of customary international law that a treaty cannot bind states not parties to it. Hence, so the argument goes, article 13(b) of the Rome Statute, which provides for Security Council referral of a situation to the Court, must be read to mean that the Security Council can refer situations involving states parties only.[60] This is confirmed, so the argument continues, by article 4(2), which stipulates that the Court 'may exercise its functions and powers . . . on the territory of any State Party and, by special agreement, on the territory of any other State',[61] and by article 87(5), which regulates such special agreements.[62] Moreover, the Sudanese lawyers argue,[63] operative paragraph 2 of resolution 1593 is internally contradictory and violates the basic principle that there should be no discrimination in the application of a single legal rule: the clause obliging Sudan to cooperate with the Court at the same time recognises the fundamental rule that 'States not party to the Rome Statute have no obligation under the Statute'. Such 'intellectual dishonesty', which by these

[58] UN Doc. S/RES/1422 (2002): 'The Security Council . . . Noting that not all States are parties to the Rome Statute, Noting that States Parties to the Rome Statute have chosen to accept its jurisdiction in accordance with the Statute and in particular the principle of complementarity, Noting that States not Party to the Rome Statute will continue to fulfil their responsibilities in their national jurisdictions in relation to international crimes . . . Acting under Chapter VII of the Charter of the United Nations, 1. Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.' On resolution 1422 (2002), see also Weller 2002.

[59] Sudan Bar Association 2008d:8, 14, 15 and 17, argues that, since this is a dispute about a peremptory rule, it can be submitted to the International Court of Justice pursuant to VCLT, art. 66(a). However, there is little evidence to prove that the *pacta tertiis nec necent nec prosunt* rule of art. 34 is *jus cogens*.

[60] Sudan Bar Association 2008e:2, Sudan Bar Association 2008b:6 and Sudan Bar Association 2008d:3.

[61] Sudan Bar Association 2008b:3 and interview with a former Minister of Foreign Affairs, Khartoum, November 2008.

[62] Interview with an NCP lawyer, Khartoum, November 2008.

[63] Sudan Bar Association 2008e:3.



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accounts demonstrates that only Sudan is targeted, is also said to be on display in paragraph 6, cited above, which excludes certain foreign persons in Sudan from the Court's jurisdiction.[64]

Most of these arguments are not convincing, most evidently because article 13(b) read with article 12(2) of the Statute clearly provides that the Security Council can refer a situation in a state not party to the Statute. Articles 4(2) and 87(5) concern the exercise and not the existence of jurisdiction. Sudan's strongest ground for objection is probably operative paragraph 6. It could argue that, by trying to exclude a category of persons from the Court's jurisdiction, the Security Council did not refer a 'situation' as such and that, since the Rome Statute allows the Council to refer only a 'situation',[65] the Court's jurisdiction has not been triggered.[66]

The second prong of the GoS's objections concentrates on the UN Charter. The argument is that, even if the Statute were to allow a referral of a situation in a state not party to the Statute, the Security Council does not have the competence under the UN Charter to make a referral to the ICC.[67] According to the Sudanese lawyers advising the GoS, the Security Council cannot refer a matter to an organisation that is not part of the UN[68] or make a state a party to a treaty. Additionally, they maintain that the situation in Darfur should be considered a matter of internal affairs. Indeed, for this reason, the world had never opened investigations into crimes committed in Southern Sudan, so the Sudanese lawyers argue.[69]

These arguments do not hold much water. The Security Council has not made Sudan a party to a treaty,[70] but has referred a situation to

[64] Interview with an NCP lawyer, Khartoum, November 2008. Others, such as a senior legal advisor in the Ministry of Justice interviewed in Khartoum in November 2008, argued that resolution 1593 as a whole is internally inconsistent, calling as it does for peace, justice and national reconciliation at the same time. They argued that it would be difficult for the government to implement all clauses simultaneously.

[65] See Chapter 2, 'Other jurisdictional provisions: the triggers'.

[66] *Ibid.*

[67] Sudan Bar Association 2008e:5, Sudan Bar Association 2008d:2, 6 and Sabderat 2008:[15].

[68] Sudan Bar Association 2008e:2.

[69] Interview with an NCP lawyer, Khartoum, November 2008; Sudan Bar Association 2008e:2 and interview with a long-serving member of parliament, Khartoum, November 2008 ('Nobody intervened in the South. Nobody said that international law had to be applied.').

[70] On the consequent lack of clarity as to the legal regime applicable to Sudan, see Sluiter 2010.



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an existing Court. Just as the Council has been considered to have the competence to establish international tribunals by resolution,[71] so it has the power to refer matters to existing courts.[72] As regards the determination of whether a situation constitutes a threat to international peace and security,[73] the Security Council has always had substantial discretion.[74]

Its rejection of the Rome Statute notwithstanding, Sudan *has* alluded, albeit in a subsidiary fashion, to the principle of complementarity. Ever since the Security Council's referral, many official statements disputing the Court's jurisdiction, while opening with the fact that Sudan is not a state party, have continued immediately with a comment about the 'ability and willingness' of the Sudanese legal system.[75] For instance, the Minister of Justice told an ICC delegation in early 2007: 'We as a government are willing and able to try all perpetrators of offences in Darfur, and for this reason the ICC has absolutely no right to assume any jurisdiction.'[76] A year later, just after the request for the Bashir arrest warrant, the new Minister of Justice told the African Union Peace and Security Council:

> The Sudan does not condone impunity and would prosecute crimes of all sorts. Sudan is not governed by the law of the jungle. It is a responsible State with an independent judicial system. The principle of complementarity constitutes the core premise of the Court and gives primacy to national jurisdictions.[77]

However, the more entrenched Sudan became in its rejection of the Court, the more careful officials became about making references to complementarity. They began to argue that a rejection of the applicability of the Statute means a rejection of the entire framework,

[71] ICTY, *Tadić Defence Motion Decision (AC)*:[26]–[48].

[72] In UN Doc. S/RES/1192 (1998), although it did not 'refer' a case to an existing court, the Security Council did oblige Libya to cooperate with a Scottish court trying Libyan defendants on Dutch territory.

[73] In various earlier resolutions, e.g. in UN Doc. S/RES/1556 (2004) and UN Doc. S/RES/1564 (2004), the Council had already determined that the situation in Darfur constituted a threat to international peace and security.

[74] ICTY, *Tadić Defence Motion Decision (AC)*:[28]–[30].

[75] UN Doc. S/PV.5158 (2005):12, 'Sudan reiterates opposition to try Darfur suspects before ICC' 2005 and 'Sudan on collision course with UN over Darfur trials' 2005. See also Sudan Bar Association 2008a:3–4 and Sabderat 2008:[16], [17] and [19].

[76] De Montesquiou 2007. [77] Sabderat 2008:[16].



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complementarity included.[78] 'Arguing complementarity', a senior Sudanese legal official warned, 'might be a trap', as by challenging admissibility on this ground Sudan would recognise the Court's jurisdiction.[79] Sudan has hired Western lawyers and has instructed them to find avenues for challenging the Court's jurisdiction without recognising the Court.[80]

## Complementarity: the views of the ICID and the ICC

Complementarity was already assessed before any specific Darfur case was brought before the Court. The International Commission of Inquiry on Darfur (ICID) considered factors relevant to complementarity when it recommended that the Security Council refer the situation in Darfur to the ICC. It contended:

> The Sudanese justice system is unable and unwilling to address the situation in Darfur. This system has been significantly weakened during the last decade. Restrictive laws that grant broad powers to the executive particularly undermined the effectiveness of the judiciary. In fact, many of the laws in force in Sudan today contravene basic human rights standards. The Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity such as those carried out in Darfur and the Criminal Procedure Code contains provisions that prevent the effective prosecution of these acts. In addition, many victims informed the Commission that they had little confidence in the impartiality of the Sudanese justice system and its ability to bring to justice the perpetrators of the serious crimes committed

[78] See e.g. Sudan Bar Association 2008e:3, Sudan Bar Association 2008b:3 and interview with an NCP member of the Legal and Parliamentary Affairs Committee of the National Assembly, Khartoum, November 2008 ('We do not need complementarity; we have our own jurisdiction.').

[79] Interview with a member of the office of the Special Prosecutor for Darfur, December 2008. Similarly, interview with an NCP lawyer, Khartoum, November 2008.

[80] 'Sudan hires UK law firm to handle ICC indictment of Bashir' 2008. One of the ideas has been to have the UN General Assembly request an advisory opinion from the ICJ on the competence of the Security Council to refer a situation to the ICC (interview with a law professor, Khartoum, November 2008). Sudanese 'trade' organisations and a 'non-governmental' committee of Sudanese citizens, established out of concern about the negative effects that ICC arrest warrants could have on the peace process in Sudan and on ordinary Sudanese, have also hired European lawyers, who produced an application for *amicus curiae* status in which they warned of the political consequences of an arrest warrant for the President. See *Application Citizens' Organisations of the Sudan*.



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> in Darfur. In any event, many feared reprisals if they resorted to the national justice system.[81]

It added:

> The measures taken so far by the Government to address the crisis have been both grossly inadequate and ineffective … The reality is that, despite the magnitude of the crisis and its immense impact on civilians in Darfur, the Government informed the Commission of very few cases of individuals who have been prosecuted or even simply disciplined in the context of the current crisis.[82]

Elsewhere in the report, the Commission explained that its 'recommendation for a Security Council referral to the ICC [was] based on the correct assumption that Sudanese courts are unwilling and unable to prosecute the numerous international crimes perpetrated in Darfur since 2003'.[83] In other words: 'The Sudanese justice system has demonstrated its inability and unwillingness to investigate and prosecute the perpetrators of these crimes.'[84]

The fact that the Commission considered complementarity is of note. All the Rome Statute requires for a referral by the Security Council is that the Council acts under Chapter VII of the UN Charter,[85] which for its part does not require any consideration other than whether there exists a threat to the peace, breach of the peace, or act of aggression.[86] In other words, an assessment of admissibility, including complementarity, is not a legal requirement for a Security Council referral. But the ICID had good reasons to consider complementarity as a factor relevant to the Security Council's decision-making on a referral. Pragmatically, a referral would be rather ineffective if subsequently the Prosecutor or judges would find all cases inadmissible on grounds of complementarity. Politically, the ICID may have considered that normative considerations may add legitimacy to what remains a political decision by the Council.

However, while borrowing the principle of complementarity from the Rome Statute, the ICID put its own spin on the application of the admissibility rule. First, as laid down in the Rome Statute, complementarity requires an assessment of a state's willingness and ability genuinely to conduct proceedings only if there is an affirmative answer

[81] UN Doc. S/2005/60 (2005):[586]. [82] *Ibid.*:[587]. [83] *Ibid.*:[609].
[84] *Ibid.*:[647]. [85] RS, art. 13(b). [86] UN Charter, art. 39.



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to the question whether there are or have been such domestic proceedings.[87] The ICID, however, began with and focused on an assessment of willingness and ability.[88] Secondly, while according to the Statute the decisive factor as to whether a case is admissible is whether there are or have been proceedings in that case conducted by a state willing and able to conduct those particular proceedings genuinely,[89] the ICID assessed Sudan's overall justice system, separate from any concrete proceedings.[90]

The ICC Prosecutor, for his part, began to discuss complementarity almost immediately after the referral. Upon receipt of the ICID document archive, the Prosecutor announced to the press his next steps. He did not just have to assess the crimes, he said:

> I have an additional duty: to assess national proceedings. The Sudanese authorities report they have begun investigations. This could be very important. I will carefully and independently assess these proceedings.[91]

He opened an investigation having established, with respect to admissibility, 'the existence of sufficient information to believe that there are cases that would be admissible in relation to the Darfur situation'.[92] However, contrary to the ICID, which had concluded that the Sudanese justice system as a whole was 'unable and unwilling', the Prosecutor emphasised that his decision on admissibility did 'not represent a determination on the Sudanese legal system as such, but [was] essentially a result of the absence of criminal proceedings relating to the cases on which the OTP is likely to focus'.[93]

When the OTP brought its first case in the Darfur situation, that against Ali Kushayb and Ahmad Harun, it elaborated on the admissibility of the case. The Under-Secretary of the Sudanese Ministry of Justice had informed the Prosecutor that Sudan had collected information on, among others, Kushayb. The OTP observed, however, that there was no reason to believe that the case against Harun and

[87] See Chapter 2, 'The substance of complementarity: the criteria for inadmissibility'.
[88] See the order of the discussion in UN Doc. S/2005/60 (2005):[586] and [587], cited above, nn. 81 and 82. See also the discussion of complementarity in [606] as 'the principle whereby the Court only steps in when the competent national courts prove to be unable or unwilling genuinely to try persons accused of serious international crimes falling under the Court's jurisdiction'.
[89] See Chapter 2, 'The substance of complementarity: the criteria for inadmissibility'.
[90] See n. 81. [91] ICC-OTP 2005c. [92] *First Darfur Report*:4. [93] *Ibid.*



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Kushayb would be inadmissible. It noted that the Sudanese investigations concerned neither the same person, in the case of Harun, nor the same conduct, in the case of Kushayb.[94] The PTC reiterated the same-person–same-conduct test and also found that the case against Harun and Kushayb appeared admissible.[95]

Absent any hint of Sudanese investigations into the Sudanese President, no such elaboration on complementarity was needed in any of the ICC proceedings related to President Bashir.[96] In the Haskanita village case, too, the PTC simply adopted the Prosecutor's information, not contested by any party to the proceedings, that no state with jurisdiction over the case had investigated or prosecuted the case.[97]

In none of these cases did the GoS challenge admissibility. Denying the Court's jurisdiction, it dismissed any relevance of the Rome Statute, including the principle of complementarity. And yet, complementarity did catalyse some effects in Sudan. The fact that some of these are legal in character does not change the fact that they were part of a political response, primarily aimed at the Security Council. Before discussing these effects, however, it is necessary to provide some basic background to a complex conflict.

## The Darfur conflict

The once independent state of Darfur became a periphery to the powerful capital and markets of Khartoum early in the twentieth century. Since Sudan's independence in 1956, ecological and economic stress aggravated by the political misuse of ethnicity all fostered long-term instability in the region. In 2003, recurring violence turned into a full-scale rebellion when armed movements mobilising around ethnicity and using discourses of marginalisation[98] directly attacked government positions in Darfur.[99] The Sudanese Government

[94] *OTP Application Harun and Kushayb*:[267]. See also Chapter 2, 'The "same case" requirement: same person, same conduct, same incidents?'

[95] *Decision Arrest Warrants Harun and Kushayb*:[24]–[25].

[96] See *Application Arrest Warrant Bashir*:[3], *Decision Arrest Warrant Bashir (PTC)*:[46]–[51] and *Second Decision Arrest Warrant Bashir (PTC)*:[44].

[97] *Decision Confirmation of Charges Abu Garda*:[29] and *Confirmation of Charges Banda and Jerbo*:[28].

[98] See, *inter alia*, Seekers of Truth and Justice 2000 and SLM/SLA 2003.

[99] More extensively on the conflict, see the sources mentioned in the references of this section and, *inter alia*, AU Doc. PSC/AHG/2(CCVII) 2009, Flint and De Waal 2008, Prunier 2005, Hassan and Ray 2009a, Tanner 2004, Tubiana 2009 and Tubiana 2010.



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responded with a forceful counter-insurgency campaign, bombing entire villages that it considered militarily or politically supportive of the rebels. On the ground, it mobilised tribal militias, whose tactics gained for them worldwide notoriety as the *Janjaweed*, in exchange for arms, money and positions in state organs such as the Popular Defence Forces, the Central Reserve Police and the Border Guards. Most of these pro-government militias hailed from Darfurian and Chadian camel-herding tribes who felt marginalised by comparison to other Darfurian groups owing to their weak titles to land. Their opponents, the members of the rebel movements, mostly belonged to the more sedentary tribes with stronger land rights. With the former emphasising Arab lineage[100] and the latter African descent,[101] the conflict centrifuged identities that used to overlap.[102] For instance, people that used to describe themselves as Muslim/Sudanese/Fur with some Rizeigat ties began to refer to themselves as 'African' to show their position in a conflict that was internationally described as 'Arab versus African'.

The scale and character of the violence and its consequences have been heavily contested. The estimated figure of conflict-related deaths ranges between 10,000 (GoS statistics) and 400,000 (Save Darfur Coalition).[103] The United Nations have reported that at least 2.7 million people have been displaced.[104] International opinion has been divided as to whether the crimes committed in Darfur amount to genocide.[105] But killing of civilians, torture, enforced disappearances, destruction of villages, sexual violence, pillaging and forced displacement committed by the militias and government forces, and to a lesser

[100] Note that Arab tribes with stronger land rights, mostly cattle-herding tribes, have for the most part refrained from joining the government's counter-insurgency campaign. See also Tanner 2005:22, Babiker 2002:8–10 and De Waal and Young 2005:[38].

[101] Note, however, that there are also 'Arab' farmers and 'African' nomads (Tubiana 2006:112) and that many nomads have adopted a transhumant lifestyle (Willemse 2009:217).

[102] See also AU Doc. PSC/AHG/2(CCVII) 2009:11, Mamdani 2009:107 *et seq.*, Hassan and Ray 2009b:17–19 and De Waal 2004b.

[103] On the politics of Darfur death-rate statistics, see Dealy 2007, Hagan and Rymond-Richmond 2009:Chapter 4, Mamdani 2009:25–39 and Degomme and Guha-Sapir 2010.

[104] 'At five-year mark, Darfur crisis is only worsening – UN aid chief' 2008.

[105] Cf. *contra* UN Doc. S/2005/60 (2005), arguing that the crimes committed in Darfur do not amount to genocide, with US Secretary of State Powell (as described in Crook 2005) stating that they do. See also Cayley 2008.



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extent by the movements, have been widely reported, particularly for the first three years of the war.[106]

Since 2005, the systematic attacks against villages inhabited by groups perceived as ethnic constituencies of rebel movements, characteristic of the early years of the conflict, have decreased. By 2008, the conflict could be considered 'low-intensity'.[107] Rebel groups, some more resembling criminal gangs than political movements, have splintered, changed allegiances, reunited and splintered again. Militias, not seeing their services to the government rewarded, have gone solo or joined the rebel movements.[108] Some militias have been fighting each other over the land of displaced persons. With arms widely circulating in the region, the government lacking control over large parts of the territory and peacekeepers having neither the mandate nor the ability to enforce law and order, the lawlessness that first fostered the conflict has become entrenched. An armed conflict between rebel movements and a government has turned into a situation of permanent insecurity in which the government, various movements, their splinter factions, and militias fight each other and among themselves, depending on the alliance of the day. The insecurity has ripped the region's social fabric and divided the population along ethnic lines, increasing the prospects for persistent inter-communal war.[109]

An analysis of the conflict in Darfur defies reduction to a single and stable 'root cause'. While it originates from local experiences of a threatened existence owing to contested land rights in the context of desertification, the Darfur conflict is inseparable from national and regional politics.[110] Like the conflicts in southern and eastern Sudan,[111] the Darfurian rebellion has to a large extent been about marginalisation of the periphery by the few riverine tribes that have run

[106] See e.g. Hagan and Rymond-Richmond 2009 and UN Doc. S/2005/60 (2005).
[107] Charbonneau 2009. [108] See also Flint 2009.
[109] On the consequences of the conflict turning into causes, see Suliman 1997.
[110] On the interrelationships between various conflicts in Sudan, see Johnson 2007, in particular Chapter IX. On the link with world politics, see Mamdani 2009.
[111] See the Comprehensive Peace Agreement 2005 and the Eastern Sudan Peace Agreement 2006. An important difference between the conflict in Darfur and the conflict in what used to be Southern Sudan and now is the independent Republic of South Sudan, is that, whereas the Southern Sudanese claimed the right to external self-determination, the Darfurians consider themselves as quintessential Sudanese, entitled to more of a say at the centre. Since 2010, however, some of the Darfurian armed movements have also made secessionist claims (sometimes invoking the ICJ's Advisory Opinion in *Kosovo*).



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the country since the British–Egyptian condominium ended in 1956.[112] While overt and covert coups and occasional elections have reconfigured the ruling groups at the centre, this centre has always consisted of an elite, disproportionally wealthy in economic, political and social terms, from a relatively small area in and around Khartoum.[113] The continuous power struggles within this elite have reverberated throughout the country. Elites have tried to shift the balance of power to their advantage in the centre by changing it in the periphery; provincial elites have used their allies in Khartoum for the advancement of their local causes.[114]

Accordingly, the conflict in Darfur has been inextricably linked to a rift within the National Islamic Front in Khartoum between President Bashir and his former mentor Hassan al-Turabi.[115] After the falling-out, Bashir remained in power as leader of the National Congress Party (NCP) while Turabi formed his own Popular Congress Party (PCP). Like other parties, the PCP was left out of the NCP's peace negotiations with the Sudan People's Liberation Movement (SPLM). Equally, Darfurian elites felt excluded from the process that would result in the Comprehensive Peace Agreement (CPA), containing power- and wealth-sharing deals that affected the entire country and ushered in South Sudan's independence. Turabi's 'marginalised' elite in Khartoum encouraged ideologically related elites in Darfur, mostly associated with the Justice and Equality Movement (JEM), to rise up against the marginalisation of the Darfurians. The Sudanese Liberation Movement/Army (SLM/A), in turn, was politically and militarily incited by the SPLM, the rebel movement originating in southern Sudan that had set the example of successfully fighting Khartoum's elites with a view to a more inclusive Sudan. With Darfur awash with weapons supplied by the governments of Chad and Libya to their proxies, the rebellion was easily armed.

Several states and international organisations have attempted to bring peace to Darfur by negotiating between the movements and the government.[116] Chad mediated two ceasefires.[117]

[112] See, *inter plurima alia*, Khalid 2009:35 and Yongo-Bure 2009:68.
[113] De Waal 2007:4–8. [114] *Ibid.*:21.
[115] See also De Waal 2004a and Daly 2007:Chapter 12.
[116] See also Flint 2010. More generally on Sudan's divided and divisive peace processes, see Nouwen 2006.
[117] Ceasefire Agreement 2003 and Agreement on Humanitarian Ceasefire 2004.



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The N'Djamena humanitarian ceasefire coincided with a drop in fatalities in Darfur and an improvement in humanitarian access,[118] but did not end the conflict. The African Union (AU) took over and started the Inter-Sudanese Peace Talks on Darfur, most of which took place in the Nigerian city of Abuja. Seven rounds of talks resulted in 2006 in the Darfur Peace Agreement (DPA). However, while the GoS, along with one faction of one of the armed movements (SLM/Mini Minawi) and a host of international observers embraced the DPA, the politically and militarily strongest movements (SLM/Abdul Wahid and JEM) refused to sign.[119] Two Special Envoys from the UN and AU then tried to unite the fissiparous movements, but, when the peace talks reconvened in the Libyan town of Sirte in November 2007, the dominant armed movements were again conspicuous by their absence. Between 2008 and 2011, peace talks took place under the leadership of the AU–UN Joint Chief Mediator in the city of Doha, at the invitation of the Emir of Qatar. The resulting Doha Document for Peace in Darfur (DDPD) was adopted with much fanfare in 2011, but was signed only by the GoS and the Liberation and Justice Movement (LJM), itself more a product of the peace process than a movement with military and political clout on the ground – and therefore described, by one of its competitors, as a 'civil society group armed with water pistols'.[120] SLA/Abdul Wahid did not participate in Doha; JEM did at times, but its ceasefire agreement with the GoS[121] was honoured mostly in the breach and it refused to sign the DDPD. Meanwhile, the African Union Mission in Sudan, initially deployed as a small force to protect the military observers monitoring the implementation of the N'Djamena ceasefire, was transformed into a peacekeeping operation with a mandate that included the protection of civilians and was replaced, in December 2007, by the 'hybrid' AU–UN peacekeeping mission UNAMID.

[118] AU Doc. PSC/AHG/2(CCVII) 2009:[161].
[119] For the reasons to refuse signing, see Abuelbashar 2009:345.
[120] JEM leader Khalil Ibrahim, cited in Murphy and Tubiana 2010:8.
[121] Framework Agreement to Resolve the Conflict in Darfur between the Government of Sudan (GoS) and the Justice and Equality Movement 2010.



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## EFFECTS CATALYSED

Despite the fact that the GoS mostly used political rather than legal arguments, and that when it did use legal arguments it focused on issues of jurisdiction rather than admissibility, complementarity did catalyse some noticeable effects in Sudan. The ICC's involvement generally and complementarity more specifically fostered an interest in transitional justice; triggered the establishment of domestic accountability mechanisms; motivated the adoption of laws on international crimes; put accountability (back) on the agenda of peace negotiations; and, to some extent, provided a boost for traditional justice.

### Fostering interest in transitional justice

'In Sudan, we always forgive the past', stated an interlocutor from the Ministry of Justice when explaining why the concept of transitional justice was new to Sudan.[122] The conflict-related crimes of the past have never been much discussed officially,[123] even though many such crimes were committed in the various conflicts that the country has fought with itself since independence.[124] The general rule for dealing with conflict-related human rights abuses or acts of treason by pacified rebels has been to let bygones be bygones. So, in 1964, General Abboud and his ministers were pardoned for human rights violations committed during their reign;[125] his successors signed an act to restrict legal proceedings for their own acts 'in the public interest';[126] the first civil war for autonomy of Southern Sudan was concluded by an agreement in which the only transitional-justice-related provision was an amnesty clause;[127] and a failed coup attempt in 1976 was followed by a National Reconciliation Agreement and yet another Indemnity Act.[128] In the few instances in which former officials were prosecuted for crimes, it was on charges of treason, corruption or, on one occasion, the smuggling of Jews from Ethiopia to Israel via

[122] Discussion with a representative of the Ministry of Justice, Khartoum, July 2011.
[123] Perhaps with the one exception of the crimes of abduction and enslavement, for which Sudan established a body that had the power to prosecute and to provide restitution. See Thomas 2011.
[124] See, more elaborately, Ajawin 2001. [125] *Ibid.*:119.
[126] Indemnity Act 1966.
[127] Addis Ababa Agreement 1972, Protocols on Interim Arrangements, Chapter III.
[128] Indemnity Act 1977.



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Sudan.[129] Only exceptionally have officials been prosecuted for human rights abuses. In those instances, victims and their families, rather than the state, pursued the cases.[130]

The 2005 Comprehensive Peace Agreement (CPA), concluding what had been at that time Africa's longest civil war, did not contain an amnesty clause since it had been struck out at the insistence of international observers at the peace talks.[131] Instead, a provision calling for a process of national reconciliation was inserted.[132] During the subsequent six-and-a-half-year implementation period, no action was taken upon it. According to many Sudanese officials, the provision has been fully implemented even so: still referring to it as 'the amnesty clause',[133] they consider 'national reconciliation' to be synonymous with forgetting the past.[134]

The CPA illustrates how the various transitional-justice aims of peace, justice and reconciliation have hitherto been ranked in Sudan. The CPA did not set forth a transitional-justice policy, but, to the extent that it nonetheless pursued aims of transitional justice, it was first and foremost peace, secondly distributive justice[135] and to a limited extent legal justice.[136] From a transitional-justice perspective, this exclusive focus on predominantly future-oriented aims missed the component of rectificatory justice, namely, looking back and addressing the direct consequences suffered by individuals due to human rights abuses[137] through retributive and restorative justice. The CPA provided for neither criminal accountability nor reparations (wealth-

[129] See Karadawi 1991. [130] Ajawin 2001:121.
[131] Crawford-Browne, Basha and Alexander 2006:141.
[132] CPA 2005, Chapter II, section 1.7, incorporated in Interim National Constitution 2005 (INC), art. 21.
[133] Interview with members of parliament, Khartoum, November 2008.
[134] Interview with an official of the Ministry of Foreign Affairs, Khartoum, November 2008.
[135] Mani 2002:6 describes distributive justice as 'addressing structural and systematic injustices such as political and economic discrimination and inequalities of distribution that are frequently underlying causes of conflict'. The CPA's provisions on power-sharing, wealth-sharing and self-determination aimed to address political and economic discrimination and inequalities of distribution.
[136] Mani 2002:5 describes legal justice as addressing 'the breakdown or corruption of the rule of law and absence of legal redress, that is a common symptom preceding and during most conflicts'. The CPA's Bill of Rights and the provisions on reform of the judicial system could be classified as promoting legal justice.
[137] See Mani 2002:5.



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sharing between north and south was deemed sufficient). To the extent that reconciliation was aimed for, it was pursued through amnesia. To date, there has been no official truth-finding and no accountability for any of the human rights abuses committed during fifty years of conflict between north and south Sudan.[138] The same holds with respect to the human rights violations committed by several of Sudan's authoritarian regimes outside the context of armed conflict.

The practice fits within the Sudanese legal paradigm, in which crimes committed against civilians, unlike crimes committed against the state (treason) or public morality (adultery and fornication), are considered to be private affairs. It is therefore up to the victim or his or her relatives to initiate prosecution. Police and prosecutors rarely initiate a case in the absence of a complaint and do not follow up if the affected party does not insist. If the affected party persists in pursuing a case involving death or physical injury, it can also decide to settle the case at any time, even after the judge has rendered a decision, by accepting blood money. Also, in *judiya*, a centuries-old mechanism in Darfur that combines mediation and arbitration by respected persons, settlement through compensation is prioritised over truth-telling; the payment of compensation is considered an implicit acknowledgment of wrongdoing. This is also how many Sudanese interlocutors understand the NCP's signature of the CPA, with its concessions to Southern Sudan in terms of power-sharing, wealth-sharing and the right to self-determination. Similarly, some interviewees in Darfur argued that a peace agreement providing for compensation and wealth-sharing would amount to government acknowledgment of crimes.[139]

In Sudan, the ICC's intervention, and to a lesser extent the Rome Statute's principle of complementarity, have led to an unprecedented interest in transitional justice as a field dealing with past human rights abuses and conflict-related crimes. First, the ICC's intervention raised awareness among the Sudanese of the conflict in Darfur, a part of the country that many Sudanese refer to as the 'wild west'. Acknowledgment of the existence of a serious conflict in Darfur is a prerequisite for

[138] In post-independence South Sudan there have been moves at least to acknowledge that crimes were committed, also by southern forces, in the context of the war with Khartoum. See e.g. 'South Sudan's Machar confirms Bor "apology", calls for wider reconciliation' 2011.

[139] Interviews with community leaders, El-Fasher, May 2010.



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any policy of transitional justice for the region. While around the world 'Darfur' has become a household name for massive suffering, the majority of the Sudanese population long seemed unaware of the seriousness of the situation. Censorship, travel restrictions and lack of interest, but also unwillingness and inability to comprehend, fostered ignorance and denial.[140] The May 2008 JEM attack on Omdurman, a twin city of Khartoum, brought the war only a little closer to the nation's consciousness. The ICC's involvement, in particular the arrest warrant against the Sudanese President, raised general awareness that the 'Darfur troubles' are considerable, if only because the conflict looms large in the eyes of dominant foreign powers. Acknowledgment of the scale of the crimes committed remains, however, exceptional. For instance, not only the GoS[141] but also some human rights defenders in Khartoum[142] portray the reports of rape as fabricated. Explaining these reports, a Sudanese doctor argued that these incidents did not involve true 'rape', stating that '[t]he West' – by which he meant Darfur – 'is promiscuous. Western [Sudanese] women are whores.'[143]

Secondly, the ICC's intervention, and again particularly the ICC Prosecutor's accusations against the President, triggered attention on the topic of transitional justice in the Sudanese media, albeit rather one-sidedly: the ICC's involvement in Sudan also led the GoS to limit the space for views diverging from its own. After the request for the arrest warrants against Harun and Kushayb, the media[144] was prohibited from reporting on domestic trials related to Darfur.[145] After the request for the arrest warrant against Bashir, newspapers were censored by the National Intelligence and Security Services (NISS).[146] Knowing that independent articles on the ICC would be

[140] See also Arbour 2006:2 and Assal 2009:289.
[141] 'Sudan president says only DNA test can prove rape in Darfur' 2008.
[142] Interviews with a human rights lawyer, outskirts of Khartoum, November 2008.
[143] Reported by a friend of the doctor, El-Fasher, December 2008. A similar view was expressed by a human rights lawyer in an interview on the outskirts of Khartoum in November 2008. See also Fricke and Khair 2009:278.
[144] Almost all radio and television is under state control; the few private stations have difficulties in obtaining licences or their broadcasts are disrupted.
[145] Ali 2007 and 'Sudan official report to UNSC in September shows no arrest of Kushayb' 2008.
[146] Interview with a Sudanese journalist, Khartoum, November 2008, 'Sudanese police arrest 70 journalists over protest for press freedom' 2008, and an interview with three human rights activists, Khartoum, December 2008. Pre-publication



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cut,[147] some journalists tried to cloak them under discussions of transitional or international justice, but most stopped writing them altogether.[148] The 'debate' on transitional justice in the media was therefore for most of the time a monologue against 'international injustice'.

Nonetheless, owing to the government's own domestic propaganda against the ICC, the public became aware of the government's 'ICC problem'.[149] The posters that decorated the city and the corridors of ministries, banks and the National Assembly, featuring the head of state in the context of the ICC or Darfur, reminded the Sudanese that the President had good reason to worry about his image. One prominent opposition member observed:

> When Ocampo first presented his request, it was so shocking to everybody that they considered it appalling. There was an overwhelming rage and anger. The NCP conducted a nagging mobilisation campaign at the popular level, in the mosques, in the community, among students, working people, in the media. Yet as a result, they have been speaking about the ICC at an hourly, not even a daily, basis. As a result, they [the NCP] have familiarised the idea that the President is a criminal.[150]

censorship was lifted in September 2009, but the announcement was immediately followed by a warning to editors-in-chief that they should 'avoid what leads to exceeding the red lines and avoid mixing what is patriotic and what is destructive to the nation, sovereignty, security, values and its morality' ('UN hails lift of censorship on Sudanese press' 2009). A deputy editor-in-chief immediately commented, 'There is no way [the security services] are going to tolerate anything about security [or] about the International Criminal Court' ('Sudan president lifts press censorship but warns from "exceeding red line"' 2009). The (pro-government) Press Council had already agreed with the security service on a 'journalistic honour code' according to which journalists exercise 'self-censorship' by avoiding reporting on topics that would be censored under normal circumstances.

147 In one week, more than twenty articles related to the ICC were taken out of the newspapers *Al-Midan* and *Ajras Alhurria* (African Centre for Justice and Peace Studies 2009:5).

148 Interview with a Sudanese journalist, Khartoum, November 2008.

149 Interview with a leading figure in the Democratic Unionist Party, Khartoum, December 2008.

150 Interview with a leader of the Umma Party, Khartoum, December 2008.



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Figure 4.3 'No to surrendering any Sudanese citizen to an unjust international court'

While newspapers could not provide the counter-arguments to the government's campaign, the campaign itself kept the issues of international criminal justice and Darfur on the agenda. During the second part of 2008 and much of 2009, the arrest warrant against the President made the ICC the talk of the town.



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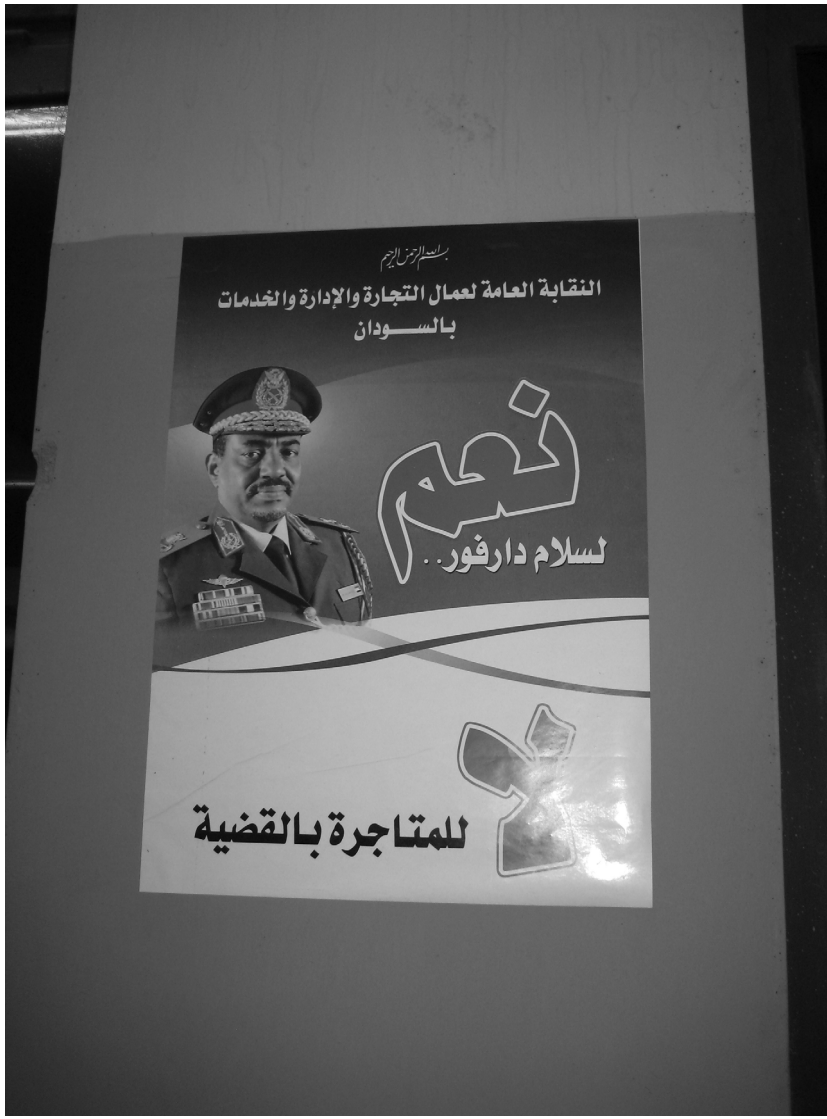



Figure 4.4 'Yes to peace in Darfur; No to commercializing the cause'

Posters of a defiant Omar al-Bashir stayed in the streets and on the windows of taxi mini-vans, but the context of the battle in the 'international court of injustice' gradually changed into that of the 2010 presidential elections. According to insiders, Bashir, tired after



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twenty-one years of being in charge, had considered handing over to a protégé in the NCP. However, facing an arrest warrant from the ICC, Bashir reckoned that he could not risk losing the protection provided by the Republican Palace. By the time he emerged victorious in the elections, public attention on the ICC had subsided: the ICC had proved to be another international actor too weak to defeat the NCP.

The opposition parties continued to have some interest in the ICC and transitional justice. While never publicly debating the topic – the National Assembly rejected the ICC Prosecutor's charges against the President without discussion – the parties internally deliberated on how to position themselves *vis-à-vis* the ICC. Some political elites reflected on broader questions of transitional justice, for instance, whether lessons could be learnt from experiences in South Africa and Morocco.[151]

Political parties' interest was not so much in justice *per se*, but in the potential costs and benefits of ICC intervention for their position in the political arena. Most of Sudan's northern opposition parties dismissed the NCP's policy of denial and spoke in favour of legal engagement with the Court,[152] but opposed the Prosecutor's request for an arrest warrant for the President, fearing his arrest would result in a 'Somalisation' of Sudan, and cautious not to be seen as unpatriotic by expressing support for an international court that criminalised the head of the Sudanese state. Only parties with a stated agenda of regime change publicly hailed Prosecutor Ocampo's move against the Sudanese President. In addition to the Darfurian armed movements, the ousted ideological mastermind of Bashir's regime, Hassan al-Turabi, advocated Bashir's being tried in The Hague[153] – and was immediately jailed (again).[154]

The political considerations are best illustrated by those of the SPLM, the long-term military opponent of the NCP and its

[151] See e.g. El-Gizouli 2009:271–2.

[152] Interview with members of the National Democratic Alliance, Democratic Unionist Party and SPLM, Khartoum, November 2008, interview with a member of the Democratic Unionist Party, December 2008, Polgreen and Gettlemen 2008 and Secretariat-General of the Sudan Communist Party 2008.

[153] Interview with Hassan al-Turabi, leader of the Popular Congress Party, Khartoum, November 2008 and 'Turabi calls on Sudan's Bashir to face ICC charges' 2009.

[154] 'Sudan's Turabi jailed over Bashir remarks; family says no regrets' 2009.



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predecessors until the CPA's power-sharing agreement transformed it into the major government coalition partner between 2005 and 2010. When the Prosecutor requested an arrest warrant for the President, the SPLM advocated engagement with the Court, but rejected the charges against the President.[155] Privately admitting that the party would not mind seeing Bashir prosecuted one day, SPLM representatives dreaded that Bashir might be successful in portraying Ocampo's move as an attack on the nation, thereby increasing the NCP's chances in the 2010 elections.[156] The SPLM was also soon confronted with the financial costs of the ICC–Sudan row: Southern Sudan missed out on highly valuable EU development funding owing to the NCP's refusal to ratify the amended Cotonou agreement according to which '[t]he Parties shall seek to take steps towards ratifying and implementing the Rome Statute'.[157] Southern Sudan would equally have to pay if the Security Council were to impose sanctions for Sudan's lack of cooperation with the Court.[158] The SPLM's greatest fear was that the NCP would use the ICC's intervention to declare a national state of emergency, which had been lifted only after the signing of the CPA in 2005, and cancel the 2010 elections and the referendum on an independent Southern Sudan that was planned for 2011.[159] SPLM politicians also wished to avoid the scenario in which the ICC would cause Bashir's downfall and hardliners within the NCP would take over and unilaterally scrap the right of external self-determination that the CPA granted to the South Sudanese. For the SPLM, the costs of siding with the ICC were too high.

But the SPLM's position *vis-à-vis* the ICC began to change once it had secured South Sudan's independence in July 2011 and its army, ousted from the contested area of Abyei, resumed the war in Sudan's

[155] Such engagement could entail challenging jurisdiction, admissibility and evidence, or handing over Harun and Kushayb (SPLM 2008, interview with an SPLM member of parliament, Khartoum, November 2008 and 'Interview: Deng Alor [Minister of Foreign Affairs], "There are two outlooks inside the ICC Crisis Management Committee"' 2008).

[156] Interview with a prominent member of the SPLM, Khartoum, November 2008 and Polgreen and Gettlemen 2008.

[157] Agreement amending the Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States and the European Community and its Member States 2005, in particular art. 11(6)(a).

[158] Interview with a prominent member of the SPLM, Khartoum, November 2008.

[159] 'Sudan first VP pleads case against ICC arrest warrant for Bashir' 2009.



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'new South', namely, the states of South Kordofan and Blue Nile. No longer recognised as political party, and publicly resuming calls for regime change, the SPLM lobbied for ICC investigations beyond Darfur.[160]

For organisations and people with a specific interest in transitional justice, organising events in Sudan became increasingly difficult after the ICC's intervention. In 2005, a few months after the referral, international and local NGOs could still organise a public seminar on the ICC in which even government officials participated.[161] After the arrest warrants for Harun and Kushayb, and particularly since the request for an arrest warrant for the President, the environment became more hostile. For the first time since the initial years after the 1989 coup, the NISS resumed the practice of torturing human rights defenders, now on allegations of cooperating with the ICC.[162] In court, people were convicted for such cooperation.[163] International humanitarian NGOs were expelled and national human rights NGOs were closed on the same allegations fifteen minutes after the ICC's decision on an arrest warrant against Bashir came out.[164] Fearing the same fate, international actors such as UNAMID adjusted their human rights work, avoiding at all costs being associated with the politically sensitive topic of international justice.[165] Human rights activists left the country and many stayed away even after the threat subsided. Students who organised an event in support of the arrest warrant against the President were shot at by government militias.[166] Lecturers in law were hesitant to raise issues related to the ICC and Sudan, afraid that their opinion would be passed on to the NCP leadership.[167]

[160] Garang 2011. [161] Participant observation, Khartoum, October 2005.

[162] Unlike in the old days, it sent home its victims without insisting on their prior recovery in detention. Their wounds had to serve as a warning against supporting the ICC. See Fernandez 2008b.

[163] 'Three human rights activists arrested in Sudan' 2008 and 'Sudanese gets 17 years for "spying" for war crimes court' 2009.

[164] See, *inter alia*, UN Doc. S/2009/201 (2009):[26] and African Centre for Justice and Peace Studies 2009:5.

[165] When they seemed not to do so, their activities were interrupted, as an official of an international programme conducting training sessions on the rule of law recounted in an interview in El-Geneina in May 2010: 'After the ICC arrest warrant [for President Bashir] national security closed three of our trainings. We had fifteen minutes to get out.'

[166] 'Sudanese students wounded in clashes with government militia over ICC' 2009.

[167] Interview with a lecturer in law. University of Khartoum, November 2008.



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The ICC's intervention thus drew attention to accountability and transitional justice, but at the same time led the GoS to restrict the space for dissenting voices. The GoS interpreted any interest in the ICC, or ICC-related issues such as criminal accountability, as support for yet another Western instrument aiming to achieve regime change in Sudan.

It was the African Union's engagement with transitional justice in Sudan that opened up the space for discussion and triggered even the GoS's interest in the topic. 'Concern[ed] with the misuse of indictments against African leaders',[168] the AU established an African Union High-Level Panel on Darfur (AUPD) and mandated it to submit recommendations on 'how best the issues of accountability and combating impunity, on the one hand, and reconciliation and healing, on the other, could be effectively and comprehensively addressed, including through the establishment of truth and/or reconciliation Commissions'.[169] Since the Panel had been created in response to the ICC Prosecutor's request for an arrest warrant for the Sudanese President and the AU in the same resolution 'request[ed] the United Nations Security Council, in accordance with the provisions of Article 16 of the Rome Statute of the ICC, to defer the process initiated by the ICC',[170] the Panel was widely expected to focus on how to end the ICC's proceedings against an African head of state.[171] However, in its 2009 report the AUPD focused on resolving the conflict in Darfur, and treated the ICC as a side-issue.[172] It merely stressed that 'the ICC is a "court of last resort"' and that the Rome Statute recognises the duty of states to exercise jurisdiction over international crimes.[173] It identified complementarity as a way of addressing ICC involvement, but with the following caveat:

> The Panel does not believe that the motivation, or the rationale, for taking national steps to address justice issues should derive solely, or predominantly, from the perceived need to deal with the ICC issue. Whilst the ICC action might be a catalyst for acts of accountability in

[168] AU Doc. PSC/MIN/Comm CXLII Rev.1 2008, clause 3.
[169] *Ibid.*, clause 11(ii). [170] *Ibid.*, clause 11(i).
[171] See e.g. 'Mbeki "outraged" over his panelist remark on Darfur mission' 2009 ('The timing [of the establishment of the AUPD] fueled speculation that the AU is seeking to circumvent the ICC indictment of Bashir particularly in light of the pan-African body position opposing the warrant.').
[172] AU Doc. PSC/AHG/2(CCVII) 2009. [173] *Ibid.*:[244]–[245].



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> Sudan, Darfurians deserve attention not because of the threat of international action, but principally because they have a right to justice, in their own country, on account of what they have suffered.[174]

Without spending many more words on the ICC, the Panel proposed an 'Integrated Justice and Reconciliation Response', based on the broad understanding of 'justice' that Darfurians had conveyed to the Panel, encompassing 'processes of achieving equality, obtaining compensation and restitution, establishing the rule of law, as well as criminal justice'.[175] The proposed response included national trials, a hybrid court, reconciliation and truth-telling mechanisms, compensation programmes, witness protection programmes and measures for strengthening the justice sector in Darfur.

By focusing on the need for justice *and* peace *and* reconciliation, and adopting the broad understanding of justice that is prevalent in Darfurian society, the Panel broke the ICC's monopoly on the definition of justice and made transitional justice discussable in Sudan. Transitional justice became attractive to the Sudanese authorities precisely because it encompassed more than, and could perhaps be distinguished from,[176] criminal justice, recognising that sometimes a balance must be struck with other worthwhile aims such as peace and reconciliation. A senior official in the Ministry of Justice, for instance, explained his request for training for his staff in transitional justice by arguing that 'transitional justice is very important for Sudan; traditional justice [by which he meant the formal justice system] is not well-suited to war.'[177]

While international attention focused on the GoS's rejection of the idea of hybrid courts, the GoS did not dismiss the AUPD report as a

[174] *Ibid.*:[245]. [175] *Ibid.*:[317].

[176] The Heidelberg Darfur Dialogue Outcome Document containing Draft Proposals for Consideration in a Future Darfur Peace Agreement, drafted by Sudanese civil society representatives, does something similar where, in art. 283, it provides that their proposed 'hybrid court' or 'extraordinary chambers' shall refer all files outside their subject-matter jurisdiction to 'the competent institution providing for transitional justice' (Max Planck Institute for Comparative Public Law and International Law and Peace Research Institute 2010:79 and 81).

[177] Discussion with a senior official in the Ministry of Justice, Khartoum, July 2011. See also 'Sudan fires Darfur war crimes prosecutor amid talk of "transitional justice"' 2010, citing the Minister of Justice as saying: '[I]f we cannot present [any] cases to the courts, we can resort to the axis of the reconciliations and transitional justice.'



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whole.[178] The report thus provided development agencies with openings to discuss transitional justice with the Sudanese authorities, to spread brochures on the ABC of transitional justice among Sudanese judicial and law-enforcement agencies and to conduct training in transitional justice for officials from the police, Ministry of Justice and NISS. The Joint Special Representative of UNAMID created his own Advisory Board on Justice, Accountability, Truth and Reconciliation, to advance the topic through UNAMID's work.

Transitional justice, for a while taboo because of its association with the ICC, thus became fashionable as an *alternative* to the ICC. As in Uganda, it was thus the search for an alternative to the ICC that had the greatest catalysing effect on national interest in transitional justice. Also as in Uganda, this effect was not directly catalysed by the ICC's involvement, but mediated by others, in the case of Sudan by the AU, following in the wake of the ICC's intervention.

It would be an exaggeration to suggest that the GoS has embraced all elements of transitional justice: its 'new Darfur strategy', presented in 2010, proposed 'to peacefully resolve the situation through efforts focused on five main elements: security, development, resettlement, reconciliation, and negotiations' – the ten-page report contains only one sentence on accountability.[179] But discussion of transitional justice, as opposed to international criminal justice, became possible, even with the government.

Only exceptionally has the increased national attention on questions of transitional justice been directly catalysed by the principle of complementarity. The pro-Bashir propaganda campaign, for instance, was evidently not catalysed by the Rome Statute's principle of complementarity (the billboards did not read 'Let us try Bashir domestically'), but was a response to the ICC's intervention in Sudan, specifically the

[178] 'Sudan reiterates rejection of Darfur hybrid courts' 2009 ('[T]he Sudanese presidential adviser Mustafa Osman Ismail said that Khartoum accepts the AU report "in its generalities" and the "African solution for the Darfur crisis" . . . Ismail said Sudan wants further dialogue with the AU on the judiciary mechanism for Darfur for the purpose of "securing the independence of the Sudanese judiciary and at the same time the necessary transparency to achieve justice on its most noble levels and punishing the perpetrators who committed crimes in Darfur".').

[179] Office of the Presidential Advisor 2010:7 ('The government recognizes the psychological and practical importance of justice and, as such, remains committed to supporting the work of Sudan's appointed special prosecutor for Darfur and related national tribunals to carry out their mandates.').



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Prosecutor's request for an arrest warrant against the President. Nonetheless, some of the interest in transitional justice can be linked more directly to complementarity. Some political parties, particularly those with the rule of law on their agenda, blamed the government for having allowed the ICC situation to escalate by not conducting domestic proceedings. Prior to the AUPD report, the Umma Party had already proposed a 'hybrid court' of Sudanese and other Arab and African judges to implement the Rome Statute and prosecute at least the cases selected by the ICC.[180] The Democratic Unionist Party proposed independent domestic proceedings, because '[f]ailure to do so forthwith paves the way for international prosecution before [the] ICC'.[181]

**Triggering the establishment of domestic accountability mechanisms**

An effect of ICC involvement which is more directly related to complementarity has been the creation of domestic mechanisms to address conflict-related crimes. The Sudanese authorities responded to the ICC's movements as if playing a game of ping-pong. So many new courts, prosecution offices, investigative bodies and committees have been established that not only the ICC[182] but even the Sudanese authorities that created them have difficulties distinguishing them.[183]

Before the ICC's involvement, Sudan had already established various bodies with a view to addressing impunity. In May 2004, before the Security Council established the ICID, President Bashir created a national Commission of Inquiry to investigate alleged human rights violations committed by armed groups in Darfur.[184] The commission

[180] 'A middle way for justice in Sudan' 2008 and interview with a prominent member of the Umma Party, Omdurman, December 2008. Still advocating for a hybrid court in 2010, the President of the Umma Party explained the proposal for the hybrid court not by focusing on the need to mix Sudanese and foreign judges but as 'an attempt to reconcile retributive justice with restorative justice . . . Abiding by the letter of the ICC indictment will upset restorative justice. Ignoring it will upset retributive justice.' (Al-Mahdi 2010:2).

[181] Hassanein 2008:5. See also interviews with leaders in the Democratic Unionist Party, Khartoum, November and December 2008.

[182] See e.g. the errors in *Third Darfur Report*:4–6 with respect to which authority established the judicial investigation and special prosecution committees.

[183] Interview with a senior official in the Ministry of Justice, Khartoum, December 2008.

[184] Presidential Decision No. 97 Establishing a Commission to Investigate Alleged Human Rights Violations Committed by Armed Groups in the Darfur States 2004.



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concluded that 'grave violations of human rights had occurred involving the three Darfur states in which all parties to the conflict had participated in varying degrees and these had inflicted human suffering on the people of Darfur'.[185] It observed violations of common article 3 of the 1949 Geneva Conventions and killing amounting to crimes against humanity, but also noted that it had not found evidence of genocide and that international claims about mortality rates and systematic rape had been exaggerated.[186]

As a partial follow-up to the recommendations of the report, three commissions were established: a commission to determine appropriate compensation, a commission to establish tracks for herdsmen and a Judicial Investigation Commission (JIC). The JIC, established by a State Minister of Justice who himself was presumed to be on the ICID's 'list of fifty-one' criminal suspects, was mandated to investigate further some of the incidents mentioned in the Commission of Inquiry report, now with a view to judicial proceedings.[187] Meanwhile, various other committees mushroomed, for instance committees against rape, along with a Unit for Combating Crimes against Women.[188]

Yet it was the ICC's involvement and the Prosecutor's moves that spurred most of the institutional proliferation in the Sudanese legal system. Immediately after the referral, the GoS sent a delegation to Cairo for legal advice. If Sudan seriously investigated and prosecuted these crimes, the ICC would not intervene, so Egyptian officials and lawyers counselled.[189] Hence, the GoS established committees to implement the various clauses of resolution 1593. But the OTP moved faster than Sudan. On 6 June, the Prosecutor announced that he was opening an investigation into the Darfur situation. The next day, Sudan's Chief Justice issued a decree establishing a Special Criminal

[185] UN Doc. S/2005/80 (2005):[19.1].

[186] *Ibid.*:[19]. The report mentioned Ali Kushayb as involved in killings. The Commission had interviewed Ahmad Harun.

[187] The Commission of Inquiry was a fact-finding commission pursuant to the 1954 Commissions of Inquiry Act. In accordance with art. 12, '[n]o statement made in the course of any inquiry under this Act shall be admissible as evidence in any Court of law, whether civil or criminal'. The JIC was established by Minister of Justice, Decision No. 3/2005 2005.

[188] See Hashim 2009:237–38.

[189] Interview with a senior legal advisor in the Ministry of Justice, Khartoum, November 2008.



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Court on the Events in Darfur (SCCED).[190] Its jurisdiction encompassed acts constituting crimes 'in accordance with the Sudanese Penal Code and other penal codes', as well as any charges submitted to it by the JIC and 'any charges pursuant to any other law, as determined by the Chief Justice'.[191] In November of the same year, the Chief Justice expanded the substantive jurisdiction of the SCCED to include acts constituting crimes under 'international humanitarian law'.[192] A few days later he issued decrees pursuant to which the then-roving SCCED would stay in North Darfur, and established two additional special courts for South and West Darfur.[193]

The Minister of Justice, for his part, appointed a Committee of Prosecution for Special Criminal Cases in Darfur, with a mandate to prosecute all criminal cases referred to it by the JIC.[194] He also set up a Specialised Attorney Agency for Crimes against Humanity, to 'perform the authorities stated in ... International Humanitarian Law, international agreements to which the Sudan is party, and any other related law in any crime against humanity or any other crime stated in any other law that touches on the security and safety of humanity'.[195]

[190] Chief Justice, Decree Establishing the Special Criminal Court on the Events in Darfur 2005 (SCCED Decree). Chief Justice, Resolution No. 702 2005 appointed three judges to the Court. The Chief Justice also appointed members of the Appeals Court to adjudicate cases before the Special Court (Chief Justice, Resolution No. 981 2005). The Chief Justice's power to establish a special court is based on the Judiciary Act 1986, s. 10(e), and the Criminal Procedure Act 1991, ss. 6(h) and 14. Officials stress that 'special', in this context, means 'specialised', rather than 'extraordinary'. Established for a specific situation, the Court is part of the normal justice system. 'Special' and 'specialised' courts had been established in Darfur in 2001 and 2003 respectively, pursuant to the Emergency and Public Safety Protection Act 1997, s. 6(2). For the argument that international human rights law permits special courts as long as they guarantee a fair trial, see ICTY, *Tadić Defence Motion Decision* AC:[45].

[191] SCCED Decree, art. 5.

[192] Chief Justice, Amendment of the Order of Establishment of Criminal Court for Darfur's Incidents 2005. This decree also made provision for observers to trials in the Special Court.

[193] Chief Justice, Order of the Establishment of Criminal Court for Darfur's Incident (Geneina) 2005. The members of the courts were appointed by Chief Justice, Resolution No. 1128 2005, and Chief Justice, Resolution No. 1129 2005.

[194] Minister of Justice, Decision No. 9/2005 Establishing a Committee of Prosecution for Special Criminal Cases in Darfur 2005. Following the creation of the two additional special courts, he divided the prosecution team also into three teams.

[195] Minister of Justice, Decree on the Establishment of a Specialized Prosecution for Crimes against Humanity 2005, s. 3.



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The geographical jurisdiction of the Agency extended to all of Sudan.[196] Then, within days of the ICC Prosecutor's request for an arrest warrant against Bashir, the Minister of Justice appointed a Special Prosecutor for crimes in Darfur.[197] The appointment was made with much fanfare, even though the person appointed was the same as the chairman of the previous Committee of Prosecution for Special Criminal Cases in Darfur. His responsibility was merely extended to include investigations.[198]

In October 2010, a new Minister of Justice replaced this Special Prosecutor with the Under-Secretary of the Ministry of Justice. The ICC Prosecutor implied that the Special Prosecutor was punished for opening an investigation into an attack on Tabra market in 2010,[199] in which at least thirty-seven people were killed. But the story told by persons close to the Special Prosecutor and the Minister of Justice is slightly different. One month after the attack, the Minister of Justice, himself from Darfur, had been criticised for the slow process of the inquiry.[200] The Special Prosecutor refused to investigate in Tabra, located in an area of frequent clashes, without security and special transport such as helicopters being made available. The Minister of Justice then entrusted the Darfur investigations to the most senior civil servant in the Ministry.[201]

Within six months of his appointment, this Special Prosecutor resigned, both as Under-Secretary and as Prosecutor. Some newspapers and foreign officials insinuated he had been frustrated by obstruction of his investigations by other government agencies.[202] Officially and privately, he cited personal reasons for his resignation; close colleagues explained that he and the Minister disagreed on the management of the Ministry. In September 2011, the new Under-Secretary of the Ministry was the third person in three years to become the Special Prosecutor for

[196] *Ibid.*, s. 4.
[197] Decision of the Minister of Justice, Appointment of Special Prosecutor for Crimes in Darfur 2008.
[198] Interview with a senior official in the Ministry of Justice, Khartoum, December 2008.
[199] See *Prosecutor's Darfur Statement SC December 2010*:[12]–[13] and *Twelfth Darfur Report*:[74]–[76].
[200] 'Sudan minister criticized for slowness of Darfur massacre inquiry' 2010.
[201] 'Sudan fires Darfur war crimes prosecutor amid talk of "transitional justice"' 2010. Discussions with close colleagues and friends of the Special Prosecutor and Minister of Justice, Khartoum, October 2011.
[202] 'Sudan's former spy chief slams slow pace of Darfur crimes probe' 2011.



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Darfur.[203] Within four months, the Minister of Justice appointed a new Special Prosecutor for crimes committed in Darfur since 2003, this time as part of the implementation of the Doha Document for Peace in Darfur.[204] Usefully, the Minister's decree authorised the new Special Prosecutor to create a coordination mechanism between the Prosecutor's office and other agencies that deal with related issues.[205]

Unlike in Uganda, the special mechanisms have not (yet) created their own dynamic. Judges and prosecutors have no incentive to operationalise institutions that the Minister of Justice and Chief Justice created for international spectators only. In private, judges of the Special Court were cynical about the *raison d'être* of their Court. One judge, when asked about the reason for the creation of a court without cases, replied that it was 'to fool us, and the Americans'.[206] International donors and organisations, in turn, have stayed away from supporting any domestic courts that they feared the GoS may put forward as (sham) alternatives to the ICC.[207]

While the committees of inquiry and on gender-based violence may have been established in response to criticism of impunity more generally,[208] the Special Courts and prosecution bodies have been presented from the outset as an alternative to the ICC, in line with the complementarity principle.[209] Publicly, officials have usually denied that the creation of these bodies is a response to any international pressure, let alone linked to the complementarity

[203] 'Sudan appoints new Darfur prosecutor' 2011.

[204] On the DDPD, see this chapter, below, 'Putting accountability on the agenda of peace negotiations'.

[205] 'Sudan to establish special court for Darfur crimes and appoints new special prosecutor' 2012.

[206] Interview with a Sudanese judge, October 2007.

[207] Interview with Western donor representatives, Khartoum, November and December 2008.

[208] See e.g. interview with a senior official in the Ministry of Justice, Khartoum, December 2008 ('There were allegations from organisations like MSF [Médecins Sans Frontières] that 5,000 women had been raped. For that reason we established a specialised bureau.').

[209] See e.g. UN Doc. S/2005/403 (2005), 'Sudan reiterates opposition to try Darfur suspects before ICC' 2005, 'Sudan: National court to try suspects of Darfur crimes' 2005 and diplomatic letter, June 2005 ('Both the Ministers of Justice and Foreign Affairs of the Sudan . . . emphasized the fact that this step is in conformity with International Law, and with the Rome Statute of the ICC which gives priority to states to try their nationals within [*sic*] the principle of complementarity, whether party or non party to the Statute'). See also *Third Darfur Report*:5.



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principle. Officially, all measures are taken for domestic reasons. But in one-on-one interviews almost all officials responded that the establishment of many of these bodies was in response to the ICC or, more particularly, to take advantage of the principle of complementarity.[210]

However, while created in the light of the complementarity principle, the mechanisms were never established with a view to challenging admissibility before the ICC. Rather, the GoS expected or hoped that the mere creation of these bodies would convince the international community, and more specifically the Security Council, that Sudan had its own Special Courts, specialised prosecution bodies and other committees addressing accountability and that therefore the ICC's role in Sudan was redundant.[211]

**Motivating the adoption of laws on international crimes**

The adoption of Sudanese laws on international crimes has been another effect catalysed by complementarity. For the first time in Sudanese history, the December 2007 amendment to the Armed Forces Act 1986 incorporated genocide and crimes against humanity into Sudanese law. The amendment also reintroduced war crimes as crimes under Sudanese law[212] and expanded the list of war crimes that had been in the People's Armed Forces Act 1983. The 2007 amendment does not mention the terms 'genocide', 'crimes against humanity' and 'war crimes' explicitly, let alone refer to their international legal sources such as the Genocide Convention and Geneva Conventions. But the structure of the chapter incorporating these crimes reveals that it is based on the 'Arab Model Law on crimes within the ICC jurisdiction'. Demonstrating that complementarity can have a catalysing effect in states not party to the Statute, the Arab Justice Ministers Council adopted this Model Law by way of guidance to the member

[210] E.g. interviews with a senior legal advisor and an advisor in the Ministry of Justice, November 2008.

[211] See e.g. 'Sudan says ICC prosecutor "messenger of destruction"' 2009 ('The Sudanese official called on the UNSC to put an end to Ocampo's mandate saying that his government appointed a special prosecutor to look into Darfur crimes.').

[212] On the introduction and removal of war crimes in Sudanese law by President Nimeiri and the subsequent civilian administration, respectively, see Babiker 2010:84–5 and Babiker 2011:162–3.



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states of the Arab League, the majority of which did not intend to become party to the Rome Statute.[213]

The Arab Model Law roughly follows the Rome Statute's definition of crimes,[214] but the amended Sudanese Armed Forces Act[215] contains an interesting selection, and in some instances modification, of the crimes and principles as laid down in the Model Law and Rome Statute.[216] For instance, as regards crimes against humanity, the list of *actus rei* omits murder, extermination, illegal imprisonment, enforced disappearance, apartheid and 'other inhumane acts' and adds adultery and fornication.[217] Adultery – all sexual intercourse outside marriage (possibly) except rape[218] – can thus amount to a crime against humanity when committed 'within the framework of a methodical direct and widespread attack, directed against civilians'.[219] The

[213] AL Doc. 598-21d-29/11/2005 (2005). Of the members of the Arab League, only Comoros, Djibouti, Jordan and, after its revolution in 2011, Tunisia have ratified the Statute.

[214] Exceptions are the categorisation of war crimes per subject-matter instead of per legal source and the integration of the Rome Statute's definitions of technical terms into the definitions of the offences.

[215] The references in the present chapter are to an English version of the Act, provided by the Ministry of Justice. The section numbers of that version at times diverge from those of the Arabic text.

[216] Comparison of the Draft Sudanese Armed Forces Act 2007 with the Armed Forces Act 2007 reveals that the earlier draft of the amendment was in several respects closer to the international definition of the crimes, but did not survive deliberations in the Council of Ministers.

[217] Armed Forces Act 2007, s. 153(2). Another difference is that, whereas the Rome Statute requires a 'widespread or systematic' attack for a crime against humanity, the Armed Forces Act refers to a 'direct and widespread attack'. With respect to the crime of genocide, Armed Forces Act s. 153(1) suggests that murder is required for all the *actus rei* of genocide. Some of the differences in the definition of crimes between the English version of the Armed Forces Act, on the one hand, and the English versions of the Arab Model Law and Rome Statute, on the other, may be a result of the retranslation of the Sudanese Act from Arabic into English.

[218] This is controversial. Section 145(1) of the Criminal Act 1991 defines adultery by the absence of a lawful bond between the man and the woman, irrespective of consent. Section 149(1) defines rape as 'sexual intercourse, *by way of adultery, or sodomy*' with any person without his consent' (emphasis added). The reasonable and dominant interpretation is that, since rape is adultery or sodomy without consent, adultery requires consent (which is also suggested by the definition of adultery in s. 145(1)(b) as committed by a woman who 'permits' a man to have sexual intercourse with her). Some Sudanese lawyers, however, are of the view that rape is a *specialis* of adultery and that a case of rape therefore also amounts to adultery.

[219] Armed Forces Act 2007, s. 153(2)(d).



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list of war crimes, by contrast, omits those involving sexual violence. In another contrast to international criminal law, some war crimes definitions suggest that ignorance of the law can exculpate a perpetrator by requiring that the person 'knowingly and voluntarily violates the laws'.[220] In addition, by on the one hand maintaining the defence of superior orders and on the other hand omitting the modes of responsibility of ordering, indirect perpetration and command responsibility, the amended Armed Forces Act seeks to ensure the dismissal of any prosecutions brought against soldiers who comply with orders and the commanders who give them.[221]

Since the Armed Forces Act is believed to apply only to persons related to the armed forces,[222] the Criminal Act 1991 was expanded 'to complete the picture'.[223] According to the explanatory note, a chapter with 'the crimes of genocide, war crimes and crimes against humanity' was added because 'the Arab Ministers of Justice determined [these] to be included as part of the criminal laws in order to cover any acts associated with these crimes in the future'.[224] Equally based on the Arab Model Law, the new chapter to the Criminal Act incorporates the Rome Statute's crimes more comprehensively than the Armed Forces Act. In some ways, the crimes as incorporated in the amended Criminal Act are more in accordance with customary international law than the Rome Statute. For instance, the Criminal Act does not require for a crime against humanity that an attack is 'pursuant to or in furtherance of a State or organizational policy to

[220] *Ibid.*, s. 155. [221] *Ibid.*, s. 34.

[222] While in all other respects only persons related to the military are subject to the Act, s. 4(h) covers 'any' person accused of committing the defined international crimes if committed by or against a Sudanese national, on Sudanese territory or if the accused is in Sudan. According to a member of the Special Prosecutor for Darfur's team, interviewed in Khartoum in December 2008, this must have been 'a mistake', as civilians cannot be tried by military courts (cf. *contra* International Commission of Jurists 2007:11, citing a Constitutional Court decision according to which Sudanese military courts may try civilians). A military lawyer confirmed in a discussion in Khartoum in September 2011 that the government was working on an amendment to correct this 'error'.

[223] Interview with a senior legal advisor of the Ministry of Justice, Khartoum, November 2008.

[224] Explanatory note to the Criminal Act Bill (Amendment) 2008. According to UNMIS Rule of Law 2009:1, the National Assembly adopted the Bill on 25 May 2009; the President signed the resulting Act into law on 28 June 2009. As with the Armed Forces Act 2007, the numbering of sections in the English and Arabic versions appears incongruent.



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commit such an attack'.[225] Going beyond positive international law, with respect to war crimes the amended Act criminalises offences irrespective of whether the conflict in which they took place was international or non-international in character.[226] Still, in some ways the Criminal Act also falls behind international law. As in the 2007 Armed Forces Act, the definition of genocide in this Act suggests that genocide always requires killing as part of the *actus reus*.[227] The amended Criminal Act also omits the Rome Statute's modes of liability[228] and does not exclude a defence of superior orders.

The Criminal Procedure Act 1991 was amended to provide that 'no criminal procedures ... may be taken against any Sudanese national accused of any act or omission that constitutes violation of the provisions of the International Humanitarian Law including crimes against humanity, genocide and war crimes save before the effect that it grants the Sudan police, General Prosecution and Judiciary'.[229] In other words, it aims to prohibit non-Sudanese actors from taking criminal proceedings against Sudanese nationals. More likely to have an effect is the paragraph in the same article that prohibits 'assistance or support to any entity to hand over any Sudanese national in order to be prosecuted overseas for committing any crime that constitutes violation of the International Humanitarian Law including crimes against humanity, genocide and war crimes'.

The fact that there have been various other incentives for incorporating international crimes in Sudanese law may suggest that it is difficult to attribute these legal reforms to the ICC in general and to complementarity in particular. Sudan was already legally obliged – by,

[225] Cf. s. 186 of the Criminal Act 1991 (as amended in 2009) with RS, art. 7(2)(a).
[226] Cf. s. 188 of the Criminal Act 1991 (as amended in 2009) with RS, art. 8.
[227] Criminal Act 1991 (as amended in 2009), s. 187.
[228] E.g. superior responsibility and concepts such as joint perpetration as codified in RS, arts. 28 and 25(3)(a), respectively. The Criminal Act 1991 does provide in s. 21 for 'joint acts in execution of criminal conspiracy' but the conspiracy must be proven and according to most judges interviewed *all* persons involved must be prosecuted for *any* conspirator to be successfully prosecuted. Section 23 criminalises ordering an offence or compelling someone to commit an offence, but only if the person who commits the crime is 'immature' or 'of good faith'. Section 25 criminalises abetment, defined as the inducement of one person by another to commit an offence, or the ordering of any person under his control to commit it. But 'ordering' is different from perpetration through another person as per RS, art. 25(3)(a).
[229] Criminal Procedures Act (Amendment) 2009, s. 2.



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variously, the Geneva Conventions and their first Additional Protocol, the Genocide Convention and the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination – to criminalise some of the crimes incorporated in the Rome Statute. Moreover, implementation of the CPA set in motion an overhaul of all legislation to make it compatible with the Interim National Constitution,[230] including the 'human rights' treaties that are declared part of the Bill of Rights. Finally, organisations other than the ICC, for instance national human rights organisations, the influential Group of [Human Rights] Experts sent by the Human Rights Council and, for decades, the International Committee of the Red Cross, had been lobbying for the incorporation of international crimes into domestic law.[231]

Yet none of these various extraneous incentives had been sufficient to convince the GoS to criminalise international offences under domestic law. Sudan has been under an obligation of domestic criminalisation pursuant to the Geneva Conventions since 1957, but in 1986 deleted the few provisions that criminalised international war crimes in Sudanese law[232] and did not reincorporate them until the ICC became involved. Of the sixty-one laws slated for amendment in light of the CPA, only very few were actually changed. In fact, if the discussed amendment to the criminal code had been part of the CPA reform package, the SPLM would have insisted on a review of all *sharia*-inspired provisions.[233] Some Sudanese international lawyers,

[230] See also Sherif and Ibrahim 2006:42.

[231] Human Rights Council 2007a and National Commission on International Humanitarian Law (undated). See also International Commission of Jurists 2007:41.

[232] See Babiker 2010:85 and Babiker 2011:162–3.

[233] Fearing that the process may get bogged down by broader reform demands, the Ministry of Justice stressed that the introduction of international crimes constituted not an 'amendment' of but an 'addition' to the Criminal Act 1991. Whereas a September 2008 draft still included the crime of female circumcision and a provision on state compensation for crimes committed by the police and army, the December 2008 version contained only the Rome Statute crimes. All that mattered to the GoS was that these crimes were seen to have been incorporated into domestic law as soon as possible. It was considered so urgent that the normal procedure whereby other ministries participated in the drafting process was not followed (interview with an official in the legislative drafting department in the Ministry of Justice, Khartoum, December 2008).



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politicians and officials in the Ministry of Justice had lobbied in the past for the incorporation of these crimes even in the event that Sudan did not ratify the Rome Statute.[234] Unofficial drafts had circulated since 2002, but a politically powerful group of government legal advisors successfully blocked this move.[235]

Only the ICC's intervention, in particular the 2008 'Ocampo campaign' against the President, made it important enough for the GoS to push legislation incorporating the crimes in the Rome Statute into Sudanese law.[236] Both the ICID and the ICC President had given the impression that domestic criminalisation of ICC offences could limit ICC involvement. The ICID based its advice to the Security Council to refer Darfur to the ICC on the conclusion that Sudan was unable to conduct proceedings because, *inter alia*, it lacked domestic criminalisation of the Rome Statute offences.[237] Sudanese officials had also heard that ICC President Philippe Kirsch had briefed diplomats from a wide range of states to '[g]o and do your homework and don't worry: change your laws, establish courts, and the ICC will not intervene'.[238] On the basis of such considerations, the legislative department of the Ministry of Justice was instructed to crank out a bill in July 2008, immediately after the OTP's request for a warrant for Bashir's arrest.[239] As the then Under-Secretary of the Ministry of Foreign Affairs explained, '[n]ow we have made the process of changing the law so as not to give any excuse to the Prosecutor that we do not have the laws.'[240] The rationale for the amendment of the Armed Forces Act was similar. Asked why the Armed Forces Act had been amended, an influential member of the Council of States noted:

[234] Interview with a member of the Legal and Parliamentary Affairs Committee of the National Assembly, Khartoum, November 2008, interview with a former Minister of Justice, Khartoum, December 2008 and interview with a senior legal advisor in the Ministry of Justice, Khartoum, November 2008.
[235] Interview with a former Minister of Justice, Khartoum, December 2008.
[236] Interview with two staff members of the legislative department in the Ministry of Justice, Khartoum, December 2008.
[237] UN Doc. S/2005/60 (2005):[451] and [586].
[238] Interview with a senior legal advisor in the Ministry of Justice, Khartoum, November 2008.
[239] Interview with two staff members of the legislative department in the Ministry of Justice, Khartoum, December 2008.
[240] Interview with Mutrif Siddiq, Under-Secretary of the Ministry of Foreign Affairs, Khartoum, December 2008.



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> Now courts start looking into crimes committed in the West [Darfur] . . . you have to have sections [in the law] that cater for that. Crimes are committed in conflict areas.
>
> [Interviewer:] *But crimes have been committed in the conflict in the South since the fifties and were never prosecuted.*
>
> Now they are, because of a lot of factors: there now is the ICC. You have to cater for that.[241]

That said, while in essence a legal reform, the amendment of the laws was first and foremost a 'change-of-policy show' designed to curry favour in the Security Council. Like the establishment of the various special bodies, the special legislation making international crimes domestic offences was introduced neither on normative grounds nor in order to facilitate a formal legal challenge to the ICC's jurisdiction on the basis of complementarity. Instead, it was intended to show Western busybodies peering into Sudan's windows that the GoS had its legal house in order.[242]

The concession was a politically inexpensive one. First, the absence of domestic criminalisation of international offences had in reality never been the main obstacle to Sudanese proceedings for conflict-related crimes.[243] Secondly, the laws are unlikely to be used against those in government. According to a former Minister of Justice, 'laws are not dangerous' for politicians.[244] Even from a legal perspective, politicians do not have to fear that the amended laws will be applied to crimes committed during the height of the Darfur conflict in 2003–5. Most Sudanese lawyers interviewed, including members of the Special Prosecutor's Office, were of the view that the amended laws could not be applied retroactively.[245] When asked why the laws were amended

[241] Interview with an influential member in the Council of States, Khartoum, November 2008.

[242] Interview with an NCP parliamentarian, Khartoum, November 2008, suggesting the Armed Forces Act was amended to 'appease donors'. Also: interview with an SPLM parliamentarian, Khartoum, November 2008.

[243] See Chapter 5.

[244] Interview, Khartoum, December 2008.

[245] Some held a different view: an international lawyer in the Ministry of Justice argued during an interview in November 2008: 'international humanitarian law has always been applied retroactively'; a senior legal advisor in the same Ministry observed: 'Sharia law is highly unprocedural. You do not allow procedure to defeat justice. Justice is timeless' and a member of the Special Prosecutor's team argued in July 2011 that the amended Criminal Act would be applied if this was beneficial to the accused. Which law will be considered beneficial to the accused is difficult to predict. In the case of murder, for instance, the punishment is death



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with a view to the Darfur conflict even though they could not be applied to this conflict, one legal advisor in the Ministry of Justice responded: 'Maybe it is done because it looks good on the books.'[246] In 2011, two years after its adoption, the amendment to the Criminal Act was unknown to most interviewed Sudanese lawyers, including those assigned to prosecute crimes in Darfur. The amendments had not yet been applied.[247] Just like the ratification of multilateral norm-setting treaties,[248] Sudan's amendment of its laws has mostly been an exercise of paying lip-service to 'the religion of Europe: human rights'.[249]

**Putting accountability on the agenda of peace negotiations**

Initially, the ICC had the opposite of a catalysing effect on the inclusion of accountability as agenda item in Sudanese peace negotiations. In the first round of the Inter-Sudanese Peace Talks on the

by retribution or, if the victim opts for blood money, imprisonment of up to ten years (Criminal Act 1991, s. 130(1)). The punishment for the crime of genocide is death or life imprisonment or a lesser penalty (Criminal Act 1991, s. 187). Much therefore depends on the decision of the victim and the judge's use of his or her discretion. One interviewee, a member of the Democratic Unionist Party, interviewed in November 2008, referred to art. 15(2) ICCPR, which is part of Sudanese law pursuant to INC 2005, art. 27(3), as an argument to justify retroactivity. AU Doc. PSC/AHG/2(CCVII) 2009:[231] adopts this last argument against the prohibition on retroactive application. There are, however, two problems with this reasoning. First, art. 15(2) ICCPR provides that '[n]othing in *this article*' (emphasis added) prejudices proceedings against a person accused of an act that was criminal according to international law: this does not render the further protection afforded by the Sudanese Criminal Procedure Act, s. 4(b), and Criminal Act, s. 4, ineffective. (On the national prohibition against retroactivity being stricter than the international, see also Gallant 2009:277–8 and 370.) Secondly, as the AUPD recognises, INC 2005, art. 27(3), making the ICCPR part of the Sudanese Bill of Rights, came into force only on 9 July 2009. The Sudanese High Court has suggested in *Abdel Rahman Nugdallah* that, before 2005, the ICCPR was not part of Sudanese law. Whether this is an obstacle to retroactive application depends on whether one adopts a substantive or procedural interpretation of the prohibition on non-retroactivity. A substantive interpretation never allows retroactivity; a procedural interpretation allows amendments to the prohibition to have retroactive effect.

[246] Interview with a legal advisor in the Ministry of Justice, Khartoum, November 2008.

[247] Interview with a humanitarian law specialist in the Ministry of Justice, Khartoum, July 2011.

[248] See Chapter 5, 'A domestic context inhospitable to a responsibility to conduct proceedings'.

[249] Interview with a former Minister of Justice, Khartoum, December 2008.



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conflict in Darfur, in July 2004, the rebel movements, putting justice forward as one of their purported causes,[250] had insisted on the launching of an international inquiry to investigate the charges of genocide and bring the perpetrators to justice as a precondition to comprehensive political dialogue.[251] But before the fifth round of the Abuja talks, just four months after the Security Council's referral of the situation in Darfur to the ICC, the AU mediating team took accountability off the table.[252] The mediation team dropped this divisive item – in the words of one advisor to the Chief Mediator, 'the peace negotiations would have collapsed' had accountability been pursued[253] – by arguing that the Security Council had delegated the issue to the ICC. The rebel movements, expecting the ICC to strengthen their position, did not object. The Declaration of Principles that was subsequently adopted in Abuja in July 2005 stresses the parties' commitment to respect international humanitarian law and to promote and protect human rights, and provides that steps shall be taken to compensate the people of Darfur, to promote reconciliation and to restore traditional peaceful coexistence among the communities of Darfur,[254] but makes no mention of criminal accountability for conflict-related crimes. Based on this Declaration, the Darfur Peace Agreement provides for compensation and reconciliatory dialogue, but equally omits any reference to accountability for crimes committed during the conflict.[255]

After the miscarriage of the DPA, rebel movements that had refused to sign it called for a review of several elements of the Agreement, but did not push for a revisiting of the issue of accountability. Acting on the mistaken assumptions that the complementarity assessment is situation-specific rather than case-specific and can no longer be influenced once the Security Council has referred a

[250] Seekers of Truth and Justice 2000. [251] Toga 2007:220.

[252] De Waal 2008:33. See also Daly 2007:315. In the final hours of the DPA negotiations the ICC was referred to, not in the context of complementarity, but to pressure the parties to agree. The US Deputy Secretary of State tried to address the movements' concerns over the draft DPA by pressuring the government to accept amendments to this end. 'If you don't agree, I'll see you in The Hague', he stated, in order 'to convey a sense of the stakes involved and the consequences' (interview with Robert Zoellick, former US Deputy Secretary of State, Washington, February 2009, as clarified in author's email exchange with his office, August 2009).

[253] Interview, Khartoum, November 2008. [254] Declaration of Principles 2005.

[255] DPA 2006, arts. 199–213 and Chapter 4.



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situation,[256] some spokespersons reasoned that, since the ICID had found Sudan 'unable and unwilling' and the Security Council had subsequently referred the situation to the ICC, conflict-related crimes were now within the Court's exclusive jurisdiction.[257] They, like the Ugandan government initially, invoked the further argument that the ICC was the more convenient forum, even though this is not part of the admissibility test.[258]

While the ICC's involvement provided a reason for taking accountability off the Abuja agenda, it is an exaggeration to consider the rebel movements' preference for ICC proceedings over domestic proceedings an effect of 'reverse catalysis', in other words, an effect of the ICC's intervention leading to less rather than more domestic proceedings. It is not evident that the movements would have pursued accountability anyway.[259] Familiar with a criminal justice system which countenances blood money as an alternative to punishment, they might well have dropped the issue of accountability if the amount of compensation offered had been satisfactory.[260] Yet for the mediation team the ICC's involvement was a reason to check off the agenda item, AU agreements calling for accountability notwithstanding.[261] And for Western observers, by and large intoning the 'no peace without justice' mantra, the ICC's involvement was a reason no longer to insist on domestic accountability. The issue was being taken care of, and, for most of them, by their preferred court.

[256] In fact, according to the Statute, the test is whether Sudan is investigating or prosecuting the specific cases before the ICC, and, if so, whether it is willing and able genuinely to investigate or prosecute these cases. In other words, what matters is the willingness and ability of the Sudanese justice system in those particular cases; a finding about the general state of the Sudanese justice system is not decisive. Moreover, a state can influence the outcome of an admissibility assessment by opening investigations and prosecutions, even if it does so only after the Security Council has referred a situation. See Chapter 2.

[257] Discussions with representatives of JEM and SLA/AW, Germany, October 2007.

[258] See 'Darfur rebel group says world must not turn its back on the ICC' 2007.

[259] It is clearer that the ICC's actions have had a dampening effect on the willingness of rebel movements to negotiate. For further elaboration of the ICC's impact on peace negotiations, see Nouwen 2012c.

[260] This is not to say that the movements' leaders supported ICC proceedings because of an expectation of compensation. Indeed, in their view the key contribution of the ICC to justice would be in bringing about regime change. For an elaboration of this argument, see Nouwen and Werner 2010a.

[261] E.g. see the Constitutive Act of the African Union 2000, art. 4(o).



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However, the ICC Prosecutor's application for an arrest warrant against the Sudanese President indirectly put the issue of justice back on the agenda of the Darfur peace talks. Convinced 'that the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace', and concerned 'with the misuse of indictments against African leaders', the Peace and Security Council (PSC) of the African Union adopted a communiqué in which it established the African Union High-Level Panel on Darfur (AUPD); requested the UN Security Council to defer the ICC proceedings against the Sudanese President; and 'encourage[d] the Sudanese parties, with the support of the Joint Chief Mediator, to ensure that issues of impunity, accountability and reconciliation and healing are appropriately addressed during the negotiations aimed at reaching a comprehensive peace agreement'.[262] Whereas the AU mediation team had taken justice off the agenda in Abuja, the PSC reinserted it into the Doha talks. The AUPD endorsed this reinsertion by observing in its report that dropping accountability from the Abuja talks had been 'an error'[263] and contending that 'external interventions will not, and cannot, of themselves, provide the answers to the range of difficult questions that Sudan faces'.[264] In this light, the AUPD, as discussed above,[265] stressed that 'the ICC is a "court of last resort"', that the Rome Statute recognises the duty of states to exercise jurisdiction over international crimes and that cases before the ICC could be rendered inadmissible on grounds of complementarity.[266]

A month after the publication of the AUPD report, a group of representatives of Darfurian 'civil society' flew to Doha to present civil society's views on various issues on the agenda of the peace talks, including justice and reconciliation. The mediation team conceived of 'civil society' as a group other than the two sides of the negotiations, namely, the Government of Sudan on the one hand and armed movements on the other. As such it identified 'traditional leaders', 'civil society organisations', 'internally displaced persons', 'women', 'youth' and 'nomads'. As was to be expected, the representatives of 'civil society' groups were not without their own, often diverging, opinions on politically contested issues. Their joint declaration

[262] AU Doc. PSC/MIN/Comm CXLII Rev.1 2008, clause 11(iii).
[263] AU Doc. PSC/AHG/2(CCVII) 2009:[173]. See also [238].
[264] *Ibid.*:[245]. [265] See this chapter, nn. 172–4.
[266] AU Doc. PSC/AHG/2(CCVII) 2009:[244]–[245] and [254]–[255].



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therefore remained silent on the ICC. They could, however, agree upon the looser notion of 'transitional justice'. Adopting many of the proposals of the AUPD, they recommended: truth and reconciliation commissions; reparation and compensation; reconciliation; accountability for perpetrators of war crimes, crimes against humanity and 'serious crimes such as rape'; 'access to transitional justice at all levels, whether national or regional or international'; reform of the judicial system 'to ensure the realization of transitional justice'; 'reform of criminal legislation in line with international conventions to ensure inclusion of international crimes not provided for in Sudanese law'; reform of legislation regarding immunities; and to 'erect a monument commemorating the Darfur crisis to be a history preserved for future generations and the invigoration of their memories and to commemorate the victims of war'.[267]

Fearing further complications in already complicated talks, the joint AU/UN mediation team in Doha only reluctantly reintroduced the 'justice and reconciliation' item onto the agenda. The 2009 'Agreement of Good Will and Confidence Building for the Settlement of the Problem in Darfur' and the 2010 'Framework Agreement to Resolve the Conflict in Darfur', both between the GoS and JEM, still did not provide for criminal accountability. Indeed, the parties agreed on the release of persons detained in relation to the conflict and a general amnesty, respectively.[268] The 2010 'Framework Agreement to Resolve the Conflict in Darfur' between the GoS and LJM also contained an amnesty, but at the same time agreed upon 'justice, the rule of law and reconciliation' as an issue of negotiation.[269] So, when in July 2010 the negotiations on a 'final agreement' between LJM and the GoS commenced, the mediation team also set up a cluster to negotiate justice and reconciliation.[270]

[267] Darfurian Civil Society 2009:[2.4]. See also for a few additional recommendations, particularly related to victims of rape, Darfurian Civil Society 2010:[2.4].

[268] 2009 Agreement of Good Will and Confidence Building for the Settlement of the Problem of Darfur, measure 3(c), and 2010 Framework Agreement to Resolve the Conflict in Darfur between the Government of Sudan (GoS) and the Justice and Equality Movement (JEM), art. 2.

[269] Framework Agreement to Resolve the Conflict in Darfur between the Government of Sudan (GoS) and the Liberation and Justice Movement (LJM) 2010, arts. 3 and 4(9).

[270] Interview with a member of the mediation team, Addis Ababa, July 2011.



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Once on the agenda, criminal accountability was pushed by the mediation team and the movements. The movements demanded provisions on cooperation with the ICC. For the GoS this was a 'no-go area'.[271] When the LJM kept demanding a provision obliging the GoS to cooperate with the Court,[272] the GoS delegation left Doha in protest and returned to the talks only after the Mediator's supplications in Khartoum. Ultimately the mediation team and the GoS convinced the LJM that there was no need to have any provisions on the ICC: the ICC could not be negotiated away; it would do its work irrespective of this agreement.

The rest of the transitional-justice package remained subject to negotiation. Both parties cited from the AUPD report, and many of its recommendations found their way into the final document. The Doha Document for Peace in Darfur sets an ambitious transitional-justice agenda in terms of aims, principles and scope. It provides for strengthening of the justice sector;[273] compensation;[274] reconciliation[275] including apologies;[276] truth-telling;[277] accountability;[278] amnesty;[279] and vetting.[280] Among the mechanisms are a Truth, Justice and Reconciliation Commission, composed of a Justice Committee and a Truth and Reconciliation Committee.[281] The former is responsible for 'receiving, examining and assessing claims, and determining the nature of compensation/*Jabr al Darar* as well as the amount to be paid to the victims as appropriate'.[282] The latter 'shall assess the root causes of the conflict in Darfur, investigate violations, crimes and human rights abuses including violations of economic, social and cultural rights committed from February 2003, address issues of impunity and build a culture of confidence, peace and reconciliation'.[283]

The DDPD also provides for yet another Special Court for Darfur, 'which shall have jurisdiction over gross violations of human rights and serious violations of international humanitarian law committed in Darfur, since February 2003',[284] and 'shall apply the Sudanese criminal law, international criminal law and international humanitarian and

[271] *Ibid.*
[272] 'Darfur mediators hand compromise proposals to Sudanese parties' 2011.
[273] DDPD 2011, art. 56. [274] *Ibid.*, art. 57. [275] *Ibid.*, art. 58.
[276] *Ibid.*, s. 307(vi). [277] *Ibid.*, ss. 316 and 319. [278] *Ibid.*, art. 59.
[279] *Ibid.*, art. 60. [280] *Ibid.*, art. 61. [281] *Ibid.*, s. 311.
[282] *Ibid.*, s. 312. [283] *Ibid.*, s. 316. [284] *Ibid.*, s. 322.



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human rights law'.[285] 'The GoS shall appoint the Prosecutor of the Special Court, and shall enable him/her to assume his/her role in bringing perpetrators to justice.'[286] The mediation team had adopted the AUPD's proposal of a hybrid court, composed of Sudanese and non-Sudanese judges and senior legal support staff, but this was rejected by the GoS[287] on the basis of the (unconvincing) argument that such a court would be unconstitutional.[288] It also argued that the Sudanese authorities were competent to investigate and prosecute conflict-related crimes. As evidence it referred to the appointment of the Under-Secretary of the Ministry of Justice as the new Special Prosecutor for Darfur and his instructions to update the Minister monthly on his progress.[289]

The missing keystone in the DDPD's panoply of transitional-justice mechanisms is a political deal on transitional justice. Agreeing that people will give apologies, denounce violence, 'adopt … justice, reconciliation and forgiveness as principles leading to peace' and 'share their experiences, establish a common understanding of the past, facilitate genuine healing within and among communities and promote reconciliation and prevention in the future' is one thing. It is quite another to ensure that people will actually do so. The latter requires incentives, for instance truth and apologies in exchange for amnesty. The DDPD, however, already determines that there shall be an unconditional amnesty for ordinary crimes and none at all for international crimes.[290] The agreement thus does not provide perpetrators with incentives to come forward to tell the truth; either one already benefits from an amnesty or one risks prosecution by disclosing. And, while justice and reconciliation shall be based on the principle that 'all perpetrators of violations of human rights and international humanitarian law are held accountable',[291] the DDPD does not oblige the Prosecutor of the Special Court, or anybody else for that matter, to uphold this principle.[292] Without an arrangement

[285] *Ibid.*, s. 324. [286] *Ibid.*, s. 323.
[287] See also 'Sudan reiterates rejection of AU plan for Darfur hybrid courts' 2011.
[288] 'Darfur mediators hand compromise proposals to Sudanese parties' 2011. The INC does not prescribe the nationality of judges; section 23(a) of the 1986 Judiciary Act does, but that does not make the proposed arrangement unconstitutional and could be amended more easily than the Constitution.
[289] Interview with a person involved in the mediation, Khartoum, September 2011.
[290] DDPD 2011, art. 60. [291] *Ibid.*, s. 283.
[292] In the early morning of the day of the signing ceremony, UN Headquarters proposed language to strengthen the commitment to prosecute, but the GoS did not accept it.



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on how the system fits together, a system with many transitional-justice mechanisms may lead to the implementation of none.

Unlike in the Final Peace Agreement concerning the LRA, complementarity was not the lynchpin of the Doha negotiations on justice and reconciliation in Darfur. The key difference was that the LRA needed a guarantee of domestic proceedings for the cases against it to be rendered inadmissible before the ICC;[293] the GoS did not need such a guarantee in a peace agreement – if it ever wished to conduct domestic proceedings to render the ICC's cases inadmissible, it could initiate domestic proceedings, with or without a peace agreement.

Nonetheless, indirectly the ICC and to a limited extent complementarity did spur the negotiations on transitional justice. Having first taken accountability off the agenda on account of the ICC's involvement, the AU put it back in light of the controversy around the arrest warrant for the Sudanese President. The AU's reconsideration of a decision to leave questions of justice to an international court and the identification of the principle of complementarity as a way to undo the ICC's involvement resemble the above-discussed developments in the Ugandan situation.[294] But, whereas the Juba Agreements envisaged domestic proceedings that could render cases inadmissible under article 17 of the Rome Statute, the AUPD did not explicitly recommend Sudanese proceedings in the same cases as those before the ICC, probably realising that this would be asking the impossible of the GoS. It remained silent on what for the GoS was a rather discouraging interpretation by the ICC of the requirement of the same case. Instead, it encouraged the Sudanese authorities to take charge of accountability irrespective

[293] On the question whether proceedings conducted by non-state actors can render ICC proceedings inadmissible, see Kleffner 2011. More generally on courts of armed opposition groups, see Sivakumaran 2009.

[294] There are, of course, differences. In Uganda, the ICC's involvement became an obstacle when the LRA refused to sign any peace agreement until the ICC had dropped its case against the LRA; in Sudan, the ICC's involvement emboldened the rebels, leading them to refuse to negotiate with 'war criminals' (see Nouwen and Werner 2010a:956–8). In Uganda, it was in the interests of the rebel movement to insist on domestic proceedings, and the GoU backtracked on outsourcing justice to the ICC; in Sudan, the rebel movements preferred ICC proceedings and the mediating regional organisation tried to address the consequences of the ICC's involvement in the Darfur conflict.



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of whether this would render the ICC's cases inadmissible on grounds of complementarity.[295]

**Providing a boost for traditional justice**

In response to the ICC's intervention, the GoS frequently praised what can collectively be called 'traditional justice' mechanisms. The Sudanese President '"call[ed] on all the children of Sudan to respond to the call of historical national reconciliation", adding that this "would be inspired by the heritage of Africa and our traditions in the reconciliation councils and mediations led by elders"'.[296] The Minister of Justice has stated that the Darfur–Darfur Dialogue[297] would trigger the use of traditional mechanisms.[298] The Sudanese Bar Association promoted such mechanisms, proclaiming that they, unlike judicial procedures, promote peace and security.[299] In government-organised rallies, government-appointed traditional leaders demonstrated against the ICC, maintaining that they are perfectly capable of addressing Darfur's problems. The Sudanese People's Initiative[300] recommended using traditional mechanisms, establishing a national fund for the payment of blood money and rehabilitating the native administration.[301] The Heidelberg Darfur Dialogue Outcome Document containing Draft Proposals for

[295] The AUPD did so by stressing that the Darfurians deserve justice irrespective of the ICC's intervention (see above n. 174 and accompanying text), and by emphasising that the Court is 'of limited practical capacity'. See AU Doc. PSC/AHG/2(CCVII) 2009:[244], [245] and [254].

[296] International Center for Transitional Justice 2007:21 citing 'President of the Republic Calls in his Independence and Peace Day speech for National Reconciliation', *Akhbar al-Youm*, 8 January 2007.

[297] DPA 2006, art. 448 defines the 'Darfur–Darfur Dialogue and Consultation' (DDDC) as 'a conference in which representatives of all Darfurian stakeholders can meet to discuss the challenges of restoring peace to their land, overcoming the divisions between communities, and resolving the existing problems to build a common future'. While most parts of the DPA have never been implemented, the AU and UNAMID have conducted DDDC activities at grassroots levels. See www.dddc.org/about.shtml.

[298] Sabderat 2008:[20].

[299] Sudan Bar Association 2008e:5.

[300] See this chapter, above text preceding n. 53.

[301] Sudan 2008. 'Native administration' is a form of governance by which the central government decentralises authority to the leadership of ethnic or tribal kinship groups. The colonial government used the term to distinguish this form of governance from administration by expatriates. See Abdul Jalil, Mohammed and Yousuf 2007:39.



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Consideration in a Future Darfur Peace Agreement suggested that '[t]he *Ajaweed*, a traditional procedure for the resolution of conflicts, shall be institutionalized and assume the function of a truth and reconciliation mechanism'.[302] New laws on the native administration were drafted.[303]

However, to the extent that the GoS put forward traditional mechanisms as an alternative to the ICC,[304] this was, again, more an attempt to influence the Security Council than the ICC. The rhetorical references to such mechanisms are part of Sudan's broader argument before the Security Council that it has its house in order and is making genuine steps to address the situation in Darfur. Whereas the GoS has often ruled by division, it has been interested, particularly since the application for the arrest warrant against the President, in being seen to settle 'local conflicts' through traditional mechanisms.[305] It is in this context of conflict resolution that the Sudanese government put forward traditional mechanisms. It did not advance them as providing a basis for invoking article 17 of the Rome Statute.

Insofar as the Sudanese authorities ever wished to invoke traditional mechanisms in the context of an admissibility challenge on

[302] Max-Planck-Institute for Comparative Public Law and International Law and Peace Research Institute, 'Heidelberg Darfur Dialogue Outcome Document Containing Draft Proposals for Consideration in a Future Darfur Peace Agreement', art. 291.

[303] 'New native administration law for Darfur submits for presidency of the republic' 2009.

[304] Note that the government has had additional reasons for promoting traditional mechanisms. First, the presentation of tribal mechanisms as a solution to the conflict fits the government's presentation of the conflict as 'tribal'. Secondly, traditional mechanisms result in reconciliation rather than in punishment, which the government prefers in cases against state officials (according to UN officials reporting in March 2006, people have been forced to settle with state officials in order to end domestic criminal proceedings against the latter). Finally, it is widely believed that reconciliation and compensation better meet the immediate demands of the displaced than does the punishment of perpetrators. Even the prosecutor appointed to investigate conflict-related crimes in Darfur argued that 'the court may hand down the death sentence, but in the end, tribes will sit together and nobody will be hanged. The death penalty will not solve tribal fights. Darfur is not the US or Europe.' (interview with the then Special Prosecutor, Khartoum, December 2008).

[305] Interview with a person supporting traditional dispute resolution in Darfur, El-Geneina, May 2010.



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the ground of complementarity, the OTP has already rejected the option, arguing that 'traditional reconciliation mechanisms … are not criminal proceedings as such for purposes of assessing the admissibility of cases before the ICC'.[306]

Darfurian traditional justice mechanisms, like northern Ugandan, have also received recognition in a peace agreement concluded in the wake of ICC involvement. Unlike the DPA, the DDPD contains provisions on traditional justice as part of a comprehensive transitional-justice package.[307] As one of the principles for justice and reconciliation it adopts 'recognition of the role that independent and impartial traditional mechanisms can play in complementing processes of justice and reconciliation and the importance of making full use of their potential while maintaining international human rights standards'.[308] It also embraces as a principle '[t]he importance of drawing upon African and international experiences and best practices with respect to accountability, reconciliation and truth seeking in addressing what occurred in Darfur and the use of the mechanisms of justice, compensation and reconciliation for the settlement of the conflict'.[309] The DDPD may be indicative of a transitional-justice trend, set by Rwanda, in which, as reflected in the above-cited principle, 'traditional mechanisms' 'complement' formal justice mechanisms.[310] More specifically, the trend suggests that traditional justice is meant for 'low-level' perpetrators while court proceedings take care of 'high-level' perpetrators.[311] The DDPD also reflects a general international concern about the compatibility of 'traditional justice' and human rights, stipulating that traditional mechanisms can play a role only if they are 'independent and impartial' and 'maintain … international human rights standards'.[312]

[306] *Third Darfur Report*:6.

[307] 'Traditional mechanisms' are also given a role in settling disputes arising from the return process. See DDPD 2011, s. 267.

[308] *Ibid.*, s. 287. [309] *Ibid.*, s. 288.

[310] The Sudanese Government, too, has showed interest in the Rwandan model, in particular in the fact that Rwanda used an 'indigenous' process as an alternative to Western formal justice. Senior officials in the Sudanese Presidency instructed a Sudanese international lawyer to reflect upon a Sudanese traditional-justice law like the Rwandan act on *gacaca*.

[311] Indeed, this is the meaning that the ICC's OTP has at times given to 'complementarity'. See Chapter 5, 'Complementarity as primary right: confusion, ambiguity and misrepresentation'.

[312] See DDPD 2011, s. 287.



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The DDPD pays little attention to what traditional justice in Darfur actually entails.[313] 'Traditional justice' could refer to two conceptually distinct processes in Darfur. One such process is *judiya*, which is conflict resolution through a mix of mediation and arbitration by respected persons (*ajaweed*). The other is the administration of justice by 'traditional' or 'native' courts, so-called rural and town courts, which are headed by traditional leaders and constitute at the same time the lowest tier of the formal justice system. In practice, there is overlap between the two processes, if only because many of the traditional leaders who head 'traditional' courts are also involved in *judiya*. The DDPD formalises this conflation by assigning reconciliation to 'the *Ajaweed* Council' and 'the Native Administration'[314] while defining '*Ajaweed* Council' as 'a Mediation Council which consists of the Native Administration and community leaders'.[315] Since there is no permanent 'Ajaweed Council' – *judiya* is an *ad hoc* mechanism – it will be difficult to determine who is part of this envisaged Council. Similarly, it is not clear who constitutes 'the Native Administration' since it was officially abolished in the 1970s,[316] and, while the practice of special administrative roles for the leaders of tribes has continued to exist, it has been contested who qualifies as such. The government has recognised only those leaders who are loyal to it, thereby depriving other traditional leaders of the necessary resources to govern.[317]

*Judiya* as a process could advance many of the aims of transitional justice, but, as a truth-telling mechanism or an alternative to a formal accountability mechanism, it would have to be considerably adjusted, not unlike what happened to Rwandan *gacaca*. When compared to the formal justice system, *judiya*'s advantage is considered to lie in promoting reconciliation: 'a judge must decide either/or; *judiya* can reach a compromise conclusion'.[318] Or, according to another Darfurian

[313] More elaborately on traditional justice in Darfur, Nouwen 2010b.
[314] DDPD 2011, ss. 288 and 307. [315] *Ibid.*:5.
[316] Interview with traditional leaders of the Fur, Nyala, December 2008 and UN Doc. S/2005/80 (2005):5, 22 and 23. See also Mohamed 2002:6–7, Babiker 2002:11 and Mahmoud 2004:5.
[317] Interview with a traditional leader of the Birgid, Nyala, December 2008 and interview with a prominent member of the Umma Party, Omdurman, December 2008. See also Mohamed 2002:7 and UNDP and Ministry of Higher Education 2002:34.
[318] Interview with a traditional leader of the Massalit, El-Geneina, May 2010.



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interlocutor: 'A judgment can give you your right; an *ajaweed* decision can give you your right *and* heal.'[319] *Judiya* is also strong from a restorative-justice perspective in that it usually results in compensation and blood money (*dia*) and helps to restore relationships. *Judiya* is weaker in terms of finding the truth or encouraging apologies: truth is secondary to a settlement, consent to pay compensation considered a sufficient implicit acknowledgment of wrongdoing, and an apology not required, indeed, seldom made. While truth-telling had never been the primary focus of *judiya*, it has been observed that, during the height of the debate about the ICC's involvement, from mid-2008 to mid-2009, local peacemakers intentionally avoided talking about the past: some said 'we do not talk about the past, because the ICC will do that', whereas others reasoned 'we do not talk about the past, because otherwise people will be sent to the ICC'.[320]

*Judiya* is not focused on protecting legal entitlements either. As one interlocutor distinguished *judiya* from the formal system: 'A judge does justice; *judiya* is a compromise for co-existence.'[321] Others elaborated on this, explaining that *judiya* is 'a *compromise* between justice and reconciliation' and 'a *sacrifice* of a person entitled to justice who forgives for the sake of his/her community'.[322] Originating in and tailored to a tribal society, *judiya*'s strength is restoring communal relations;[323] it is weak in terms of enforcing individual obligations and protecting individual rights. Individual perpetrators are not held accountable; it is the perpetrator's group that takes the burden of being held accountable and paying for the consequences. At the same time, the victim's group represents the victim.

As included in the DDPD, traditional justice is not presented as an alternative to the ICC. There is therefore no need to adjust any traditional-justice processes for these to meet the requirements for rendering ICC cases inadmissible on grounds of complementarity.

[319] Interview with a Darfurian lawyer, El-Fasher, May 2010.
[320] Discussion with Jérôme Tubiana, researcher with expertise in *judiya*, Khartoum, September 2011. See also Tubiana 2011.
[321] Focus group with *ajaweed*, El-Fasher, May 2010.
[322] *Ibid.*
[323] It is because of this comparative advantage that *ajaweed* ask a prosecutor or a judge to defer a case to them if they consider it better for the communal relations that the issue is settled outside the court-room. Similarly, the judge will recommend that the case be settled outside the courtroom if he or she deems that application of the law would not benefit future coexistence in the community (more elaborately, Nouwen 2010b).



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But this does not deny that the increased attention on traditional justice in the peace agreement and in political debates has indirectly been catalysed by the ICC's intervention generally, and to a more limited extent by complementarity. The ICC's intervention, and in particular the Prosecutor's application for an arrest warrant for the President, led to the creation of the AUPD and the search for a more integrated approach towards peace and justice in Darfur. This in turn triggered Sudan's interest in transitional justice, including mechanisms of traditional justice. Although never suggesting the use of complementarity as a principle to render the ICC's cases inadmissible, the AUPD report did stress that the ICC alone would not achieve justice in Darfur and in that sense would always have to be 'complemented' by other mechanisms. It is in this broader, non-legal, meaning that complementarity has had a catalysing effect on the consideration of Darfurian traditional-justice mechanisms.

Unlike in Uganda, Darfurian traditional leaders themselves have seldom advocated traditional justice as an alternative to the ICC. Local leaders opposed to the government have lacked any incentives to help the government with its 'ICC problem' by offering an alternative to the Court.[324] Indeed, the most vocal of them, namely, the representatives of the displaced in the camps, initially pinned their hopes on the ICC, envisaging that the Court, an external actor pursuing the President on behalf of the international community, would incapacitate the government by executing its arrest warrants, if necessary through military intervention.[325] Parroting rebel leaders, who operated from Paris, London and Kampala, and, for their part, echoed slogans of Western lobby groups such as the 'Save Darfur Coalition', the leaders in camps proclaimed 'No peace without justice' and 'We need justice, not reconciliation'.[326]

More fundamentally, and again unlike in Uganda, local leaders did not perceive traditional mechanisms as alternatives to the ICC. Indeed, the ICC was seen as having 'nothing to do with the *ajaweed* system'.[327] It is of note that the distinction pointed to is not, as one might expect, that traditional mechanisms' focus is on peace through

[324] See also Ibrahim 2005–2006.
[325] Interview with a person working on traditional justice in Darfur, Nyala, December 2008.
[326] *Ibid.*
[327] Interview with a traditional leader of the Birgid, Nyala, December 2008.



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compensation and the ICC's on retributive justice. Rather, the ICC is seen as a global political power that may secure peace through regime change, after which the *ajaweed* can secure justice.[328]

As in Uganda, the *practice* of traditional justice with respect to conflict-related crime has hardly increased.[329] At the beginning of the conflict some traditional leaders tried to use the developed practice of government-sponsored *judiya*.[330] They meticulously recorded the incidence of attacks, the persons involved and the losses incurred, reported these to the President and Minister of Justice and petitioned for an end to the violence and for compensation.[331] But no reply, besides further attacks, was forthcoming.

There are substantial obstacles to applying *judiya* to the events that have taken place since 2003. First, the conflict has challenged the authority of traditional leaders by demonstrating that the power of the gun trumps the power of tradition.[332] Secondly, the government has forfeited its role as impartial facilitator in government-sponsored inter-tribal *judiya*, by arming some groups to fight others.[333] Thirdly, being either pro- or anti-government, *ajaweed* themselves are sometimes too politicised to function as mediators in disputes related to the conflict with the government.[334] Fourthly, despite the government's attempts to depict it as such, the conflict is not purely tribal and may therefore be difficult to resolve through procedures for tribal reconciliation. Fifthly, *ajaweed* work on the basis of precedent, but there is no precedent for the numbers of victims and perpetrators of this conflict, for its regional dimensions and for some of the crimes it has involved. For instance, traditional mechanisms have previously been used for murder and looting, but never for systematic rape.[335] Finally, and most obviously, a climate in which there is no end to the conflict in sight, in which millions of people languish in camps, in which

[328] As is illustrated by part of an interview cited in Nouwen 2012a:330.
[329] Traditional mechanisms have, however, been used in two other contexts. In camps for displaced persons, where traditional leaders have solved conflicts by negotiating compensation, such mechanisms have been almost the only form of justice available. Traditional mechanisms have also been employed to nip in the bud emerging tribal conflicts over land vacated by displaced persons.
[330] See also UNDP and Ministry of Higher Education 2002:49.
[331] International Center for Transitional Justice 2007:30.
[332] See also Mohamed 2002:9. [333] See also *ibid*. and Babiker 2002:31.
[334] Interview with a traditional leader of the Meidob, El-Fasher, December 2008.
[335] Interview with an expert on traditional justice in Darfur, Nyala, December 2008.



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alliances are constantly changing, in which parties are awash with arms, in which 'people who rode camels now drive landcruisers'[336] and in which traditional mechanisms are insufficiently backed by enforcement agencies is hardly conducive to reconciliation conferences.

And yet, some obstacles may also turn into reasons for increased practice of *judiya*. Absence of precedence may be a reason to develop it, as in any other legal system. Moreover, after seven years of international involvement in the Darfur conflict, it is more and more evident, in particular to Darfurians, that outsiders cannot resolve the conflict. As a lean and lenient home-grown method, *judiya* may become more attractive as a coping mechanism.

## EFFECTS EXPECTED BUT NOT CATALYSED

While complementarity catalysed some effects, other effects observed in Uganda could not be found in Sudan, in particular the broadening of the approach from the military and political to the legal and the discouragement of amnesties. As in Uganda, the only effect directly relevant to an admissibility challenge on the ground of complementarity, namely, more trials, prosecutions and/or investigations, did not take place.

### Broadening the approach from the military and political to the legal?

Many of the interviewed lawyers in Sudan see no role for their profession in addressing the conflict in Darfur. A senior magistrate in North Darfur explained why, in his view, criminal proceedings were not useful in the context of the Darfur conflict:

> In Darfur, conflicts are not criminally investigated. It is solved through the *ajaweed* system. That is the only way to solve this problem. If we follow international people, it will take a long time. Look at Rwanda: they have done very few people. Time will lapse. *Ajaweed* is the system here, already since the days of the English. If there is a political solution, all tribal leaders will solve the problem together. We have no major role in these cases. Only if they fail to pay money, we may enforce, but such cases are rare. The government may even help them to pay. Nobody is punished. An accused person will be released.[337]

[336] Interview with a traditional leader of the Birgid, Nyala, December 2008.
[337] Interview with a senior magistrate, El-Fasher, December 2008.



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A judge of one of the SCCEDs, the courts created officially to adjudicate crimes committed during the war in Darfur, in turn, argued that the conflict should be ended by offering the rebels money, government positions and amnesty.[338] One of the Special Prosecutors for Darfur agreed: 'courts will not provide the solution to the Darfur problem.'[339]

With respect to crimes committed by state actors, many Sudanese legal professionals consider it unfair to hold the government to account for a conflict 'solicited by the aggression of rebels', while the rebels have mostly stayed beyond the reach of law.[340] Asked about the legality of aerial attacks by the Sudanese Armed Forces on villages where there had been no indication of rebel presence, a Sudanese lecturer in criminal law replied: 'If there is a war, villages are attacked; a government has the right to defend itself.'[341] On this view, civilians die as collateral damage or because they are 'oxygen' for the rebels.[342] The applicability of international law is rebutted with the argument that international law is part of Western foreign policy, not Sudanese law.[343] To demonstrate the arbitrariness of the international community, Sudanese lawyers referred to the decades-long war between the government and the SPLM; in that context, international criminal law was never enforced.[344] Unlike in Uganda, the paradigm through which most Sudanese lawyers and politicians perceive the conflict has not (yet) been broadened to include a legal dimension. *Silent enim leges inter arma*[345] has remained the dominant view, even among lawyers.

The main reason that the Sudanese paradigm of the conflict in Darfur has not expanded to include a legal dimension is that the GoS

[338] Interview with a Sudanese judge, Khartoum, March 2007.
[339] Interview with a former Special Prosecutor for Darfur, Khartoum, July 2011.
[340] One government lawyer explained during an interview in Khartoum in December 2008: 'If we are not able to punish the rebel movements, why should we punish our own people?' This view was also expressed by lawyers critical of the government.
[341] Interview with a lecturer in criminal law, Khartoum, November 2008.
[342] Interview with a Sudanese human rights lawyer, Khartoum, November 2008.
[343] Interview with a member of the directorate of legal affairs in the Ministry of Foreign Affairs, Khartoum, March 2007. In a similar vein, a chief magistrate in Darfur, interviewed in El-Fasher in December 2008 ('International law is a big question now any politician in the West uses it for political ends. We are deceived by Western politicians. Until a few days ago, President Nixon [*sic*] was still bashing on Sudan.').
[344] See also this chapter, above, 'Fostering interest in transitional justice'.
[345] Cicero 52 BC:5 ('For among [times of] arms, the laws fall mute.').



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has resisted the legal approach. It has perceived the ICC as simply another patch of turf for political battle.[346] So has the Ugandan Government, but, whereas the GoU opted to enter this battlefield, the GoS has been forced into the legal domain against its will. For the GoS, the ICC is just another international political instrument that Western powers in the Security Council use selectively to topple regimes of which they do not approve. The referral is therefore, in its view, just as political a measure as the international condemnations, the arms embargo, the obligation to disarm the *Janjaweed* and the imposition of UN peacekeepers in Darfur.[347]

Government officials argued that this was evinced by the sequence of events leading to the referral by the Security Council. The referral was made in the same week that the Council imposed sanctions.[348] It came only two months after the GoS had made, in its view, far-reaching concessions to Southern Sudan and the international community, namely, signing an agreement granting the south the right to self-determination, committing itself to share substantial parts of its wealth and power and consenting to the presence of 10,000 UN peacekeepers to monitor implementation of the peace agreement. In the words of the Sudanese representative to the Security Council, Sudan was 'rewarded for putting an end to the longest conflict in Africa with further sanctions and procedures'.[349] The Sudanese authorities believe their view of a US-led ICC to be confirmed by statements made by the US representative to the Council[350] and by the manner in which the Prosecutor requested a warrant for the President's arrest: the US announced the request for Bashir's arrest warrant before Ocampo.[351] Finally, the Sudanese authorities see the Prosecutor's case against the President as the former's revenge for the latter's refusal to hand over Ahmad Harun

[346] More elaborately on the International Criminal Court as a political battlefield, see Nouwen and Werner 2010a and Nouwen and Werner 2011.
[347] See also De Waal 2008:34. [348] UN Doc. S/RES/1591 (2005).
[349] UN Doc. S/PV.5158 (2005):12 (Mr Erwa).
[350] *Ibid.*:3 (Mrs Patterson: '[W]e expect that, by having the Security Council refer the situation on Darfur to the ICC, firm political oversight of the process will be exercised. We expect that the Council will continue to exercise such oversight as investigations and prosecutions pursuant to the referral proceed.').
[351] Sabderat 2008:[6.8] and interview with a former Minister of Foreign Affairs, Khartoum, November 2008.



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and Ali Kushayb, the objects of the Prosecutor's first case in relation to the situation in Darfur.[352]

Against this background, the GoS considers the formulation of a legal response, and hence the expansion of the domestic approach to the conflict to encompass a legal dimension, as engaging in a political debate on the opponent's terms. Instead, the GoS has to date adopted what is primarily a strategy of 'rupture',[353] refusing to acknowledge, at least officially, any legal dimension to the conflict.[354] An awakening of the domestic legal sector as a result of the government's recognition of a legal dimension to the conflict, an effect catalysed by complementarity in Uganda, has therefore remained absent in Sudan.

Sudanese lawyers, for their part, have not used the ICC's intervention to emphasise the legal dimension to the conflict and to expand their own role, as happened in Uganda. One factor obstructing such action is that, in Sudanese legal practice, law frequently yields to the executive.[355] The Constitutional Court has been reluctant to find the state's actions unconstitutional: for instance, the Court upheld President Bashir's decision to declare a state of emergency and dissolve the Parliament when parliamentary speaker and political rival Hassan al-Turabi attempted to have the assembly limit the President's powers;[356] the Court refused a petition complaining of police harassment and advised informal settlement instead;[357] the Court upheld immunity of officials and prescription in case of torture allegations;[358] the Court dismissed a case challenging the Bar Association elections on the ground that there was no legal dispute; the Court ruled that decisions by the Minister of Justice are not subject to judicial review; and the Court rejected a challenge of pre-censorship on the ground that

[352] The Prosecutor links the case against Harun to the case against Bashir in *Prosecutor's Darfur Statement SC December 2007*:10 ('Maintaining Harun in his position is clear indicia [*sic*] of collusion with other officials. Who is taking responsibility for supporting him? This is the new case I will bring to the judges.').

[353] A defence strategy of 'rupture' attacks the system rather than the facts presented by the Prosecutor within that system. See Koskenniemi 2002a:26.

[354] The steps that the GoS has made, such as the establishment of Special Courts and amendments of laws, are legal in appearance but political in substance, aimed as they are at convincing international political rather than legal actors. See this chapter, above, 'Complementarity: less than a secondary response'.

[355] See more elaborately El-Gaili 2002.

[356] 'Constitutional Court rejects petition against Bashir' 2000.

[357] El-Gaili 2002:16.

[358] *Farouq Mohamed Ibrahim Al Nour* v. *(1) Government of Sudan; (2) Legislative Body*.



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freedom of expression was secondary to national security needs.[359] Illustrative of the tendency to bend to the executive is a decision of the Constitutional Court in which it concluded, after finding that the special procedural rules for the Special Terrorism Courts[360] violated principles protected by the Constitution, as follows:

> [T]his Court is not a political body, however, it is also not an isolated island from what was happening in the country . . . [T]his Court, in considering the contested constitutionality of the rules cannot manage, except to coexist with some derogation from the normal standards, and this is not unprecedented. As in Nuremberg, the heavy losses in the life and property and the cruelty and brutality with which the whole was conducted, compelled those in charge to neglect one of the renowned established legal rules to the non-retroactivity of laws . . . I reject the judgment of the non-constitutionality . . . notwithstanding that . . . no doubt, this is contradictory with the accepted principle of gradation [read: 'hierarchy'] in constitutional jurisprudence and justice, as the constitutional provisions in their force and supremacy comes at the top of the pyramid followed by the legislative power . . . [T]his required me to decide the non-constitutionality and nullity of the provision of Article 25 of the rules, had it not been for the exceptional circumstances which required the issuance of the rules.[361]

With the executive being able in times of 'exceptional circumstances' to overrule the Constitution, the Constitution's impressive catalogue of human rights has thus far remained more of a letter of assurance for foreign observers than the state's legal foundation embodying enforceable individual entitlements.

This in turn reveals a further reason why the Sudanese legal profession has not, of its own accord, used the ICC's intervention to emphasise the potential role of law and lawyers in the conflict, namely, the lack of independence of the legal profession.[362] The Constitution of 2005 guarantees the judiciary's independence from the executive,[363] but this independence is in practice limited by several institutional and historical factors. As regards the institutional factors,

[359] Information from experts on Sudan's Constitutional Court, 2010.
[360] These courts were established to prosecute the rebels involved in the May 2008 attack on Omdurman.
[361] Cited in Mekki Medani 2008. No state of emergency was declared in Khartoum during or after the attack.
[362] See more extensively El-Gaili 2002.
[363] INC 2005, arts. 123(2) and 128. See also Constitution of the Sudan 1998, art. 101.



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the Chief Justice is the chairman of the body responsible for appointing judges, the National Judicial Service Commission.[364] He has the power not only to assign specific judges to specific cases and to transfer cases but also to establish special courts, to set their special procedures and to appoint special judges with temporary contracts.[365] Secondly, cases that the National Intelligence and Security Service considers in its interest are assigned to 'judges' who are on the NISS payroll.[366] Thirdly, in some cases the judge acts simultaneously as both magistrate and prosecutor. As for the historical factors for the lack of independence, purges in the judiciary after various changes in government, particularly after the 1989 coup by Bashir, have instilled an executive-mindedness in the judiciary. Judges who were not supportive of the new ideology were considered against it, and more than 500 judges, from the Supreme Court down, received a three-line letter that they were dismissed 'in the public interest'.[367] The remaining and newly recruited judges are on their guard against stepping out of line. They refrain from referring to international law out of fear that such a reference would be considered 'anti-government'.[368]

As in many legal systems, the question of the independence of the prosecution is even more vexed an issue. The Constitution guarantees that prosecutors, as state legal advisors, shall perform their duties impartially,[369] but their chief, the Minister of Justice, is a political actor.[370] In theory, a prosecutor must prosecute if there is a *prima facie* case and the Minister cannot give instructions in individual cases of serious crimes.[371] In practice, in politically sensitive cases prosecutors refrain from prosecuting or ask the Minister for permission or the latter intervenes.[372] The police equally try to avoid such cases. By way of example, when Chadian opposition groups attacked villages in West

[364] National Judicial Service Commission Act 2005, art. 4(a).
[365] Judiciary Act 1986, s. 10(e), and Criminal Procedure Act 1991, ss. 31(2) and 212.
[366] Interview with parliamentarians, Khartoum, November 2008, interview with an opposition leader who had often been tried, Khartoum, December 2008 and interview with another opposition leader, Khartoum, December 2008.
[367] Letter shown by a Sudanese human rights lawyer, Khartoum, November 2008.
[368] Phone interview with a judge, October 2007.
[369] INC 2005, art. 133(3). [370] *Ibid.*, art. 133(2).
[371] Criminal Procedure Act 1991, s. 58(2), discussion with Sudanese judges and prosecutors, October 2007.
[372] If permission is denied, prosecutors simply explain publicly that there is not enough evidence for a *prima facie* case (discussion with Sudanese judges and prosecutors, October 2007).



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Darfur, a local police officer explained that the police were unable to investigate the incidents on account of the fact that the Chadian rebels had been 'invited by the higher authorities'.[373]

Internal divisions within the Sudanese legal profession provide a third explanation as to why it has not used the ICC's intervention as an opportunity to expand the national conflict paradigm with a legal dimension. Human rights activists have long tried to do so,[374] but they have been too marginalised to bring about a paradigm shift in the profession as a whole. Instead of giving their work an impetus, the ICC's involvement complicated it, at least within Sudan. After the torture of human rights activists on allegations of 'fabrication of evidence for the ICC', many human rights lawyers fled abroad or ceased to practise.[375] Disillusioned by the national legal system, this group of lawyers does not advocate domestic proceedings but has focused its hope on the ICC.

The lawyers at the other end of the spectrum, pro-NCP lawyers such as the Chief Justice and the leadership of the Sudanese Bar Association, have not advocated domestic proceedings either. Instead of *la bouche de la loi*,[376] they are *la bouche du chef politique*, who has already determined his position on the ICC.[377] By way of illustration, Figure 4.5 shows a banner that decorated the club of the Sudanese Bar Association after Ocampo requested the arrest warrant for Bashir.

In between the two extremes of human rights activists and pro-NCP lawyers is a broad range of technocrats, formally supportive of the government, but mostly silently trying to stay within the limited

[373] As reported by human rights lawyers, August 2006.

[374] Lawyers in the rebel movements also speak out against the GoS, but they operate separately from their professional colleagues.

[375] *Inter plurima alia*, interview with three Darfurian human rights lawyers, Khartoum, December 2008, interview with a Darfurian human rights lawyer in El-Fasher, May 2010 ('Many of the lawyers formerly of [the dissolved NGO] Amel [Centre] have left Fasher. This was after the arrest warrant. They feared something was coming up.'), interview with a Darfurian human rights lawyer in Nyala in December 2008 ('If Bashir is touched, they will kill every human rights defender everywhere in Sudan. This is what [Presidential Assistant] Nafi ali Nafi has said in the press.') and in August 2011 ('I no longer do human rights cases. I do not want to get my family in trouble . . . I am now alone here. [My former colleagues] are in Sweden, the UK, and Kampala.') and author's email exchange with a human rights lawyer who used to be in Khartoum and moved abroad, December 2009. See also Fernandez 2008b.

[376] Montesquieu 1862.

[377] See e.g. Sudan Bar Association 2008c.



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Figure 4.5 'Taking Sudan to Ocampo's court is a political decision with a legal cover'

'politically neutral' terrain on which they can exercise their profession. Remarkably, quite a few senior government positions concerning human rights and humanitarian law are held by Darfurians. Yet, as one such senior lawyer explains:

> I am in this position only to justify the Government's conduct. These posts have their red lines. I know mine.[378]

By definition political, the conflict in Darfur is beyond the red lines for technocratic lawyers. Wishing to avoid getting their fingers, and careers, burnt on politically sensitive cases, they do not pursue them. As a legal advisor in the Ministry of Justice said: 'Here, in the Ministry, we do the non-political cases … Political cases are done by the lawyer-politicians, like the Chairman of the Bar Association.'[379] Even a former cabinet minister did not dare to push for domestic trials, as he explained:

[378] Interview, Khartoum, February 2011.
[379] Interview with a senior legal advisor in the Ministry of Justice, Khartoum, December 2008.



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> I would spoil . . . my [entire] programme if I were to go in the direction of domestic accountability. I focused on the goals I could focus on . . . I did not intend to be nosy in other things, as this would stop my programme. The people [in the cabinet] would not allow me. Accountability for the military would create madness.[380]

During a study tour abroad, Sudanese judges and prosecutors skilfully applied the statutes of international criminal tribunals to hypothetical case studies ('this is genocide'), but refused to discuss the situation in Darfur as a case study, arguing that this was a political rather than legal issue. Part of the explanation is that participants close to the Chief Justice would subsequently brief him on who had said what.[381] But the other part of the explanation is that many lawyers share the government's perception of the ICC as an instrument of aggressive Western foreign policy. 'Why did the Cassese report lead to a referral of the situation in Darfur to the ICC, but the Goldstone report not to a referral of the situation in Gaza?', asked a senior official in the Ministry of Justice with reference to the ICC's involvement in his country.[382] Just as Sudanese doctors in Darfur are reluctant to allege rape, many judges and prosecutors refrain from bringing conflict-related cases before domestic courts, fearing that such cases would only confirm foreign allegations of widespread crime, thereby further worsening the country's image abroad.

The space within which international and foreign organisations can promote transitional justice through transnational judicial processes – a factor contributing to the paradigm shift in Uganda – has been limited in Sudan. After the Prosecutor's request for an arrest warrant for the President, a decree was issued denying visas to persons working in the field of 'human rights'.[383] For organisations already present in Sudan, the ICC's involvement spurred some developments for which they had lobbied for decades, for instance domesticating international humanitarian law, but overall it complicated their work. The political

[380] Interview with a former Minister of Justice, Khartoum, December 2008.
[381] Discussion with participants.
[382] Interview, Khartoum, July 2011.
[383] Interview with a lawyer in a Sudanese human rights organisation seeking visas (the organisation would later, after the issuance of the arrest warrant for the President, be closed down), Khartoum, November 2008. In Sudan, as in Uganda (see Chapter 3, n. 398), 'human rights law' and 'international humanitarian law' are often considered one and the same.



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sensitivities surrounding the ICC affected everything that could in the slightest bit be related to the Court, such as human rights or humanitarian law. A representative of a humanitarian organisation observed:

> Now with the ICC, it is over. The request for the arrest warrant against Bashir was a turning point, for Sudan, and for African states more generally. They now say: 'We cannot commit ourselves to any new convention, agreement, related to international humanitarian law.' These fields have been politicised and this will backlash on our work.[384]

Since the GoS perceives the referral as part of an international conspiracy against it, international and foreign organisations are easily branded as accomplices of the Court. Realistically fearing expulsion after the Prosecutor's application for an arrest warrant against the President,[385] they began to avoid topics related to international law. UNAMID, for instance, took care not to raise the topic of justice, afraid that this would suggest even more of a link between the UN and the ICC, and lead the government to impede their peacekeeping activities further.[386] Only after the AUPD report did they take up issues of international justice again, through the backdoor of the concept of 'transitional justice'.

Finally, transnational professional contacts between Sudanese lawyers and foreign colleagues have been complicated too. For instance, the Chief Justice must give permission for judges' professional interactions with foreigners and has the final word on the lists of participants and the contents of workshops and study tours. To the extent that they have had international exposure, Sudanese officials have been trained by international lawyers but, unlike their Ugandan colleagues, have not become part of international professional networks. Only the human rights activists who have fled abroad have been incorporated into international networks of human rights activists and pro-ICC advocacy groups, but by moving abroad they have lost most of their influence on the Sudanese legal profession.

[384] Interview with a senior representative of a humanitarian organisation, Khartoum, October 2008.
[385] 'Defiant Sudan expels aid agencies after Beshir warrant' 2009.
[386] Discussion with a representative of an international organisation, El-Fasher, December 2008.



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Nonetheless, some steps taken since the OTP's request for the arrest warrant for the President suggest that technocratic lawyers, while normally shying away and kept from politically sensitive cases, may suddenly be called upon once these cases become urgent.[387] If the costs of denial become too high, the GoS may ultimately decide to engage with the Court through the legal avenues prescribed in the Statute. This could open up some space for lawyers and for a legal dimension to an overwhelmingly political and military conflict paradigm.

**Discouraging immunities and amnesties?**

Immunity is a big thing in Sudan. It is one of the attractions of holding a government job. In the years since independence, the entire spectrum of state officials, from the President,[388] ministers[389] and members of the national legislature[390] to the rank and file of the armed forces,[391] police[392] and National Intelligence and Security Services,[393] have come to be protected by some form of immunity, sometimes substantive, sometimes only procedural. Soldiers, police and security officers, for instance, cannot be prosecuted without the permission of the suspect's superiors.[394] The process of obtaining such permission

[387] For instance, the GoS mandated the University of Khartoum to 'prepare a memo to assist concerned competent authorities to refute the decision' of the ICC Prosecutor. The University's legal committee in fact recommended the GoS to invoke complementarity. Arguing that the admissibility assessment is continuous, it proposed taking a 'real preemptive step as to initiate independent procedures commensurable with the Rome Statute; the international standards of human rights; the international humanitarian law; and the post-CPA/DPA democratic laws.' (University of Khartoum 2008:8–9). But the Vice-President, himself a lawyer, rejected the University's finding that the Court had jurisdiction (interview with a member of the University of Khartoum, Khartoum, November 2008).

[388] INC 2005, art. 60(1) and Constitution of the Sudan 1998, art. 45(1).

[389] Privileges and Immunities Appropriation Constitutional Officeholders, Executive and Legislative Act 2001, s. 21 (as reported in Pichon 2008:221).

[390] INC 2005, art. 92 and Constitution of the Sudan 1998, art. 74.

[391] Armed Forces Act 2007, s. 34, People's Armed Forces Act 1986, s. 8, as amended by the People's Armed Forces Act (Amendment) 1999, s. 6. Pursuant to the Judiciary Headquarters, Criminal Decree No. 3/95, 1995, the Chief Justice takes the final decision on whether or not immunity is lifted.

[392] Police Forces Act 1999, s. 46.

[393] National Security Act 2010, s. 52(1). National Security Forces Act 1999, s. 33(b).

[394] See also UN Doc. CCPR/C/SDN/CO/3/CRP.1 (2007):[9].



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has been arbitrary and non-transparent, and has usually resulted in no or a negative reply, particularly if the relevant crime is alleged to have been committed in the context of state operations.[395]

The ICC's involvement has done nothing to limit the scope or increase the lifting of immunities. Indeed, within two weeks of the Security Council's referral of the situation in Darfur to the ICC, the Sudanese President decreed the expansion of the immunity available under the Armed Forces Act. A substantive defence was introduced and from then on immunity could be lifted only by the President or a person authorised by him.[396] The Police Forces Act was amended without affecting the immunities for the police.[397] In 2008, the Constitutional Court found that 'procedural immunity for the security and police services is routine . . . and one cannot argue that it is unconstitutional'.[398] The DDPD provides that 'immunities enjoyed by persons of the official status or functions shall not obstruct the speedy dispensation of justice nor shall they prevent the combating of impunity' but does not declare immunities irrelevant.[399] The number of beneficiaries of immunities has only increased over the years since the ICC's involvement, as a result of the integration of pro-government militias and former rebels into the Popular Defence Forces, the Central Reserve Police, the Border Guards and other state-affiliated institutions. Indeed, according to one member of the opposition, the entire 'list of fifty-one', the confidential list of suspects identified by the ICID, has been given positions that come with immunity.[400] The practice of the lifting of immunities has remained non-transparent.[401]

[395] Interview with Sudanese human rights lawyers, El-Fasher and Nyala, December 2008.

[396] Sudan Armed Forces Act (Amendment) 2005. When this decree lapsed, the President passed a new one, containing only the immunity. The latter decree lapsed when the National Assembly, by way of exception, refused to pass the expiring decree into law. But the immunity provisions of the former were incorporated into the amended Armed Forces Act 2007, s. 34.

[397] National Police Forces Act 2008, art. 45(1).

[398] Judge Altayeb Abass al-Ga'ali in *Farouq Mohamed Ibrahim Al Nour* v. *(1) Government of Sudan;(2) Legislative Body*.

[399] DDPD 2011, s. 295.

[400] Interview with a member of the opposition, Khartoum, March 2011.

[401] Human rights lawyers in Nyala, first interviewed in November 2005, reported in interviews in December 2008 an improvement in the lifting of immunity in rape cases in Nyala, which they attributed to particular superiors in the army. Cases of torture, however, were kept beyond judicial scrutiny.



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Nor has the ICC's involvement ended the practice of amnesties. Soon after the conclusion of the 2006 Darfur Peace Agreement, an amnesty was declared, the Prosecutor's opening of an investigation into Darfur notwithstanding. Decree 114 provided a general amnesty for those belonging to armed movements that had signed or adhered to the DPA and to parties that participated in officially endorsed tribal reconciliation procedures.[402] Whether the decree applies only to those who took up arms against the government or also to those who fought on the government's behalf remains controversial: no policy document on its application or overview of its beneficiaries has been made available.[403] Anecdotal evidence suggests that it has been given a wide interpretation and applied in instances in which the government wished to amnesty certain persons.[404]

In the subsequent Darfur peace negotiations in Doha, aimed at the armed movements that had refused to sign the DPA, amnesty featured again. Despite JEM's and LJM's espoused commitment to accountability, both movements signed framework agreements with the GoS containing an article providing for the '[i]ssuance of a general amnesty for . . . members of [JEM and LJM, respectively], and the release of the war prisoners and convicted persons from both sides, after the final signing of this Agreement'.[405] Armed groups that had fought for the *government* subsequently sought association with one of the rebel movements, LJM, if only to benefit from the amnesty.[406] Only the Joint Chief Mediator had to pay a price for this provision in the Framework Agreement: he was reprimanded by UN Headquarters for signing an agreement

[402] Decree No. 114, 2006.

[403] Interviewed senior officials in the Ministry of Justice working for the Special Prosecutor's Office thought the decree to apply to all sides of the conflict (interviews in Khartoum, July 2011).

[404] A senior magistrate in North Darfur justified in an interview in El-Fasher in December 2008 the release of two convicted military intelligence officers (see next section) by arguing that a private blood-money settlement was in line with the 'tribal reconciliation' referred to in the amnesty decree, even though the case had not involved a dispute between tribes.

[405] Framework Agreement to Resolve the Conflict in Darfur between the Government of Sudan (GoS) and the Justice and Equality Movement 2010, art. 2; Framework Agreement to Resolve the Conflict in Darfur between the Government of Sudan (GoS) and the Liberation and Justice Movement (LJM) 2010, art. 3.

[406] Interview with a prosecutor, El-Fasher, August 2011.



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that contained a blanket amnesty without appending a rider that would exclude the UN's list of amnesty-unworthy crimes from the scope of the amnesty.[407]

The Mediator learnt his lesson: the final outcome document of the Doha negotiations, the DDPD, again includes an amnesty provision,[408] but, for the first time in the history of Sudanese peace agreements, makes an exception for 'war crimes, crimes against humanity, crimes of genocide, crimes of sexual violence, and gross violations of human rights and humanitarian law'. The GoS had proposed an alternative exception clause, namely:

> The Parties agree that the individual rights in relation to the crimes and violations which have taken place in Darfur during the conflict, including war crimes, crimes against humanity, crimes of genocide, crimes of sexual violence, and gross violations of human rights and humanitarian law shall not be included in the scope of application of the amnesty.[409]

The GoS's proposal was not accepted. For the protection of individual rights the amendment was not necessary; the text reflects Islamic law as applied in Sudan, according to which amnesties, as laws promulgated by the state, can never deprive an individual of his or her Quranic entitlement to *qisas* (retribution) or *dia* (blood money). This law will continue to apply with or without provision in the DDPD. The consequence of the GoS's proposal's not having made it into the DDPD is thus only that the text it was meant to substitute, namely, the exclusion of a category of special crimes from the scope of the amnesty, still stands. The practical relevance of this exception to the amnesty is of course questionable, since the state that proposed to replace it can easily secure a *de facto* amnesty by refraining from prosecutions in practice.

It is unlikely that the new immunity and amnesty provisions reflect a 'reverse catalysis' on the part of the ICC. They are more a continuation of past practice than a response to the Court. The fact remains, however, that the ICC's intervention has not discernibly spurred the

[407] Interview with persons close to the mediation team, Khartoum, May 2010.

[408] DDPD 2011, s. 329: 'In order to create a conducive environment for peace and reconciliation, the GoS shall grant a general amnesty in accordance with the Sudanese Constitution and Laws, to civil and military members, to prisoners of war and those sentenced from the Parties, and on this basis, release the prisoners of war.'

[409] Sudan 2011.



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GoS to decrease the use of immunities or amnesties, even though both may obstruct attempts to render ICC cases inadmissible on grounds of complementarity.

**Encouraging more trials, prosecutions and/or investigations?**

Special courts, new laws and transitional-justice talk notwithstanding, the only product of a catalysing effect on the part of complementarity that could render ICC cases inadmissible, namely, genuine domestic investigations and prosecutions, has remained largely absent in Sudan. This is not to say that there have been no proceedings related to the conflict. There have been several trials of members of the armed movements, most notably of people accused of being supporters of JEM in the attack on Khartoum's twin city, Omdurman.[410] More indirectly related to the conflict, people have been investigated and prosecuted for having links to the ICC. However, the offences prosecuted, mostly treason and terrorism, are different in character from those in the Rome Statute.

With respect to the persons sought by the ICC, the GoS has sometimes appeared to initiate domestic proceedings.[411] A week after the Prosecutor had requested the Court to issue summonses for the appearances of Ali Kushayb and Ahmad Harun, Kushayb was reportedly sent for trial by the Special Court in West Darfur. The Sudanese Prosecutor-General attempted to open an investigation into Harun. However, Kushayb was released for lack of evidence and the Sudanese President aborted the investigation into Harun.[412] Immediately after the ICC Prosecutor's application for an arrest warrant for the President, newspapers reported that Kushayb was in custody again[413] (but several interviewees said they had spotted him walking as a free man

[410] At least 103 persons have been sentenced to death in tribunals especially created to deal with this attack (UN Doc. S/2009/352 (2009):[4]).

[411] Other officials have seemed to test the waters by suggesting that Sudan might hand Harun and Kushayb over to the Court 'as a protection from further indictments' (Ali 2008a).

[412] 'UK, France agree to Chinese proposal on Darfur trials: report' 2008 and El-Gizouli 2009:261. Harun remained the State Minister responsible for humanitarian affairs including in the Darfur region until he was appointed governor of the state of South Kordofan in 2009.

[413] On Kushayb's transitions in and out of prison, see 'Sudan official report to UNSC in September shows no arrest of Kushayb' 2008, 'Sudan detains militia leader wanted by ICC in preparation for trial' 2008, and 'Darfur war crimes suspect transferred to Khartoum' 2009.



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in north Khartoum and in West Darfur)[414] and some officials suggested publicly that even Harun might be prosecuted domestically, if the ICC provided the evidence.[415] But, in a private interview, a prosecutor responsible for the investigation claimed to have found evidence only against Kushayb, not against Harun.[416] He said he had not looked for evidence against the President, since the latter could be prosecuted only if three quarters of the National Legislature decided to charge him before the Constitutional Court.[417]

The special bodies set up to investigate, prosecute and try persons for crimes committed in the context of the Darfur conflict largely failed to fulfil their (purported) mandates. Alternatively, their recommendations were not implemented.[418] The government has given more attention to their establishment than to their functioning. For instance, after its establishment, the Specialised Attorney Agency for Crimes against Humanity, mandated to prosecute crimes against humanity throughout the country, was not mentioned again in any government records. In 2008, the highest officials in the Ministry of Justice did not seem to know of the existence of this agency that was created in 2005.[419] The JIC, mandated to investigate certain incidents that had been highlighted by the national Commission of Inquiry with

[414] Two years later, he was officially still in 'police custody' – Kushayb had been integrated into the 'Central Reserve Police' and the normal practice is for suspects belonging to the army or police to be detained by their employer during the course of the investigation. But in August 2011 he could be spotted drinking tea in the streets of Nyala, without any indication of detention.

[415] Ali 2008b and Tisdall 2008.

[416] Interview with a member of the office of the Special Prosecutor for Darfur, Khartoum, December 2008. In fact, even when no longer a state minister, Harun continued to enjoy immunity as a governor. Kushayb, integrated into the Central Reserve Police, may be protected by immunity, which applies even though the alleged crimes were committed before he joined the police.

[417] INC 2005, art. 60.

[418] For instance, when a Commission on Reparations, the establishment of which coincided with the release of the ICID report, recommended the payment of billions of Sudanese pounds to Darfurian victims (Abu Al Gasim 2005 speaks of approximately US$2 billion and of 200 billion in Sudanese pounds), the Vice-President refused to receive the report. Payment of the suggested amounts to the identified Darfurian victims, he said, could open a Pandora's box in Southern Sudan (interview with a member of the Commission on Reparations, Khartoum, November 2008).

[419] Interview with a senior official in the Ministry of Justice, Khartoum, December 2008.



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a view to prosecution, never completed its work. Consequently, the Special Prosecution Commissions, which were supposed to prosecute cases investigated by the JIC, did not have any cases. Initially, they took some investigated cases from ordinary prosecutors to the Special Courts.[420] But, after a few months, the Special Court in El-Fasher received no more cases. The Special Courts in El-Geneina and Nyala decided their last cases in 2006. While the Special Courts officially still exist, the judges have long since taken up other positions, some of them abroad.[421]

It is difficult to appraise the number and contents of Sudanese proceedings for conflict-related crimes,[422] but it is clear that the SCCEDs have not, with one exception, tried cases inherently connected with the conflict.[423] The dozen cases that they have considered have involved charges of (though not always convictions for) armed robbery, receipt of stolen goods, possession of firearms without a licence, intentional wounding, murder and rape. The majority of the acts have been committed by civilians[424] or low-ranking armed forces, and have been only tangentially related to the armed conflict.[425] In the two cases against low- and middle-ranking military intelligence officers on the grounds of their interrogation causing the death of persons suspected of rebel activities (a thirteen-year-old boy and

[420] Interview with three prosecutors from North Darfur, El-Fasher, December 2008.

[421] Repeat interviews with one of the judges, 2007, 2008 and 2011.

[422] A complicating factor is that there is no rule determining which cases are brought before the Special Courts or other courts. General courts, the Specialised Courts of 2003 and military courts have continued to adjudicate similar cases.

[423] This paragraph is based on an analysis of Sudan 2008, *Third Darfur Report*:5 and incident reporting in newspapers. Over-reporting has been sought to be avoided through careful comparison of descriptions of the reported cases, among others the charges and sentences. If many cases have not been reported, the analysis may suffer from under-reporting. For a description of many of the cases taken into account in this paragraph, see Human Rights Watch 2006 and International Commission of Jurists 2007. See also Barends 2007.

[424] See e.g. Special Court, Nyala, 6271/2004, 25 July 2005 (four civilians convicted of armed robbery of a vehicle) and Special Court, Nyala, 462/2005, 28 August 2005 (a civilian acquitted of armed robbery and intentionally wounding a staff member of the United States Agency for International Development during an attack against a humanitarian convoy, sentenced to nine months' imprisonment for possessing an unlicensed weapon).

[425] See e.g. Special Court, El-Fasher (no case number or date available), convicting three low-level members of the Sudanese army of armed robbery (stealing sheep) and a civilian (a butcher) of receiving stolen property.



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sixty-year-old man), the accused were sentenced to death. In one of the two cases, the family of the deceased granted full pardon in return for *dia* (blood money). Using its discretion in exercising the 'public right',[426] the Court sentenced the men to two years' imprisonment. Shortly thereafter, however, they were pardoned.[427] Of the two rape cases, one resulted in an acquittal due to a lack of evidence.[428] The other case was successful, as the accused had been caught red-handed and confessed.[429] No high-level official has been convicted and no case has involved an allegation of a widespread or systematic attack on civilians. The jurisdiction of the SCCEDs may have been expanded to include 'actions which constitute crimes pursuant to ... the international humanitarian law',[430] yet all the charges, with one noteworthy exception, have involved only Sudanese law.

The one noteworthy exception is a case brought in Nyala. Four days after militias had assaulted the villages of Tama and Kashkur, leaving forty-one persons dead, the accused were found looting and were arrested. Silent on the legal effect of international law in Sudanese law in general, the decision shows a willingness directly to apply international humanitarian law as embodied in the Geneva Conventions and Rome Statute. As the only available Sudanese case concerning the Darfur conflict in which international criminal law is referred to and even applied, it is worth quoting the Court's considerations *in extenso*:[431]

> The case we are deliberating herein constitutes an illustration of war and tribal violence. Conforming to section 5-a [of the amended decree

[426] According to the Criminal Procedure Act 1991, s. 36(1), '[a]n injured, or interested party ... may relinquish his private right in the criminal suit, by pardon or conciliation [i.e. payment of *dia*] at any time before passing a final judgment therein, without prejudice to the public right'. The 'public right' is the right of the state to punish the perpetrator despite the private settlement. A judge may exercise this right at his or her discretion, but the sentence may be only minimal in comparison to what the sentence had been in the absence of a private settlement.

[427] See this chapter, above n. 404.

[428] Special Court, Nyala (no case number available), 27 August 2005 (eight members of the Popular Defence Forces and two military personnel were acquitted of rape of a sixteen-year-old girl during an attack on two public buses).

[429] SOAT/Amel Centre 2006.

[430] Chief Justice, Amendment of the Order of Establishment of Criminal Court for Darfur's Incidents 2005.

[431] The following citations related to this case come from *Adam Abras Adam* (no paragraphs or page numbers).



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> establishing the Special Court], the mandate … of this tribunal includes the incidents considered as crime according to the Sudanese criminal act, other penal acts and the International Humanitarian Law. Therefore, this tribunal enjoys a legal style [similar?] to [the] International Criminal Court.
>
> One of the significant principles agreed on in Rome's Statute is reaffirmation of inter-community ties that constitute … a common heritage. It is a concern that this strong fabric might be torn off any time. Hence, the judicial provisions maintained by this tribunal aim at controlling the jeopardy of crimes worrying the international community – see section 4-1 [*sic*] [of] the Statute of Rome for [an] ICC,[432] section 4 of [the] Criminal Procedure Act 1991.[433]

The Court then discussed the charges of robbery and criminal misappropriation in accordance with the Sudanese Criminal Act and 'sections 8\16 of humanitarian criminal act'. With respect to 'section 8 of international human criminal act – Statute of Rome', the Court cited article 8(1) and (2)(a)(i)–(iv) of the Statute, but not the crime charged, namely, that under article 8(2)(b)(xvi) ('pillaging a town or place, even when taken by assault'). Remarkably, both the crimes cited and the crime charged represent provisions applicable in *international* armed conflict. The Court went on to quote the beginning of common article 3 of the 1949 Geneva Conventions, applicable to non-international armed conflict, and considered:

> The international community has faced various difficulties to have [. . .] access to a specific law tackling the aftermath of current armed conflict. As a consequence of the growing complexity of modern armed conflict, the law of war is also becoming more and more complicated. And this law from the strategic level downward, application of the law of war becomes increasingly a matter of internal order and discipline.

The Court concluded that the prosecution failed to prove a link between the looting and the military action, hence the 'law of war or humanitarian criminal law' did not apply, so that 'section 16\8 of humanitarian criminal law – Statute of Rome [was] inapplicable'. In

[432] The relevance of art. 4(1) of the Rome Statute in this context is questionable, reading as it does: 'The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.'

[433] The Criminal Procedure Act 1991, s. 4 contains 'principles to be regarded', the first principle being that 'prevention of offences is a duty of all'.



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the event, the accused were convicted of theft pursuant to the Sudanese Criminal Act. The heaviest sentence imposed was three years' imprisonment.

This case of direct application of international criminal law has not set a trend. The case was decided at a time when the GoS grudgingly and quietly extended some cooperation to the ICC, still hoping that by cooperating in the Court's assessment of admissibility it would avoid ICC cases. Some Sudanese officials even considered asking the ICC for support in domestic trials. After the arrest warrants for Harun and Kushayb, however, the GoS ended all cooperation, became more explicit in its rejection of the Rome Statute and made fewer references to complementarity. No more instances of direct application of international criminal law followed, possibly because it could suggest an implicit recognition of the Statute. The Special Prosecutor's team claimed to focus on 'cases that affect many people', such as group attacks on villages, but one of the team members stated in an interview that he had no intention of applying international law directly. He said he had not heard of the case decided in Nyala, and added that he did 'not know the Rome Statute', even though he had participated in a course on international criminal law in The Hague a year earlier. Other sources of international law, such as the Geneva Conventions, could, in his view, not be applied as they failed to specify punishments. The amended Armed Forces Act and Criminal Act could not be applied retroactively. When asked 'what, then, is the applicable law?', he answered 'we will see when investigations are completed'.[434]

The appointment of a Special Prosecutor for Darfur and the subsequent shuffles in the position occasionally stirred up investigative activities. In 2010, the office of the Special Prosecutor for Darfur brought its first cases since the creation of the position in 2008 (which led one of the members of the Office of the Special Prosecutor to ask the interviewer: 'Are you going to put me in the Guinness Book of Records?').[435] The cases were judged by new special courts, established for the occasion, and governed by rules of evidence and procedure as determined by the Chief Justice for these special courts specifically; the Special Courts created in 2005 were not revived to try the Special Prosecutor's first cases.

[434] Interview with a member of the Special Prosecutor for Darfur's office, Khartoum, December 2008.
[435] Interview, August 2011.



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One of the cases brought by the Special Prosecutor concerned an attack by JEM members on a GoS convoy in Sanyi Afandu (South Darfur) in May 2010, in which more than fifty government soldiers were killed. Five of the defendants claimed to be under the age of eighteen, but the medical authorities accepted only one of these claims as valid. The other four, together with five undisputedly adult defendants, were convicted and sentenced to capital punishment by hanging.[436] The Supreme Court quashed the decision on grounds of procedural errors. After a retrial, seven persons, including two who were minors at the time of the offence, were sentenced to death and three to imprisonment.[437]

Two other cases concerned bank robberies, one in Nyala and one in Kabkabiya. The Nyala bank robbery case led to the conviction of the accused, Mattar Kharalla Isgak, on counts of armed robbery and, after the quashing of the first judgment, also terrorism. His initial sentence to cross-amputation (right hand and left foot) was changed into imprisonment.[438] The Kabkabiya case led to convictions for armed robbery and killing. The other cases involved the abduction of UN-contracted pilots and the hijacking of a car of an international non-governmental organisation. In the former, one minor was sentenced to six years of reform school; the other suspects are still at large. In the latter, two suspects were convicted and sentenced to ten years' imprisonment.[439]

In the Tabra case, the slowness of which had been the purported reason for the replacement of one Special Prosecutor, arrest warrants have been issued, including for members of the Popular Defence Forces, and sent to the police and security authorities;[440] most remain to be executed.

In terms of crimes prosecuted, with the exception of the Tabra case, none of these cases involved widespread or systematic attacks on civilian populations or war crimes characteristic of the first years of the conflict. A member of the office of the Special Prosecutor explained that they started with 'recent crime', and that this was

[436] Interviews with lawyers involved, Nyala and Khartoum, August 2011.
[437] See African Centre for Justice and Peace Studies 2011.
[438] Case 30870.
[439] Interviews with lawyers involved, Nyala, August 2011. See also 'Carjackers in World Vision case convicted in Darfur' 2011.
[440] 'Darfur crime prosecutor admits impact of politics on legal cases' 2010.



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intended to 'stop the signal of lawlessness'. In due course, they would work backwards, he said.[441]

While there are several factors confounding any assessment of causation,[442] the timing of the few (supposed) domestic proceedings and officials' references to actions by the ICC suggest sufficient correlation between complementarity and the proceedings to consider them Sudanese responses to the ICC's complementarity principle. A prosecutor tasked with conflict-related crimes in Darfur, for instance, stated in an interview shortly after the ICC Prosecutor requested the arrest warrant for President Bashir that he 'read everything they [the OTP] have, all the charges in the applications'.[443] One of the most senior officials in the Ministry of Justice explained:

> We are now focusing on domestic proceedings, in accordance with the complementarity principle. The ICC has no jurisdiction. But even if it had jurisdiction: there would be complementarity.[444]

However, again, as with the amendments to laws and the establishment of courts, the catalysing effect on (purported) developments in Sudanese proceedings is more an indirect effect of complementarity stemming from attempts to satisfy the international community, in particular the Security Council, than an effort to render the ICC's

[441] Discussion with a former member of the Special Prosecutor's team, Khartoum, July 2011.

[442] Investigating and prosecuting crimes is a core responsibility of governments and need not be an effect catalysed by complementarity. Indeed, Sudan Bar Association 2008e:4 underlined that Sudan is conducting proceedings for conflict-related crimes 'according to its own conviction'. A prosecutor appointed to investigate conflict-related crimes in Darfur stressed that he has 'nothing to do with the ICC' (interview, Khartoum, December 2008). The fact that bodies other than the ICC have pressured Sudanese authorities to conduct more domestic proceedings constitutes another confounding factor (see e.g. Human Rights Council 2007b:Annex 1, in particular recommendation 3.1). The increase in prosecuted rape cases observed in the town of Nyala (see McDoom 2008), for instance, was not catalysed by complementarity. These prosecutions are not an attempt to render cases inadmissible before the ICC but an answer to successfully targeted pressure on certain enforcement agencies by international organisations with a presence in the area and local human rights lawyers (interviews with human rights lawyers in Nyala, Nyala, December 2008).

[443] Interview with a member of the office of the Special Prosecutor for Darfur, Khartoum, December 2008.

[444] Interview with a senior official in the Ministry of Justice, Khartoum, December 2008.



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cases inadmissible on grounds of article 17. Whereas the Rome Statute and the Court's first case law would require genuine domestic proceedings against the same person for the same conduct and same incidents as covered by the OTP's case for the latter to be inadmissible on grounds of complementarity, the GoS expected the Security Council to be satisfied when Sudan addressed impunity in respect of the overall situation in Darfur. As a former Minister of Foreign Affairs recounted:

> We were trying to satisfy the UN. The UN has obliged us to cooperate [with the ICC]. We wanted to convince the Security Council that we were able and willing. We set up courts.[445]

Sudan believed that apparent action to counter impunity was required to convince the Council to vote in favour of a deferral pursuant to article 16, and, more generally, to persuade individual states, in particular the US, to lift their punitive measures against the GoS. These states had emphasised that Sudan had to 'move' on the accountability front in Darfur, without setting requirements as strict as in article 17 of the Statute and the Court's case law on complementarity.

## CONCLUSION: COMPLEMENTARITY'S CATALYSING EFFECT IN SUDAN

The GoS's denial of the ICC's intervention notwithstanding, complementarity catalysed several processes in Sudan. Various domestic accountability mechanisms were created, laws were amended and transitional and traditional justice received more attention in peace negotiations and other fora. Nonetheless, unlike in Uganda, the domestic conflict paradigm has not (yet) been expanded to include a legal dimension. Immunities have continued to block domestic proceedings. As in Uganda, the only effect that could render ICC cases inadmissible, namely, genuine domestic proceedings for conflict-related crimes, was difficult to discern.

Overall, the ICC's intervention sometimes seems to have had the opposite to a catalysing effect. The topic of accountability was taken off the agenda of the Abuja peace talks because mediators, rebel movements and observers considered it to be dealt with by the ICC. The space for debate on issues related to justice for conflict-related

[445] Interview with a former Minister of Foreign Affairs, Khartoum, November 2008.



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crimes was restricted after the ICC's intervention, in particular after the ICC Prosecutor's application for a warrant of arrest for the Sudanese head of state. While it is difficult to assess what would have happened had the ICC not intervened, one can observe that the ICC's intervention has had a retarding rather than catalysing effect in these areas.

The absence in Sudan of some of the effects catalysed by complementarity in Uganda, most notably the expansion of the conflict paradigm with a legal dimension, can be explained by the fact that in Sudan there has been far less space for normative processes than in Uganda. In Sudan, unlike in Uganda, there has been no coalescence of a cost–benefit analysis on the government's part and the interests of norm entrepreneurs in promoting accountability. Perceiving itself as under attack by yet another instrument of Western states, the GoS, or more specifically the NCP, shut down the already limited public debate on sensitive issues such as international criminal justice.[446] As a result, the opportunities for NGOs and human rights activists became even narrower than they were before. Rather than opening a window for the promotion of international norms, which it did in Uganda, the ICC's intervention in Sudan made horizontal transnational normative processes more difficult.[447] It was only when the African Union High-Level Panel on Darfur presented transitional justice as an alternative to criminal justice alone that transitional justice was inserted as an item on the agenda of the Doha negotiations and that it became a topic for discussion with the GoS. To some extent it was the character of the messenger that made the message

[446] Freedom of expression is generally more limited in Sudan than in Uganda, and even more so since the ICC's intervention. (On the freedom of the press, see e.g. Freedom House 2011, where Uganda is considered 'partly free' with a shared 112th rank and Sudan 'not free' with a shared 168th position (out of 196)).

[447] The GoS has not been able to prevent all transnational processes. Leaders of displaced persons in camps in Darfur are in touch with Hollywood celebrities (e.g. Jolie 2007), and echo the 'Save Darfur Coalition' in stating that they are victims of 'genocide'. Babies born in camps have been named Okampo ('Darfur refugees named their children Okampo – Farrow' 2009). Children in a camp for displaced persons in Darfur who had put a rope around a hedgehog's neck commented: 'This is Bashir and we are taking him to the International Criminal Court' (interview with a representative of an international organisation, El-Fasher, December 2008). Ideas about the conflict's causes and solutions have been influenced by international concepts and actors (see also De Waal 2004b). But these are not effects specifically of complementarity.



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swallowable for the GoS; a senior Sudanese legal advisor observed that the Sudanese 'prefer an African solution to that of the international community'.[448] But it was also due to the contents: transitional justice allows for a balancing of pursued aims (peace, justice, reconciliation) that international criminal justice does not.

The OTP, for its part, initially paid more attention to complementarity with respect to Darfur, and by doing so encouraged domestic proceedings, than it had done with respect to Uganda. Attempting to reach an *entente* with the GoS,[449] the OTP stressed that the GoS still had a chance to end the ICC's involvement on grounds of complementarity.[450] Only once the GoS's response to the first arrest warrants dashed the Prosecutor's hopes for cooperation from Sudan did he change his cautious approach into one of full confrontation.[451]

Most of the processes that were catalysed by complementarity stemmed from cost–benefit analyses on the part of the government. Perceiving the ICC's intervention to be against its interests, the GoS tried to end it by showcasing efforts to improve the situation in Darfur. Opting for pronouncement over actual proceedings and form over substance, the government took measures it considered

[448] Interview, Khartoum, February 2011.

[449] The OTP tried to avoid confrontation with the GoS in several ways. In its first reports to the Security Council, the OTP highlighted the instances in which Sudan granted cooperation, while making no mention of any refusal to cooperate, only of some outstanding requests (*Third Darfur Report*:9 and *Fourth Darfur Report*:9 and 10). In the discussion of domestic efforts to conduct proceedings, the OTP circumvented offending the GoS by focusing on the practical obstacles instead of the GoS's willingness (*Second Darfur Report*:6). The Prosecutor abstained from publicly making cooperation requests that the GoS was likely to turn down. For instance, Ocampo never publicly requested Sudan to allow ICC investigators to work in Darfur, arguing that the ICC's presence would be too dangerous for witnesses who cooperate with the Court (*Second Darfur Report*:4, *Third Darfur Report*:1 and *Fourth Darfur Report*:3 and 4). The OTP requested summonses to appear rather than warrants of arrest for Ahmad Harun and Ali Kushayb since summonses would not oblige Sudan to transfer them to the Court. The OTP hoped that the GoS would sacrifice these relatively less powerful figures to the ICC in the expectation that it would end its ICC problem. Ocampo reportedly made an informal statement to a high-level African Union official to the effect that 'if Sudan had handed over these two guys, it would not have had the problem of the President' (interview with AU advisors, Khartoum, December 2008). See also, Nouwen and Werner 2010a.

[450] ICC-OTP 2005c.

[451] See also Cryer 2011.



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relatively inexpensive such as amendment of laws and establishment of special mechanisms.

The fact that complementarity has had a catalysing effect in Sudan, a state that is not a party to the Rome Statute and that is careful to reject the applicability of the entire Statute, reveals the principle's normative power.[452] For Sudan, complementarity is acceptable for two main reasons. First, it reflects state sovereignty, a fundamental tenet of international law. Secondly, it grants states considerable leeway as to how to conduct domestic proceedings for crimes within the jurisdiction of the Court. However, to the extent that Sudan embraces the principle of complementarity, it accepts a primary right to address impunity in general, including the right to decide which cases to investigate and prosecute, rather than a responsibility to investigate and prosecute the same cases as the ICC. The fact that even states not party to the Statute consider the principle to be legitimate may have enhanced its 'compliance pull',[453] but 'compliance' is of little relevance to complementarity when complementarity is considered a right rather than an obligation.

Remarkably, the effects were catalysed by complementarity only indirectly. The GoS hardly considered domestic proceedings with a view to challenging admissibility under article 17, if only because challenging admissibility could imply acceptance of the applicability of the Rome Statute. The GoS sought to tackle the problem where it originated, namely, in the Security Council. It aimed for the withdrawal of the referral (which would not bind the Court, as it is not

[452] For Sudanese officials expressing support for the principle of complementarity, see e.g. 'Dr Ghazi Salah El Din Attabani: "We have to pay an expensive political tax for resolving the Darfur crisis!"' 2008 ('Even if we are members, there is a section 17, which provides in the first paragraph that national criminal courts take the matter unless a country is not willing or not able. We are willing, we are able.'), 'Sudanese Justice Minister on Darfur crisis, efforts to achieve peace, AU force' 2006 ('We are fully convinced that the ICC must not have any jurisdiction in the matter of Darfur as long as we are serious in, have the desire to, and are capable of trying the crimes that are committed in Darfur. That is stated in the charter of the ICC itself.'), Sabderat 2008:[7] ('The ICC Prosecutor General had actually compromised the very obvious principles of international law, including the principle of complementarity enshrined in the Rome Statute 1998 itself, to the vicious pressures pounded on him by certain Western governments and pressure groups.') and interview with a long-standing member of parliament, Khartoum, November 2008 ('It is also the strongest logic in the Rome Statute itself that places an independent national judiciary above the ICC.').

[453] See, generally, Franck 1990.



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provided for in the Statute) or a deferral pursuant to article 16. While the Statute does not stipulate any conditions for the Council to take into account when deciding whether or not to request a deferral,[454] Sudanese officials came to believe that complementarity plays a role in Security Council decision-making,[455] as is illustrated by the answer of a Sudanese judge to a question about plans for domestic proceedings:

> Now, [the GoS is] going to investigate and try Kushayb. He will be sacrificed. This would influence any article 16 decision in the Security Council. That is what Sarkozy has said.[456]

A prominent opposition leader similarly argued that the 'hybrid court' that he had proposed 'must be part of a package acceptable to the Security Council'.[457] The belief that the Security Council takes into account complementarity is also illustrated by a legal opinion provided by the University of Khartoum:[458]

> [F]or the requirements of justice, the [Security Council] would link the issue of achievement of peace to the issue of impunity. This would be done through inducement of the Sudan to introduce alternative means of justice to substitute for international criminal prosecution through the adoption of either of the following models:
> a. internal/international courts or mixed courts, in accordance with a UNSC resolution and upon an agreement with the UN along the model adopted with Sierra Leon[e] and other countries.
> b. establishment of real internal justice mechanisms, using mechanisms provided for in the CPA, to lead to national fair trials under international supervision. This provides a model for internal fair prosecution that substitutes for international criminal prosecution while striking at the same time a positive formula to achieve peace and justice and be satisfactory to all parties.[459]

[454] See Chapter 2, 'Other jurisdictional provisions: a deferral requested by the Security Council'.

[455] This has been encouraged by reports such as International Crisis Group 2009:ii, which recommends that partners in the Sudan peace process 'deliver a firm message in Khartoum that they will only consider a Security Council resolution suspending execution (via the procedure for one-year renewable deferral provided in Article 16 of the Rome Statute . . .) if the NCP first takes a series of specific and irreversible steps, including but not limited to acceptance of judicial reforms and transitional justice mechanisms as key elements of a Darfur settlement'.

[456] Interview with a Sudanese judge, Khartoum, November 2008.

[457] Al-Mahdi 2010:2.

[458] See also this chapter, above, n. 387.

[459] University of Khartoum 2008:11.



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Hence, in addition to all the policy changes that it announced, and putting forward the argument that the ICC would jeopardise peace in Sudan and therefore was not in the 'interests of justice',[460] the GoS considered it necessary to demonstrate some action on domestic accountability for conflict-related crimes in order to garner the required international support for its diplomatic offensive against the ICC.[461]

Various international actors nourished Sudanese officials' belief that complementarity features in Security Council decision-making. For instance, by assessing complementarity as part of its consideration of whether or not the Council should refer the Darfur situation to the Court, the ICID suggested that complementarity is a relevant factor for the Security Council.[462] According to international newspapers, the UN Secretary-General, for his part, 'said [that] the Sudanese government should start its own "reasonable and credible" judicial process before seeking to defer al-Bashir's prosecution by the ICC'. The reporter continued: 'If Sudan launched judicial proceedings, Ban said it would then be up to the *UN Security Council* and the International Criminal Court to determine whether the measures taken by the Sudanese government would meet "the expectations and requirements of relevant provisions" of the council's resolution and the court's statute.'[463] The AUPD, too, suggested that the Security Council considers in its decision-making the extent to which Sudan addresses accountability.[464]

The fact that the Security Council is not legally required to consider admissibility when deciding whether or not to refer or defer a situation does not mean it makes no sense for it to do so. First, pragmatically, its referral would not have a long lifespan if all the ICC's cases were subsequently found to be inadmissible on grounds of complementarity. Secondly, consideration of provisions other than the relevant article, article 13(b) in case of a referral and article 16

[460] See Chapter 2, 'No ICC proceedings because of the "interests of justice"'.
[461] See Tisdall 2008. The Council itself had already demanded that the GoS address impunity e.g. in resolutions UN Doc. S/RES/1556 (2004):[6], and UN Doc. S/RES/1564 (2004):[7]. But, since the ICC's involvement, addressing impunity has come to be seen as a precondition for a deferral of ICC proceedings, which has given the demand a stronger compliance pull.
[462] See this chapter, above, 'Complementarity: the views of the ICID and the ICC'.
[463] 'UN chief: Sudan president could avoid prosecution' 2009 (emphasis added).
[464] See e.g. AU Doc. PSC/AHG/2(CCVII) 2009:[245], [249] and [339].



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in case of a deferral, could imbue a discretionary decision with legal principle and hence constitute a defence against accusations of arbitrariness.

Whether the Security Council does so in practice or not, the fact that some states believe that the Council considers complementarity encourages complementarity's catalysing effect. Conducting domestic proceedings then becomes necessary not only for states that plan to challenge admissibility on grounds of article 17 but also for states that wish to avoid a Security Council referral pursuant to article 13(b), to obtain a Security Council deferral under article 16 or to influence any other Court-related, or even more generally, any related decision by the Security Council.[465] The Court's legal principle has become, or at least is believed to have become, one of the Council's political criteria.[466] This contributes to a political expectation on states to conduct proceedings for conflict-related crimes.

However, the Security Council's political criterion does not coincide with complementarity as a legal rule in the Statute. Whereas article 17 requires a state to address the same cases as the ICC if it wishes to obviate proceedings in the ICC, complementarity as a

[465] The expectation that the Security Council will take into account domestic accountability efforts is also visible in the Ugandan context. As is evident from the following clauses, the Agreement on Implementation and Monitoring Mechanisms 2008 envisages the Security Council's taking into account Ugandan preparations for domestic proceedings when deciding whether or not to grant Uganda's request to defer ICC proceedings: '[36] During the Transitional Period, the Government shall urgently take the necessary steps to establish national mechanisms of accountability and reconciliation as are provided for in the Agreement on Accountability and Reconciliation. In this regard, the Government shall give priority to commencing criminal investigations and establishing the special division of the High Court. [37] *On the basis of the steps taken under clause 36 of this Agreement*, the Government shall request the UN Security Council to adopt a resolution under Chapter VII of the Charter of the United Nations, requesting the International Criminal Court to defer all investigations and prosecutions against the leaders of the Lord's Resistance Army.' (emphasis added).

[466] In the Ugandan context, too, diplomats have suggested that domestic proceedings feature in Security Council decision-making on deferrals (interview with a diplomat from a European state, Kampala, October 2008: 'There is no official position on a Security Council deferral [but] our legal experts at headquarters are sceptical about Uganda's capacity to take this [domestic LRA] case far.'; and interview with another diplomat of a European state, Kampala, October 2008: 'When the talks progressed, [our headquarters] were ready to support a deferral as long as they would consider the national proceedings adequate.').



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political criterion in Security Council decision-making is believed to require the state to address impunity in general. Sudan initially believed that this meant demonstrating that its system was 'willing' and 'able'. Hence Sudanese officials pointed to fair trial guarantees in Sudanese law and the Sudanese judiciary's being a role model for the Arab world. In addition, they established extra courts and adopted new laws to demonstrate Sudan's efforts to end impunity.[467] When GoS officials realised that Security Council members required actual proceedings, they still did not deem it necessary for these proceedings to involve the same persons as the ICC's cases.[468] This explains why, for instance, Ahmad Harun argued that the Security Council may defer the ICC proceedings in the case against the President if Sudan were to try him and Ali Kushayb:

> The Americans . . . are talking about a certain process that should take place. [The ICC's case against the Sudanese President] could be ended if Harun and Kushayb are presented before local courts.[469]

A proposal by the Arab League was based on the same belief that the Security Council would request a deferral of the proceedings against Bashir if Sudan addressed impunity in Darfur generally.[470] According to a legal advisor in the Ministry of Foreign Affairs, the French for their part had proposed to the Sudanese, in the margins of the Doha negotiations, that, if Kushayb were tried domestically and Harun stripped of all official responsibilities, Bashir could benefit from a deferral of his case by the Security Council in accordance with article 16 of the Statute.[471]

[467] Similarly, Uganda included traditional justice in the transitional-justice package of the Juba agreements to show its comprehensive approach towards accountability, even though traditional justice would probably not render ICC cases inadmissible.

[468] The UN Secretary-General has been ambiguous on this point. See 'UN chief: Sudan president could avoid prosecution' 2009 ('The secretary-general was then asked whether he was suggesting that the Sudanese courts launch their own prosecution against their president. He did not answer the question but told reporters that he had urged al-Bashir "to take, first of all domestic judiciary measures – very credible (ones)" which could then be considered by the Security Council and the ICC.').

[469] Interview with Ahmad Harun, Khartoum, December 2008. See also Polgreen and Gettlemen 2008.

[470] 'Egypt warns Sudan that Bashir not immune from ICC prosecution' 2008.

[471] Discussion with a legal advisor in the Ministry of Foreign Affairs, Khartoum, June 2011. Whether the French actually said this in these terms is of little relevance – what matters more is that the GoS *believes* the Security Council to consider complementarity.



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The fact that many of the phenomena catalysed by complementarity in Sudan have so far been cosmetic in character does not prevent them from facilitating domestic proceedings in the future. Courts established and laws enacted may one day be used, depending on the extent to which the (next) government allows this.



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