TO MAKE UNITY ATTRACTIVE

A FRAMEWORK FOR STATE- AND POWER-STRUCTURES AND ELECTORAL SYSTEMS IN THE SUDAN'S POST-CONFLICT TRANSITION

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Submitted by Martin Schüepp

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THE FLETCHER SCHOOL

TUFTS UNIVERSITY

Executive Summary

"To make unity attractive" is the stated task for all political actors as the Sudan finds itself at a crossroads. More than a year after the signing of the so-called "Comprehensive" Peace Agreement (CPA), about three years ahead of the first post-conflict elections, and with the crucial referendum over the independence of the South in 2011, making unity "attractive" is a last attempt to avoid the fragmentation of Africa's largest country. While the stated task requires action on many levels, this thesis addresses two macro-level issues that can potentially have a large impact on the "attractiveness" of unity: the state- and power structures in the future Sudan and, as part of this broad picture, the electoral system by which the representatives are to be elected.

First, given that the past 50 years have brought the Sudan to the brink of disintegration, it is argued that the constitutional obligation for a comprehensive constitutional review should be used to radically rethink the state- and power structure in the Sudan, in order to build a "new Sudan" on fresh foundations. The framework presented in this thesis as an example of such a radical restructuring suggests the creation of large, clearly heterogeneous federal entities with an internal power balance between the communities that are on different "sides" of the deepest Sudanese divides. This is intended to reduce the interests in some of the most contentious issues at this point – as for example the exact delineation of the border between the "North" and the "South" – problems which continue to fuel tensions rather than making unity attractive. Such states, vested with significant autonomous powers, will also be well situated to counter the historical dominance of the center, which marginalized many communities and has rendered unity an unattractive option for them. Yet, the unwillingness to engage in such a discussion by leading Sudanese is discussed, and some proposals for more modest adaptations of the current system are proposed.

Second, the 2009 Sudanese elections represent a major event in creating and assessing the "attractiveness" of unity. They therefore need careful preparation, which should include a thorough consideration of different electoral systems that could help to promote peace and unity.
As a contribution to this discussion, this thesis suggests an adapted proportional electoral system for the legislative elections, which can provide an incentive for integrative behavior through the distribution of bonus seats to parties with a nationwide outreach.
Unfortunately, the interim constitution has pre-determined that the new president shall be elected in a two-round majoritarian system, before an integrative discussion on this topic has been held. In light of this, the adoption of a strong code of conduct among the competing parties for the presidency could be used as a flexible tool to commit the candidates to run on a national platform and on an integrative message. Together, it is argued, the proportional and the majoritarian aspects with an integrative spin in the two elections could help to "make unity attractive."

Mindful that the decisions on these matters will finally have to be taken by the Sudanese politicians, and that the process of decision-making will crucially impact the legitimacy of the adopted solution, it is hoped that this academic contribution can help foster discussion on these topics in the Sudan.

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Abbreviations

AAA	Addis Ababa Agreement on the Problem of South Sudan (1972)
AV	Alternative Vote *(electoral system)*
CPA	Comprehensive Peace Agreement (2005)
DUP	Democratic Unionist Party
FPTP	First Past the Post *(electoral system)*
GoNU	Government of National Unity
GoS	Government of Sudan
GoSS	Government of Southern Sudan
HEC	High Executive Council
ICCPR	International Covenant on Civil and Political Rights
ICSS	Interim Constitution for Southern Sudan (2005)
IGAD	Inter-Governmental Authority on Development
INC	Interim National Constitution of the Republic of Sudan (2005)
MMP	Mixed Member Proportional *(electoral system)*
NCP	National Congress Party
NCRC	National Constitutional Review Commission
NDA	National Democratic Alliance
NEC	National Electoral Commission
NIF	National Islamic Front
PNA	People's National Assembly
PR	Proportional Representation *(electoral system)*
PRA	People's Regional Assembly
SNTV	Single Non-Transferable Vote *(electoral system)*
SPLA/M	Sudan's People Liberation Army/Movement
SPRSGA	Southern Provinces Regional Self-Government Act (1972)
SSLM	South Sudan Liberation Movement
SSU	Sudan Socialist Union
STV	Single Transferable Vote *(electoral system)*
TRS	Two Round System *(electoral system)*
UDHR	Universal Declaration of Human Rights
UNMIS	United Nations Mission in Sudan

Political map of the Sudan

Source: Rightsmaps.com. Oil & Human Rights in Central and Southern Sudan: A Geographic Resource. *Sudan*. http://www.rightsmaps.com/html/sudmap1.html [accessed May 4, 2006].[1]

[1] Western Upper Nile in the following also referred to as Unity State; Bahr El-Jabal also referred to as Central Equatoria.

Introduction

"We will stand as a lighthouse for peace, tranquility, and compassions in this world."[2]

Sixty years after these words were spoken at the celebrations for the independence of the Sudan, it is hard to believe that they were phrased on this country which has known nearly fifty years of conflict since 1956, which led to millions of people death or displaced from their homes.

In 2005, the Sudan has entered a new phase in its history, as the two main conflicting parties from the North and the South of the country signed a so-called "Comprehensive Peace Agreement" (CPA), putting an end to the longest lasting conflict on the African continent.[3] This phase is decisive for the future of the country, as for the first time the Southern Sudan is recognized the right to opt for secession in a 2011 referendum. In the case of an affirmative outcome, this choice would end the history of the Sudan as it is known to date and open a new chapter in Eastern African history.

Given the uncertainties associated with such a decision, the CPA urges all actors to "make unity attractive" in the interim period before the referendum.[4]

How can unity be made attractive against the background of such a war-torn history?

While this question will require a multidimensional answer touching on every aspect of society, this thesis will tackle two macro-political issues which can have a significant impact on the desirability of unity: First, the current state- and power structure will be analyzed and

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[2] Sudanese Prime Minister Ismail al-Azhari at the occasion of the celebration of independence (as reported in Al-Ayyam, January 3, 1956. Cit. in Gumaa Mohamed Ahmed, "The Sudan: African and Arab," in *Sudan: Aid and External Relations*, ed. Mohamed Omer Beshir (Graduate College Publications No 9, Khartoum: University of Khartoum, 1964), 6).

[3] *Comprehensive Peace Agreement*. Naivasha (Kenya), January 09, 2005; available from http://www.usip.org/library/pa/sudan/cpa01092005/cpa_toc.html [hereinafter CPA; accessed May 4, 2006].

[4] This phrase is often used by different political actors. See for example Jan Pronk in Cornelia Schneider and Lyn Debevois, "Interview with Jan Pronk, UN Special representative of the Secretary-General in the Sudan," *The Fletcher Forum of World Affairs* 30, no. 1 (Winter 2006), 21-22; or repeated statements by the Sudanese president Bashir (see for example "Al-Bashir affirms keenness to make unity attractive," *Sudan Tribune*, February 15, 2006; available from http://www.sudantribune.com/article.php3?id_article=14089 [accessed May 4, 2006]).
The expression builds on several provisions of the CPA's *Protocol Between the Government of Sudan and the Sudan People's Liberation Movement on Power Sharing* (May 26, 2004) [hereinafter *Agreement on Power Sharing*], in particular its Preamble and its §§ 1.4.4, 2.4.1, 2.5.1, 2.5.9.

recommendations will be made in view of theoretical models. Second, and related to this overarching topic, possible ways to structure the upcoming 2009 elections will be analyzed.

The analysis starts with the premise that people like to live together if they feel that they are neither politically, nor economically and socially persistently marginalized. This requires a sufficient level of representation in the political sphere and thus a sufficient inclusiveness of political processes. Both these requirements call for institutions that are adequately framed to the requirements of the society.

As the first part will show, the sixty years of Sudanese post-independence history show a persistent failure on all these accounts. As the present period represents a last chance to maintain the unity of the Sudan, the analysis following in the two subsequent parts on the state- and power structure and the electoral processes respectively aims to contribute to an important discussion which is not led sufficiently as the time to the elections and to the referendum on independence elapses quickly.

The present thesis does not intend to make a value-judgment on the desirability of unity or secession as such. Rather, as the Sudanese past has shown how unity can be unattractive and as secession is also not without risks,[5] it is argued that the question if and how unity could be an "attractive" option to all Sudanese merits careful attention not only as a constitutional obligation, but also in order to allow the Sudanese to make a best-informed decision over the most desirable future of their country or their countries.

[5] As outlined in chapter II.1.

Part I: The Sudanese society and political history

1. "Unity in diversity"? The Sudan's multiple societal fault lines

This thesis starts from the premise that there is no "one size fits all" of state institutions which could be applied to the diversity of countries found around the globe, but rather that the institutions of a State should be a reflection of the composition of the society for the organization of which they have been created.[6] The composition of and major fault lines in the Sudanese society are thus first briefly outlined, in order to be "mindful of religious, racial, ethnic and cultural diversity in the Sudan."[7]

The Sudan derives its name from an expression used by Arab geographers to describe the lands south of the Sahara: "Bilad al Sudan" – the land of the Blacks.[8] Yet, this term does not describe the Sudanese reality adequately. Neither is the largest country in Africa situated wholly south of the Sahara, nor do all of its 34 Million people describe themselves as "Blacks" (or as "Africans"). This differentiation between "Arabs" and "Africans" has played an eminent role in the Sudan's history although it is difficult to draw. With a little less than 40% of the population considering themselves as "Arabs", they constitute the largest single ethnic group, primordially living in the North of the country.[9] On the other hand, different "African" tribes constitute together a little more than 50% of the population, representing the majority of the population in the South as well as in the North-West of the country. In addition, the Beja in Eastern Sudan make up about 6% of the total population.[10] Yet, beyond

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[6] This idea builds on Rousseau's concept of the social contract (Jean-Jacques Rousseau, *Le contrat social* (Paris : Gallimard, 1993 [1762])).

[7] *Interim National Constitution of the Republic of Sudan*, Republic of the Sudan Gazette, Special Supplement No. 1722, July 10, 2005 [hereinafter INC], Preamble.

[8] Mohamed Omer Beshir, *The Southern Sudan; background to conflict* (New York: F. A. Praeger, 1968), 1.

[9] These data are according to the last census giving details on this question – which notably dates from 1956 (Economist Intelligence Unit, *Country Profile 2005* (London: The Economist Intelligence Unit, 2005), 26; available from http://www.eiu.com/ [accessed January 20, 2006]).
Note that most "Arabs" have to be considered "Arabized" (Steven Wöndu and Ann Lesch, *Battle for peace in Sudan: an analysis of the Abuja conferences, 1992-1993* (Lanham, Md.: University Press of America, 2000), 2).

[10] Economist Intelligence Unit, 26.

these figures, one should not forget that through constant intermarriage these dividing lines have been blurred over the centuries.[11]

As to the religious composition of the country, it has to be said that the divisions are much less congruent with the African-Arab divide than common discourse often seems to pretend. In total, about 60% of the population is of Muslim faith, indicating that there is also significant non-Arab Muslim population.[12] In the South, a majority of the population follows indigenous beliefs (about 60%), along with a significant Christian minority.[13]

While tensions and conflicts among the tribes are frequent, one of the most important sources of conflict seems to have been economic disparities and marginalization of certain regions or a certain populace. This economic fault line divides mainly the Northern Nile valley region around the capital Khartoum from the entire rest of the country. This division was further deepened in recent years as the country's oil-wealth started to have a significant impact in Khartoum, while most other regions remain marginalized and their institutions under-developed.[14] This fault line is also dominant in the political sphere: As the famous *Black Book* reveals,[15] the Northern Region, representing a little more than 5% of the Sudanese population, held since independence always between 59,4% and 79% of the ministerial posts.[16]

While this marginalization is at the heart of the Sudan's different conflicts, such generalizations hide a much more complex reality: the Sudan's society is exceptionally

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[11] Beshir, *The Southern Sudan; background to conflict*, 1, expresses this idea in an antiquated language by stating that "all degrees of admixture between the Brown and the Negro" are found in the Sudan.

[12] This fact has received particular attention since the outbreak of the recent conflict in Darfur. On the Arab and African identities in Darfur see for example Alex de Waal, "Who are the Darfurians? Arab and African Identities, Violence and External Engagement," *African Affairs* 104, no. 415 (2005): 181-205.

[13] Economist Intelligence Unit, 26.

[14] On the effect and the sharing of the oil revenues see for example International Crisis Group, "God, Oil and Country: Changing the Logic of War in Sudan," *Africa Report* no. 39 (2002), 99-105; available from www.crisisgroup.org [accessed May 4, 2006]. For an extensive account also covering the impact on the population see for example Human Rights Watch, *Sudan, Oil, and Human Rights* (Brussels et al.: Human Rights Watch, 2003); available from http://www.hrw.org/reports/2003/sudan1103/sudanprint.pdf [accessed May 4, 2006].

[15] For some background information on this book see for example William Wallis, "The Black Book history or Darfur's darkest chapter" *The Financial Times*, August 21, 2004; available from http://www.sudantribune.com/article.php3?id_article=4868 [accessed May 4, 2006].

[16] With the exception of the brief but significant democratic period from 1986 to 1989, when Sadiq Al-Mahdi's government "only" contained a 47,4% Northern representation (Seekers of Truth and Justice, *The Black Book: Imbalance of Power and Wealth in Sudan*; available from www.sudanjem.com/english/books/blackbook_part1/book_part1.asp [accessed January 20, 2006]).

diverse, composed of almost 600 tribes, speaking about 400 different languages and dialects.[17] Given this enormous diversity, it is questionable if it is still possible to talk about a case of "unity in diversity" in the Sudan. As the Sudan stands on the brink of the secession of its Southern part, the claim "to make unity attractive" presents a last attempt to answer this question in the affirmative. To stand up to this claim, the Sudanese institutions will have to deal with this reality in one way or another and this brief overview shall serve as a constant reminder that "[t]he ethnic divisions of Sudan are considerably more complicated than the 'north-south' picture so often presented […]."[18]

2. Power-sharing and elections in the Sudan's history

As the Sudan's "past experiences should have tremendous influences on what that restructuring [of the State] will entail and what the final outcome should look like if we [the Sudanese] are not to be torn apart,"[19] this chapter will provide a brief overview on the Sudan's most significant experiments with state structures and elections in the past.

a) From colonialism to independence

The Sudan has a rich history during which it saw different kingdoms and empires rise and fall on its territory. After 1820, Turkish and Egyptian aggressors subjugated the Northern Sudan under a colonialist system and tried to establish their influence also over the South; a control that never really became effective. During this time, the South remained a hunting ground for foreign and especially Northern Sudanese slave traders. Only the British put an end to this appalling practice after their conquest of the Sudan in 1898 and the establishment of an

[17] Lino J. Lauro and Peter A. Samuelson, "Toward Pluralism in Sudan: A Traditionalist Approach," *Harvard International Law Journal* 37 (1996): 93.
[18] John Morton, "Ethnicity and Politics in Red Sea Province, Sudan," *African Affairs* 88, no. 350 (1989): 76.
For a differing analysis see for example R.T. Akinyele, "Power-sharing and Conflict Management in Africa: Nigeria, Sudan and Rwanda," *Africa Development* XXV, Nos. 3 & 4 (2000): 209-233.
[19] B. Yongo-Bure, "Introduction," in *Part of the Proceedings of the Conference on North-South Relations since the Addis Ababa Agreement*, Sudan Library Series (14), eds. Mom K. N. Arou and B. Yongo-Bure (Khartoum: University of Khartoum, 1988), 8.

Anglo-Egyptian Condominium. This historical experience importantly shaped the North-South animosity persisting today.[20]

Under the Anglo-Egyptian administration, the Southern Sudan was administered as a separate entity until 1947 – even if formally part of the Sudan. This structure was chosen in an effort to protect Christianity in Southern Sudan and in order to stop the subjugation of the South, but had the effect of further deepening the North-South divide.[21]

In the early 1950s, the British started a policy of "Sudanization" to put the Sudan on the track of independence by handing the administration over to locals. However, as only a tiny fraction of posts was attributed to Southerners, this process was largely perceived as a "northernisation" of the Sudan and led in August 1955 to a mutiny in the South.[22] Facing such unrest, the British hastily released the Sudan into independence on January 1, 1956, endowed with considerable political unrest and with an incomprehensive interim constitution quickly drafted by a "British academic constitutional expert."[23]

b) A difficult start: coups and wars after independence

This first Sudanese interim constitution failed to address two issues which are at the heart of the quest to define the identity of the Sudanese State: "the secular or Islamic character of the state; and its federal or unitary nature."[24] In order to draft a permanent constitution, a 46-

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[20] Zakaria Mohamed Ali Abdelrahman, *Entwicklungschancen von Demokratie und Föderalismus in einem Entwicklungsland am Beispiel des Sudan im Vergleich zu Nigeria und Südafrika*, Inauguraldissertation zur Erlangung des Grades eines Doktors der Philosophie, dem Fachbereich Gesellschaftswissenschaften und Philosophie der Philipps-Universität Marburg, 2005: 8; available from http://archiv.ub.uni-marburg.de/diss/z2005/0141/pdf/dzmaa.pdf [accessed May 4, 2006]. He also notes that despite this official structure, the condominium shared *de facto* the attributes of an ordinary British colony.

[21] Emeric Rogier, "No More Hills Ahead? The Sudan's Tortuous Ascent to Heights of Peace," Clingendael Security Paper No. 1, The Hague: Netherlands Institute of International Relations Clingendael, September 2005: 7; available from http://www.clingendael.nl/publications/2005/20050800_cscp_security_paper_1.pdf [accessed May 4, 2006].

[22] T. Ali and R. Matthews, "Civil War and Failed Peace Efforts in Sudan," in *Civil Wars in Africa: Roots and Resolution*, eds. T. Ali and R. Matthews (Montreal: McGill-Queen's University Press, 2000), 203. See also Abdel-Rahman Abdalla, *Sudan: Integration or Disintegration* (Hamburg: LIT, 2001), 87.

[23] Douglas H. Johnson. *The Root Causes of Sudan's Civil Wars* (Bloomington and Indianapolis: Indiana University Press, 2003), 30.

[24] Rogier, "No More Hills Ahead?' 10.

member constitutional committee was appointed in September 1956,[25] but Ibrahim Abboud's military coup in 1958 put an end to such discussions. The constitution was suspended, and the Sudan plunged into civil war for more than a decade, opposing the Anyanya (the military wing of the South Sudan Liberation Movement (SSLM)) in the South and the Government of Sudan (GoS) in the North.

Abboud, who later had engaged in a constitution-making process, was ousted from power in 1964 and in the following turbulent years, the 1956 constitution saw a brief revival.[26] What remained constant during this first decade and a half after independence was the violent opposition of the marginalized populations in the South and other regions against the respective governments in Khartoum, which continued to largely concentrate the power and resources in the Northern Nile river valley.[27]

c) The Addis Ababa Agreement and the Sudan's peaceful decade [28]

In May 1969, another military *coup d'Etat* brought the socialist Ja'afar Nimery to power, who rapidly signaled that he sought a peaceful resolution of the long and bloody conflict. In his famous June 9th [1969] Declaration he recognized *inter alia* the right of the Southerners to develop their cultures within the framework of a united socialist Sudan.[29] As several internal and international developments between 1969 and 1971 led to a stalemate, this declaration laid the basis for the ensuing negotiations in Addis Ababa in February 1972, where the two delegations led by vice-president Abel Alier – a Dinka from the Southern Sudan – for the GoS

[25] Note that the only three representatives of the South were constantly outvoted in this Committee. Francis Mading Deng, "Negotiating a Hidden Agenda: Sudan's Conflict of Identities," in *Elusive peace: negotiating an end to civil wars*, ed. William Zartman (Washington D.C.: Brookings Institute, 1995), 86.

[26] Marti Alane Flacks, "Sudan's Transitional Constitution: Potential Perils and Possibilities for Success," *The Journal of International Policy Solutions* Vol. 3 (Spring 2005): 4; available from http://www-irps.ucsd.edu/IPS/Sudans%20Transitional%20Constitution%20Potential%20Perils%20and%20Possibilities%20for%20Success [accessed May 4, 2006].

[27] For a more extensive and more balanced account see for example Catherine Jendia, *The Sudanese Civil Conflict 1969-1985*, Society and Politics in Africa Vol. 12 (New York: Peter Lang, 2002), 55-72.

[28] The analysis in this chapter largely builds on an earlier analysis in Martin Schüepp, "After Addis Ababa and Naivasha: The Sudanese Constitutions of 1973 and 2005" (Boston: 2005 [unpublished]).

[29] Mom K. N. Arou, "Preface: Opening Address to the Conference on North-South Relations," in *Part of the Proceedings of the Conference on North-South Relations since the Addis Ababa Agreement*, Sudan Library Series (14), eds. Mom K. N. Arou and B. Yongo-Bure (Khartoum: University of Khartoum, 1988), x – xi.

and by Ezboni Mondiri for the SSLM hammered out a peace deal.[30] On February 27, they agreed upon a text that addressed the main problems, in particular the questions of Southern self-governance, of a cease-fire and of interim arrangements.[31] On March 3, the *Addis Ababa Agreement* (AAA) was incorporated in Sudanese law through the *Southern Provinces Regional Self-Government Act* (SPRSGA) and the fighting was ordered to cease the same day.[32] After 17 years of war, peace had been found within days.[33]

The AAA served as a basis for the elaboration of a new constitution through which Nimery sought to strengthen his power basis. A People's Council was formed on October 4, 1972 for this purpose, composed of 207 members, 175 of which had been elected.[34] The Sudan Socialist Union (SSU), which had been founded in 1971 to become the Sudan's sole political movement under the Nimery regime,[35] dominated the elections and the deliberations of the Constituent Assembly, as Nimery excluded opponents of the Peace Agreement.[36] After six months of deliberations and its approval by the Council and the president – but without popular consultation – the *Permanent Constitution of the Sudan* was issued on May 8, 1973 (hereinafter 1973 Constitution).[37] It provided basic answers to the open questions of 1956: the application of *Shari'a* law only to Muslims and an autonomous South in a unified Sudan.[38]

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[30] See Gerard Prunier, *From Peace to War. The Southern Sudan 1972-1984* (Hull: University of Hull, 1986), 11. On the mediating role of the All-African Council of Churches (AACC) in this conflict see Dunstan M. Wai, *The African-Arab conflict in the Sudan* (New York: Africana Publishing Company, 1981), 149-158.
[31] Jendia, 94.
[32] Mohamed Omer Beshir, *The Southern Sudan: From Conflict to Peace* (London: C. Hurst & Co., 1975), 107-108.
[33] For an extensive report on the peace process from a Northern perspective, see Ministry of Foreign Affairs, *Peace and Unity in the Sudan: An African Achievement* (Khartoum: Khartoum University Press, 1973).
[34] Edgar O'Ballance, *Sudan, civil war and terrorism, 1956-99* (Houndmills, Basingstoke, Hampshire: Macmillan Press; New York: St. Martin's Press, 2000), 91.
[35] For more information on the SSU and the political system created by Nimery, see Timothy C. Niblock, "A new Political System in Sudan," *African Affairs* 73, 293 (1974): 408-418.
[36] Ciao, *Sudan*, ciao atlas: maps & country information; available from http://www.ciaonet.org/atlas/countries/sd_data_loc.html [accessed May 4, 2006]. A different report in Deng Awur Wenyin, *Southern Sudan and the Making of a Permanent Constitution in Sudan* (Khartoum: University of Juba, 1987), 22.
[37] O'Ballance, 92. See also 1973 Constitution, art. 217.
[38] Angela M. Lloyd, "The Southern Sudan: A Compelling Case for Secession", *Columbia Journal of Transnational Law* 32 (1994): 445-448.

As to this latter part, the 1973 Constitution defined the Sudanese state as "unitary",[39] while earlier documents had only mentioned a "united" Sudan.[40] This provision excluded therefore a broader federalist system, as also underscored by article 6, providing that "the Sudan shall be administered in accordance with the system of decentralization as prescribed by law" which was intended to give the South – and the South only – a special status.[41] In the rest of the country, province level People's Executive Councils with very limited powers were to be established; powers that can not be associated with real decentralisation.[42]

For the South, the SPRSGA[43] provided for the creation of a Southern legislature (People's Regional Assembly (PRA)) and executive (High Executive Council (HEC)). Importantly, chapter III of the SPRSGA listed ten powers that were *not* vested in the regional authorities. In particular, the national authorities remained solely responsible for matters of national

[39] 1973 Constitution, art. 1.

[40] Note that the SSLM suggested a comprehensive autonomy program during the Addis Ababa negotiations, a request turned down by Khartoum with the argument that it was not mandated by the people of the North to address this question and that therefore no regional autonomy could be "imposed" on Northern regions without their consent. (*Minutes of the Addis Ababa Conference on the Southern Sudan held in Addis Ababa commencing on 16.2.1972, between the Sudan government on the one hand and the Southern Sudan Liberation Movement (SSLM) on the other* as referred to in Elias Nyamlell Wakoson, "The Politics of Southern Self-Government 1972-83," in *Civil War in the Sudan*, eds. M.W. Daly and Ahmad Alawad Sikainga (London, New York: British Academic Press, 1993), 34.) The fact that the negotiations were held on a strictly bilateral level can certainly be said to have played a significant role in this outcome.
As a side note, it is interesting to see that these arguments seemed forgotten in 1980, when the Unity province was created without consultation to remove the oil-rich region of Bentiu from the administrative jurisdiction of the South [*ibidem*.].

[41] Wakoson, 33. Note that the Southern Region was defined as encompassing the three provinces Bahr El Ghazal, Equatoria, and Upper Nile as defined at independence (SPRSGA, art. 3) as well as – in theory – "other areas as may be decided by a referendum to be culturally and geographically a part of the Southern complex" (SPRSGA, art. 2(iii)). This provision was framed in particular on the regions of Abyei (between Bahr el Ghazal, Southern Kordofan, and Darfur), Hufrat al-Nahas, and Kafia Kingi (both North-West of Bahr el Ghazal), which still remained part of the North until the organization of such a referendum (Wöndu and Lesch, 4. Wakoson, 32, includes also Kurmuk in South-Eastern Sudan.) Yet, the AAA as well as the accompanying Protocols and the SPRSGA failed to give details on the referendum. This imprecision constituted a major shortcoming and probably contributed to the fact that the promised referenda were never held. The Abyei question was the leading case among these regions and the GoS decided to turn a blind eye on several popular petitions as well as on a resolution from the Southern People's Regional Assembly, asking for the referendum to be held (Wakoson, 33).

[42] See 1973 Constitution, art. 182-184.

[43] Note that the SPRSGA "shall be an organic law, and shall not be amended except in accordance with the provisions thereof" (1973 Constitution, art. 8) and constituted thus a "sort of constitution for the South" (Jeswald W. Salacuse, "Visit to Juba, Southern Sudan, March 18-21, 1975," Report to Mr. Courtney A. Nelson [unpublished?], April 9, 1975: 2). It has thus to be analyzed in the first place to gain a better understanding of the meaning of the autonomy of the Southern Sudan.

defense, external affairs, nationality and immigration (emigration), as well as for the planning for economic and social development and for educational planning.[44]

After these significant restrictions, the SPRSGA specified the powers vested in the regional legislature and executive. As for the legislator, article 10 of the SPRSGA assigned the PRA the power to "legislate for the preservation of public order, internal security, efficient administration and the development of the Southern Region in cultural, economic and social fields" as well as in 20 other listed points.[45] Other powers, in particular the ones related to education, the economy, and social issues were often restricted as they had to abide to the national plan.[46] It is significant that the PRA had no role to play in an eventual amendment of the SPRSGA, which could only be done by a three-quarter majority in the Peoples' National Assembly (PNA) and confirmed by a two-thirds majority in a referendum in the South.[47]

In sum, this listing of competences underlines that the residual legislative powers remained with the central government. With regard to the devolved powers, it is important to keep in mind that they can only be effective if backed up by the necessary financial and administrative capacity, as well as executive powers to implement this legislation. This last point is especially significant as African countries have often known a division of power dominated by the executive body.[48]

In the present case, the powers devolved to the HEC, ordered to "supervise the administration and direct public affairs in the Southern Region of the Sudan,"[49] have to be analyzed.

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[44] The remaining points concern currency and coinage, air and inter-regional river transport, communications and telecommunications, public audit, as well as "Customs and Foreign Trade except for border trade and certain commodities which the Regional Government may specify with the approval of the Central Government" (SPRSGA, art. 6).

[45] Of particular significance seem in particular the powers to legislate on traditional law and custom – yet not surprisingly "within the framework of National Laws" (SPRSGA, art. 6(c)) - and the "recruitment, organization and administration of the services of the police and prisons in accordance with national policies and levels." (SPRSGA, art. 6(o)).

[46] See for example SPRSGA, art. 10(e). On the problems arising of such a division of competences see for example Arou, *Characteristics and Problems of the Decentralized Regional Government in the Southern Sudan*. [unpublished?], [198?]: 3-11.

[47] SPRSGA, art. 34.

[48] See for example H.W.O Okoth-Ogendo, "Constitutions without Constitutionalism: Reflections on an African Political Paradox," in *Constitutionalism and Democracy: Transitions in the Contemporary World,* eds. Greenberg et al. (New York and Oxford: Oxford University Press, 1993), 74-75.

[49] SPRSGA, art. 2(v).

Conceived as acting "on behalf of the President,"[50] all executive powers not covered by the abovementioned Chapter III (or in the final provisions of chapter IX[51]) were vested in the HEC. Despite these rather broad powers, it has to be noted that in the critical area of security the powers of the South remained most limited. This situation was made worse as it was agreed that the Southern forces should be integrated in the army of the North, which was to be controlled by the president with advice from the president of the HEC.[52]

Nevertheless, the powers vested in the HEC – and in particular in its president – were considerable, raising the question of the power to appoint and dismiss its members. This point reveals a major shortcoming of the SPRSGA: the president of the HEC had to be "appointed and relieved of office by the President on the recommendation of the [PRA],"[53] giving the president of the GoS the final word in the determination of the executive power of the South, in defiance of the principle of Southern "self-government."[54]

This finding is further strengthened if other aspects of the SPRSGA are considered, which put only vague limitations to the power of the GoS-president.[55] In sum, it appears that the autonomy of the South could only be meaningful with the support of a benevolent president in

[50] SPRSGA, art. 16.

[51] In this chapter, article 26(ii) deserves special mention, as it specified that even outside the framework of national defence (excluded from regional powers under chapter III) "the use of the People's Armed Forces within the Region" remained under the control of the President of the GoS – "on the advice of the President of the High Executive Council" (SPRSGA, art. 26(2). See also AAA, art. 27(ii)). Phrased like this, it was apparent that the HEC had no real power in this issue.

[52] SPRSGA, art. 26(2). The arrangement provided that a Southern Command should be built, consisting of 12,000 men, half of which should be from the South.

[53] SPRSGA, art. 18. Note also that the President of the HEC in turn recommended the other members of the HEC to the President for appointment (SPRSGA, art. 19).

[54] Note also that the oath of office had only to be taken before the President, making one question the stipulation in article 20 SPRSGA which suggests accountability of the HEC both to the President and to the PRA.

[55] A striking example is given in article 13 of the SPRSGA, indicating that a two-thirds majority of the PRA could "request the President to postpone the coming into force of any law which, in the view of the memners [sic!], adversely affects the welfare and interests of the citizens of the Southern Region". Yet, facing such a request, the article continues that "the President *may*, *if he thinks fit*, accede to such request." (SPRSGA, art. 13 [emphasis added]). While the stipulation of "any law" seems to indicate the devolution of wide-ranging power to the PRA, the last part of the article made it clear that such an action would not have any legally binding consequences for the President.
Further, according to article 27 SPRSGA, the President also had the right to veto bills (of the PRA) which he considered contrary to the National Constitution. Yet, in such a case the PRA could reintroduce the bill "after receiving the President's views" (SPRSGA, art. 27).

Khartoum, raising the question of the influence of the South on the national level in order to counterbalance and control this presidential influence.

According to article 80 of the 1973 Constitution, the national executive powers were vested in the president who had to be nominated by the SSU and mandated by a plebiscite. He could be reelected for an unlimited number of terms of six years, controlled the Armed and Security Forces, and had a discretionary power to appoint ministers, vice-presidents, and/or a Prime Minister.[56] This absolute dominance of the executive was coupled by an important influence of the president in legislative matters, in defiance of the principle of checks and balances.[57] Further, the 1973 Constitution did not provide for a special regional representation in the GoS or the PNA, saying with regard to the latter simply that "geographical areas, administrative units, and alliance of working forces of the people shall be represented in the Assembly."[58] Such a representation was not amenable to protect the interests of the South and of the other traditionally marginalized regions sufficiently, even more so as the procedures for an amendment of the Constitution did not offer a special protection either.[59] Finally, the judiciary could not counterbalance the executive's broad powers either, as it was – despite being named "independent"[60] – "directly responsible to the President […] for the performance of its functions",[61] and the president had the power to appoint and remove judges at all levels.[62]

[56] See 1973 Constitution, art. 84, 99, 90, and 88 respectively.
Note in addition that, except for cases of high treason, he could not be convicted nor could he be impeached in another way. Such a charge could however only be brought up by one third of the members of the People's Assembly, and had to be supported by two-thirds in a meeting held *in camera* (1973 Constitution, art. 115).
[57] *Inter alia*, he could appoint up to one tenth of the members of the PNA (1973 Constitution, art. 120), convene or prorogue the PNA (art. 126. Note that this power had to be exercised after consultation with the speaker of the PNA.), veto Bills passed by the PNA (art. 107. Note that a two-thirds majority of the PNA could pass the Bill again against the will of the President.), issue "Provisional Republican Orders having the force of law," (art. 106) which would then have to be submitted to the PNA within 15 days "or at the first meeting in case of dissolution, or prorogation or end of session," (*ibidem*.) or he could also simply dissolve the PNA "after consultation of the Speaker [of the PNA]" (art. 108).
[58] 1973 Constitution, art. 119.
[59] A constitutional amendment had to receive a two-thirds majority in the PNA and the consent of the President. But even a one-third representation in the PNA could not necessarily stop a constitutional amendment as it "shall be put to a general referendum in the event of disagreement between the President […] and the [PNA]" (1973 Constitution, art. 218).
[60] 1973 Constitution, art. 185.
[61] 1973 Constitution, art. 186.
[62] 1973 Constitution, art. 188.

The president of the GoS could thus exert significant influence over the South – and even more so over the other regions. The power structure on the central level cemented this strong position of the president – a president who represented since independence always mainly the Northern Sudanese Arab Muslims.

In conclusion, although it has to be acknowledged that the process unleashed by the AAA not only ended the war, but also meant a progress for the position of the Southerners in the Sudan, a closer look reveals that the level of centralization remained very high, resulting in a "President-dependent sham self-government"[63] for the South with no special provisions for other minorities. The president of the central government was given so many means of influence that even if he could not legally change the status of South, he was able to undermine the effectiveness of the Southern autonomy.[64]

During the first years following the AAA, the Southern autonomy arrangement operated with some success: the huge task of refugee-relocation got underway and the 1973 elections were relatively successful.[65] Yet, in the mid-1970s,[66] the Islamic-oriented movements, which had organized themselves in the National Front opposing the religiously too liberal AAA, regained more and more political influence and Nimery had to give in to their demands to a certain extent in order to reduce the risk to be overthrown by an Islamist coup.[67] As a critical example, it can be noted that the Islamist leader Turabi was appointed to key policymaking positions.[68] Including these forces helped Nimery to stay in power by reducing at the same

[63] Schüepp, "After Addis Ababa and Naivasha," 21.
[64] While Arou, *Characteristics and Problems*, 54-56, agrees on the fact that the legal powers of the South "are far short of regional autonomy," his interpretation focuses much more on the problems of ambiguous power relations and weak southern financial sources.
[65] Tim Niblock, *Class and power in Sudan: the dynamics of Sudanese politics, 1898-1985* (Albany: State University of New York Press, 1987), 278. See also Nelson Kasfir, "Still Keeping the Peace: The Southern Sudan Four Years After the Addis Ababa Agreement," *Northeast Africa Series* XXI, No. 4 (April 1976): 11.
[66] In particular since 1977 (Gabriel R. Warburg, "The *Sharia* in Sudan: implementation and repercussions," in *Sudan: state and society in crisis*, ed. John Obert Voll (Bloomington and Indianapolis: Indiana University Press, 1991), 92).
[67] More on the National Front and Nimery's politics in Mohammed Beshir Hamid, *The politics of national reconciliation in the Sudan: the Numayri regime and the national front opposition* (Washington, D.C.: Georgetown University, 1984).
[68] He became Attorney General as well as a member of a Committee with the task to redraft legal codes in order to bring them in conformity with Islamic law (Wöndu and Lesch, 5).

time the influence of the Southerners in the central government,[69] and it became apparent that Nimery's main concern remained his position in the North.[70] Like this, the Southerners increasingly lost their effective self-government as the president became less and less benevolent to their cause.

The Southerners were also increasingly frustrated as the AAA did not wield the expected results. In particular economically, it was mainly the ever-dominant Northern Nile valley that profited from the peace-dividend; while the promised investments in the South did either not take place or were not sustained. The disappointment increased after the discovery of oil in the South in 1978, as it became clear that the North was unwilling to share revenues with the South.[71] This factor should from then on become one of the major contentious issues, and it added to other tensions, such as the fact that the promised referendum in the Abyei area was never held or such as the problematic absorption of the Anyanya into the national army.[72] In addition, Nimery's involvement in Southern politics allowed him to play the main southern politicians – Lagu (Equatorian) and Alier (Dinka) – off against each other, deepening the divide along tribal lines in the South.

It was finally the unconstitutional re-division of the South into three regions by presidential decree of Nimery in a strategy of *divide et impera* which led in 1983 to the resumption of the war between the North and the South.[73] Further, he decreed the *Shari'a* in his "September Laws", despite opposition throughout the country.[74]

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[69] Wöndu and Lesch, 5-6.
[70] Prunier, *From Peace to War*, 45-46.
[71] Note also that the building of a refinery was planned in the North (near Kosti).
[72] In fact, not only was the Anyanya cadre systematically reduced by retiring officers without recruiting sufficient Southerners in the cadet colleges, but the units were also mixed more quickly than planned, which led to mutinies in the mid-1970s (Wöndu and Lesch, 5-6).
[73] Although this proceeding was unconstitutional, the fact that the constitution accorded so ample powers to the president of the GoS had set the stage for such unilateral action and is therefore to be held "responsible" to a certain extent (Wöndu and Lesch, 6). On the arguments and factions *pro* and *contra* division see also Raphael K. Badal, "Political Cleavages within the Southern Sudan: An Empirical Analysis of the Re-Division Debate," in *Short-Cut to Decay: the case of the Sudan*, eds. Sharif Harir and Terje Tvedt (Uppsala: Nordiska Afrikainstitutet, 1994), 110-124; or Arou, *Characteristics and Problems,* 49-54.
[74] For example also by the influential Ansar brotherhood. It is not clear if this act was actually unconstitutional as the 1973 Constitution already indicated the *Shari'a* as a source of Sudanese law (Constitution 1973, art. 9. See also Wöndu and Lesch, 7).

In sum, while some argue that the ultimate demise of the constitution and the re-emergence of the war were not due to inherent inadequacies in the SPRSGA,[75] it is argued here that it was at least facilitated by several weaknesses of the constitutional process and of the constitution:

- the inconclusive constitution-making process contributed to a lack of legitimacy of the document – or, in Nimery's view: "it was not sacred;"[76]
- in a similar vein, the "quickly cobbled together" AAA "should have been seen as a point of departure, not as a point of arrival"[77] – as it was seen by the GoS;
- the president of the GoS was attributed such a strong position in the SPRSGA and the 1973 Constitution that he could actually dominate Southern politics despite a status of self-government, which was built on the existence of a benevolent-president;[78]
- given the large influence of the president, the marginalized regions lacked effective means on the national level to limit his power;
- the fact that the Anyanya was to be integrated into the national forces robbed the South effective military means to protect the respect of its rights;
- the ambiguous division of power between the central level and the South – such as the distinction between the planning and the implementation of plans – weakened the Southern government;
- the lack of genuine popular participation in a way reflecting the different parts of the Sudan's multifaceted society undermined the legitimacy of the system as a whole;
- the lack of sufficient proper financial resources made the South more vulnerable.[79]

[75] Niblock, *Class and Power*, 278.
[76] As reported by Wöndu and Lesch, 6.
[77] Prunier, *From Peace to War*, 60.
[78] Using the term "imperial presidency", Hamid comes to the same conclusion when he states that "[t]he basic contradiction in the Sudanese experiment in devolution is that of a highly personalized style of decision-making operating within a formally and institutionally devolved system of government." (Mohammad Beshir Hamid, "Devolution and the Problems of National Integration: A Case Study of the Sudan," in *Part of the Proceedings of the Conference on North-South Relations since the Addis Ababa Agreement*, Sudan Library Series (14), eds. Mom K. N. Arou and B. Yongo-Bure (Khartoum: University of Khartoum, 1988), 158).
[79] The issue of financial autonomy has not been specifically addressed above. Two reasons explain that: on the one hand, the weaknesses unveiled by the analysis could not be repaired by a strong financial autonomy, and on the other hand, article 25 of the SPRSGA established a fairly complex funding mechanism indicating both own sources of funding and contributions by the national government, which made a judgment on the financial autonomy of the South *in abstracto* difficult. It was the practice that unveiled the incapacity of the South to raise sufficient funds. For an extensive account on Southern financial powers and problems see Arou, *Characteristics and Problems,* 11-27; and also Kasfir, 8-9.

d) Another two decades of war

As the Sudan slipped back into civil war – this time with the newly created Sudan's People Liberation Army/Movement (SPLA/M) under the leadership of John Garang de Mabior at the head of the Southern resistance[80] – Nimery was overthrown in a 1985 coup led by Sadiq Al-Mahdi. In April 1986, the first elections of the national legislative body for 17 years saw a remarkable revival of party politics as not less than 36 parties registered.[81] Despite the majoritarian electoral system, no single-party majority emerged, but the two strongest parties, the Umma led by Al-Mahdi (99 seats) and the Democratic Unionist Party (DUP; 64 seats) were able to form an unstable coalition government.[82] The third and most radical religious party, the National Islamic Front (NIF; 51 seats) decided not to coalesce as a junior partner, as it vigorously opposed the abolition of the *Shari'a* laws to which the Umma and DUP had agreed in principle.[83]

Al-Mahdi opened negotiations with the SPLA/M, without however abrogating the "September Laws". In addition, despite some efforts to re-decentralize the administration – following the idea used in the aftermath of the AAA – these reforms remained embryonic due to the ongoing war.[84] The unstable government under changing coalitions also hampered clear policies, until a new coup brought in 1989 General Umar al-Bashir and his NIF to power.[85] In July of the same year, the constitution was suspended; Bashir dissolved the parliament and forbade all political parties.[86]

Despite the NIF's radical ideas, given its inability to overcome the Southern Sudanese rebellion, the government had to take a more conciliatory stance over time in order to stay in power. As one important step, the consideration of a new federalist system for the Sudan has

[80] The SPLA/M had emerged in Summer 1983, and was created *inter alia* by John Garang, who became the leader of both the military and political wing until his death in 2005 (Jendia, 105-107).
[81] Kamal Osman Salih, "The Sudan, 1985-1989: The Fading Democracy," *The Journal of Modern African Studies* 28, no. 2 (1990): 201.
[82] Note that four Southern parties were also included in this government as junior partners (*ibidem*.).
[83] Abdelrahman, 22.
[84] *ibidem*.
[85] For a more extensive account on these for years see Salih, 199-224.
[86] Rogier, "No More Hills Ahead?" 20-21.

to be mentioned.[87] In 1991, constitutional decree no. 4 (February 4, 1991) created a nominal "federal" Sudan, consisting of nine states with limited powers excluding the key competencies.[88] In addition, a pyramidal system of political participation was introduced,[89] which reflected the determination of the government to islamize the country and to continue to ban political parties. In this structure, even the top levels retained relatively little competencies largely at the whims of the governing junta.[90] The strongly religious approach by the NIF and the more limited powers of the regions than in the 1973 constitution made this solution from the outset unacceptable for the South, and the war continued.

In 1994, constitutional decree no. 10 re-divided the Sudan into 26 states, each of which should cut-across tribal lines.[91] Despite this increased federalization and the appointment by Bashir of several Christians to senior positions, the reform was unsuccessful to bring peace to the Sudan, also as the power retained by Bashir remained untouched.[92] It seems that the population was well aware of these power relations and consequently largely abstained from the elections held in 1995 to elect 45% of the members of the State Councils in single-member districts.[93] For example, according to al-Hayat, only 29,000 of potentially 1,500,000 voters in Khartoum cast their ballot.[94]

The 1996 elections for 275 out of 400 members of parliament were held according to the same plurality electoral system and saw a significantly higher participation despite calls for boycott.[95] Also in 1996, presidential elections gave Bashir a comfortable majority of 75,7%

[87] Abdelrahman, 26-28.
[88] The nine states were: Khartoum State, Northern State, Central State, Kordofan State, Darfur State, Bahr al-Ghazal State, Equatoria State, Upper Nile State, and Eastern State, divided in turn into 68 provinces and 218 administrative districts. For more details on the states' powers see also *ibid.*, 28-29.
[89] The structure of this pyramid consisted of "popular congresses", "sectoral conferences" as well as "constitutional, legislative and control institutions" – including first of all the presidency (*ibid.*, 28-33).
[90] For a more detailed analysis of this structure with some more positive conclusions see *ibid.*, 29-48.
[91] According to the then Sudanese Ministry of Federal Relation, as cit. in Abdelrahman, 36.
[92] See also the reiteration of presidential prerogatives in republican decree no. 165 of May 1995 (in *ibid.*, 41).
[93] Note that the number of districts varied with the population of the state. According to the 11. constitutional decree, an other 45% of the representatives were to be designated by the State Congresses and the final 10% were representatives of worker unions (*ibid.*, 40).
[94] Cit. in *ibid.*, 41.
[95] Note that the remaining 125 members were appointed by a 4,862 member National Congress (*ibid.*, 44). It is further notable that in 60 districts there was only one candidate running and that 11 Southern Sudanese members

against 40 competitors, under the allegations of fraud by the opposition. In his speech to the newly constituted National Assembly he reiterated two pillars of his policy: the Islamic concept of society and the irreversible prohibition of political parties. This radical course also increased the inner-northern opposition, which formed the National Democratic Alliance (NDA) to better oppose the GoS.[96]

In 1998, after a home-grown constitution-making process boycotted by opposition parties, a second "permanent" Sudanese constitution with a much more Islamic character was adopted in a referendum. It largely followed the line adopted in the earlier decrees, maintained the distribution into 26 states vested with very limited effective powers, while the competences of the presidency remained immense.[97] Surprisingly, it reintroduced the right to build political parties. However, by emphasizing the Islamic character of the State and by adopting Arabic as the sole national language this constitutional arrangement was unacceptable for the Southern Sudanese from the outset, and the armed resistance continued, leading already in 1999 to partially suspension of the constitution.[98]

e) The historical experience: a proof of failure or a failure to prove?

As this historical overview has shown, no Sudanese government so far seems to have succeeded "to make unity attractive" for all Sudanese. This could be taken as an argument that the Sudan can not remain united. However, it has also been seen that none of the institutional designs of the Sudanese state has contributed to effectively reflect the diversity of its society.[99] In addition, during the brief periods of elected governments, the electoral design has largely focused on plurality elections. In the following, the assumption that this represents

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were appointed by Bashir as the security situation in these districts did not permit a ballot, bringing the number of non-elected members to 49%.

[96] See also "Introduction," to NDA: National Democratic Alliance – Sudan, http://www.ndasudan.org/ [accessed May 4, 2006].

[97] See details in Abdelrahman, 49-51 and 86. Constitutional text available from http://www.sudanembassy.org/default.asp?page=documentsreports_constitution [accessed May 4, 2006].

[98] Flacks, 5-6.

[99] See also Gunnar M. Sørbø, "Peacebuilding in post-war situations: Lessons for Sudan," *CMI Reports* R 2004: 13 (Bergen: Christian Michelsen Instititute), 16; available from http://www.cmi.no/pdf/?file=/publications/2004%5Crep%5Cr2004-13.pdf [accessed May 4, 2006].

the most suitable electoral system in the Sudan will be challenged. It has been seen that these elections have cemented the dominance of two to three political parties, which failed in the following to develop more than just a "mechanical" understanding of democracy.[100]

Before turning to the analysis of these theories, the current situation and how it came about has to be analyzed in closer detail.

3. Peace in the Sudan, version 2005: an incomprehensive deal

a) The Naivasha peace talks and the Comprehensive Peace Agreement

Since 1983, Sudan's bloody civil war killed 1.5 million people and displaced more than 4 million alone within the country,[101] and ending it proved to be a long and difficult process. After several failed attempts by different mediators, the Intergovernmental Authority on Development (IGAD) started a mediation effort in 1994.[102] Although the principle of self-determination for Southern Sudan was agreed upon already in 1997, it took until 2005 to conclude the "Comprehensive Peace Agreement" (CPA) between the GoS and the SPLA/M, which put an end to the war and united under one *chapeau* six protocols on which the parties agreed upon since the break-through achieved in Machakos (Kenya) on July 20, 2002.[103]

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[100] Abdelrahman, 24.

[101] Gerard Prunier, "Sudan peace accords won't end war," *Le Monde diplomatique*, February 2005; available from http://www.sudantribune.com/article.php3?id_article=8030 [accessed May 4, 2006].

[102] IGAD was created in 1986 as IGADD to promote cooperation in economic, humanitarian and security affairs among seven countries at the Horn of Africa (Djibouti, Eritrea (joined after independence 1993), Ethiopia, Kenya, Somalia, Sudan and Uganda). The change in the acronym occurred in 1996 (See www.igad.org [accessed May 4, 2006]).
Unlike other peace initiatives in the 1990s, this initiative contained larger international involvement, in particular through the "IGAD Partners' Forum" (formerly "Friends of IGADD"), which associated a group of Western donor countries to the process (Rogier, "No More Hills Ahead?" 39).

[103] The other Protocols, which make up the six chapters of the CPA, are (in chronological order):
the *Agreement on Security Arrangements During the Interim Period* (September 25, 2003),
the *Agreement on Wealth Sharing During the Pre-Interim and Interim Period* (January 7, 2004),
the *Protocol Between the Government of Sudan and the Sudan People's Liberation Movement on the Resolution of Conflict in Abyei Area*,
the *Protocol Between the Government of Sudan and the Sudan People's Liberation Movement on the Resolution of Conflict in Southern Kordofan/ Nuba Mountains and Blue Nile States*, and
the *Protocol Between the Government of Sudan and the Sudan People's Liberation Movement on Power Sharing* (all signed on May 26, 2004).

The IGAD peace process was conceived as strictly bilateral, including only the GoS and the SPLA/M. In the South, the SPLA/M-leader John Garang was able to largely control dissent within the movement and from other groups both through his emblematic leadership and with an iron fist. Nevertheless, it has to be kept in mind that opposition to this Dinka-dominated approach – especially by the other large Southern tribes, the Nuer and the Equatorians – was more or less clearly articulated at all times.[104]

As to the "North"; the peace process has not been more inclusive. Although the GoS, formed by the National Congress Party (NCP),[105] is supported only by a tiny fraction of the population, opposition parties were not invited to the conference table, provoking harsh criticism.[106] Further, the regions of the North marginalized by the GoS were also neglected during the peace negotiations, constituting a major explanatory factor for the outbreak of the war in Darfur[107] and for troubles in other parts of the country.[108]

As this brief overview indicates, the IGAD peace process was a highly exclusive affair, leaving a majority of the Sudanese unrepresented at the negotiation table.[109] Although the idea to find solutions for these other groups in separate agreements based on the framework of the CPA seems promising,[110] the exclusionary approach has certainly reduced the legitimacy of

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Further, the CPA contains different Implementation Modalities and Corrections in its annexes, adopted during the final negotiations.

[104] See for example Jok Madut Jok and Sharon Elaine Hutchinson, "Sudan's Prolonged Second Civil War and the Militarization of Nuer and Dinka Identities," *African Studies Review* 42, no. 2 (1999): 125-145; or Adam Branch and Zachariah Cherian Mampilly, "Winning the war, but losing the peace? The dilemma of SPLM/A civil administration and the tasks ahead," *Journal of Modern African Studies* 43, no. 1 (2005): 1-20.

[105] Note that the NCP emerged from the NIF after an internal split (Rogier, "No More Hills Ahead?" 26-27).

[106] See for example Al-Sadig Al-Mahdi, "The Peace Agreement Jan. 2005 & The draft Constitution May 2005"; available from http://www.sudaneseonline.com/epressrelease2005/jul30-69840.shtml [accessed May 4, 2006].

[107] On the close connection between the peace talks and the violence in Darfur see for example Cheryl O. Igiri and Princeton N. Lyman, "Giving Meaning to 'Never Again': Seeking an Effective Response to the Crisis in Darfur and Beyond," *Council on Foreign Relations, CSR* no. 5 (2004), 3; available from http://www.cfr.org/content/publications/attachments/NeverAgainSudanCSR.pdf [accessed May 4, 2006].

[108] Even if less covered by the media, other regions also voice their grievances against the exclusive approach to the peace negotiations. In the East, some outbreak of violence took place, raising fears of a popular uprising by the Beja (see for example "Eastern Sudan conflict threatens peace in the south," Sudan Tribune, 2 October 2005; available from http://www.sudantribune.com/article.php3?id_article=11844 [accessed May 4, 2006]). A serious further problem of the peace process represented the exclusion of the regions on the edge between the North and the South, "which are technically in the North but identify more closely with the South" (Flacks, 11).

[109] According to Prunier, the signatories of the peace accords "have the backing of only about 30% of the Sudanese people" (Prunier, "Sudan peace accords won't end war").

[110] This opinion was also expressed by Abel Alier in a personal telephone interview on October 25, 2005.

the peace process, a fact that could compromise the sustainability of the peace it brought about. Despite this exclusionary approach, intended to reduce the complexity of the negotiations, an agreement was only finally reached when the US (alongside with the UK and Norway) became more heavily involved in the process in the context of the post-"9/11" "war on terror."[111] This increasing pressure, mainly from the American Special Envoy John Danforth, was crucial to push the parties to the conclusion of the CPA.[112]

b) The making of the Sudanese interim constitutions

Unlike the AAA, the CPA is clear about the elaboration of a new constitution and provides for a process. In fact, it foresees the creation of multiple constitutions: on the national level, on the level of Southern Sudan, as well as on the State level, intended to create an asymmetric federalism.[113] The guiding principle of the constitution-making process on the national level was already adopted in the *Machakos Protocol*: It provided for a pre-interim period of six months after the entry into force of a peace agreement, during which an interim constitution was to be elaborated, which is to be applied during the following six-year interim period.[114] The *Agreement on Power Sharing*[115] and the *Implementation Modalities of the Machakos and Power Sharing Protocols* clarified the drafting procedures, reducing the "constructive ambiguity"[116] of the *Machakos Protocol*.

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[111] Rogier, „No More Hills Ahead?" 45-57.

[112] It is unclear to what extent the international players also influenced the substance of the agreement. While Rogier, "No More Hills Ahead?", 67-71, argues that their focus was mainly on the process while they left the content of the agreement largely to the discretion of the parties, Abel Alier sheds at least some doubt on this by indicating that the US and the other powers were always careful not to appear as if they were taking a leading role (Telephone interview with his Excellency Abel Alier in Kampala (Uganda) on October 25, 2005. Note that Abel Alier was Vice-President of Sudan and President of the HEC from 1971 to 1982, assisted the IGAD peace process as an independent observer and mediator and served and serves as co-chairman of the National Constitutional Review Commission (NCRC)).
As to the role of international legal advisors, see Martin Schüepp, "Sudan's Constitution-Making Process: The Role of International Actors," (Boston: 2005 [unpublished]).

[113] More on this model will be provided below. Note that the word "federalism" was officially avoided (Max Planck-Institut [?], "Engagement des Max Planck-Instituts für ausländisches öffentliches Recht und Völkerrecht im Sudan", [200?; unpublished?], 3-4).

[114] *Machakos Protocol*, §§ 2, 2.2 and 2.1f.

[115] See *Agreement on Power Sharing*, § 2.12.

[116] Max Planck Institut, das Sudan Peace Project, *Contents of the* Heidelberg Dialogue; available from http://www.virtual-institute.de/projects/spp/en/everh.cfm [November 25, 2005].

The work on the INC started in accordance with the CPA with a small Technical Committee, composed of 7 GoS- and 7 SPLA/M-members, preparing a Draft Interim Constitution.[117] After this secretive start of the process, the following stage was slightly more open as a National Constitutional Review Commission (NCRC) was in charge to finalize the draft for approval by the parliament. As the NCRC was in accordance with the CPA composed of a more than two thirds majority of the two former warring parties,[118] they had the possibility to dominate all oppositional forces.[119] After massive criticism by oppositional forces, the membership was *de facto* tripled (to 180 members) in order to include more oppositional forces and they were also accorded some more voting seats.[120] This strategy helped to include a delegation of the National Democratic Alliance (NDA) towards the end of the process.[121] Yet, it remains that the included opposition members were generally "hand-picked"[122] and many opposition groups maintained their objections.[123] It has also to be kept in mind that the armed groups in the East and the West of the country remained excluded.[124] Finally, as to the participation of the "civil society" in the process, it can be concluded that no meaningful participation has taken place before the adoption of the Interim National Constitution (INC) – despite the official encouragement to comment the draft.[125]

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[117] The Draft was published in early May 2005, but dates from March 16, 2005. Draft text available from http://www.sudantribune.com/IMG/pdf/20050316_SUDAN_DRAFT_CONSTITUTIONAL_TEXT.pdf [accessed May 4, 2006].

[118] 52% for the National Congress Party (NCP), 28% for the SPLA/M, 14% for other northern -, and 6 % for other southern political forces (*The Implementation Modalities of the Machakos and Power Sharing Protocols*, December 31, 2004 [hereinafter *Implementation Modalities*], point 41 according to *Agreement on Power Sharing* § 2.12.4.2 and § 2.12.4.3).

[119] According to the CPA *Implementation Modalities*, point 41 according to *Agreement on Power Sharing* § 2.12.4.2 and § 2.12.4.3), decisions could be taken by a two third majority if no consensus could be reached.

[120] International Crisis Group, "The Khartoum – SPLM agreement: Sudan's uncertain Peace," *Africa Report* No. 96 (25 July 2005): 3; available from www.crisisgroup.org [accessed May 4, 2006].

[121] See *Agreement between the Government of Sudan and the National Democratic Alliance*, Cairo, June 16, 2005; available from http://www.sudantribune.com/IMG/pdf/Cairo_Agreement_between_GoS_NDA.pdf [accessed May 4, 2006]. On its earlier opposition, see for example "Sudan prepares to draft interim constitution amid opposition boycott," *AFP*, 30 April, 2005; available from http://www.sudantribune.com/article_impr.php3?id_article=9351 [accessed May 4, 2006].

[122] Telephone interview with Dr. Jäger (Nairobi, Kenya) on October 25, 2005 [quote according to notes taken].

[123] See for example the creation of a national opposition alliance consisting of more than 20 parties (International Crisis Group, "The Khartoum – SPLM agreement", 4) or the opposition by some very senior Sudanese personalities such as the President of the Umma party, Sadiq al-Mahdi. (See Al-Mahdi).

[124] International Crisis Group, "The Khartoum – SPLM agreement", i.

[125] "Sudanese president urges national participation in constitution making," *Sudan Tribune*, May 3, 2005; available from http://www.sudantribune.com/article_impr.php3?id_article=9391 [accessed May 4, 2006].

The making of the INC was thus not much more inclusive than the conclusion of the CPA, also because the Draft of the Technical Committee importantly shaped the subsequent discussions. This lack of inclusiveness certainly undermines the legitimacy of the INC in the eyes of many.

Similar concerns have to be raised with regard to the elaboration of the Interim Constitution for the Southern Sudan (ICSS). This process was nearly entirely dominated by the SPLA/M, which called upon the Max Planck Institute to elaborate a draft constitution. In several workshops in the South, Khartoum, and Nairobi a draft text for the considerations by the Southern parliament was elaborated and discussed and adopted by the latter.[126] In all these steps, the SPLA/M represented the key player able to control the outcome alone. This drafting procedure and the exclusionary approach taken by the SPLA/M plague also the process in the South with a lack of legitimacy.

4. The way ahead: elections and the comprehensive constitutional review

The INC entered into force on July 9, 2005 – after the review by the NCRC and the formal ratification by the parliament and the parties – starting a six-year interim period, during which the Constitution is to be reviewed. In addition, six months before the end of the interim period, the South has to hold a referendum on its future independence or unity with the Sudan.[127]

Note that this was also due to the short amount of time between the publication of the Draft and its adoption in Parliament. As a notable exception, Amnesty International submitted a memorandum commenting the bill of rights in the draft. Most of its suggestions have then been integrated in the INC, but some important grievances – in particular concerning the immunity of leaders – remain. (See the memorandum Amnesty International, *Sudan: Memorandum to the National Constitutional Review Commission*; available from http://web.amnesty.org/library/pdf/AFR540492005ENGLISH/$File/AFR5404905.pdf [accessed May 4, 2006]; as well as a subsequent critique on Amnesty International, "Sudan: New constitution provides sweeping immunity for high level officials," Press release, 07/06/2005; available from http://news.amnesty.org/index/ENGAFR540662005 [accessed May 4, 2006]).
For a more extensive comment on the international involvement in the constitution making process see Schüepp, "Sudan's Constitution-Making Process".

[126] Max Planck Institut, "Engagement des Max Planck-Instituts," 4.

[127] Art. 219-222 precise how this right is to be exercised; and several articles have a clause outlining what should happen after the referendum – either in case of unity and secession. See especially art. 222(1): "Six months

Until the Sudan comes to this decisive moment in its history, different steps will have to be undertaken to live up to the claim "to make unity attractive." Among these, two particularly salient points will constitute the heart of this thesis:

First, a new constitution will have to be elaborated to prepare for the post-interim period, which, according to the CPA, should be done in an "inclusive Constitutional Review Process."[128] The same NCRC which elaborated the INC is put in charge to undertake this review.[129] Given that the record of the NCRC in the elaboration of the INC was – as has been shown –far from what one would term an "inclusive" process, one may doubt if the NCRC will be able to stand up to the terms of the CPA.

It is certainly laudable that the CPA underlines that "the process must provide for political inclusiveness and public participation"[130] and that the implementation modalities specify the main elements which are understood to be part of an inclusive process – although one would have wished a clearer expression of these elements in view of the past record.[131] It is in particular questionable that the CPA and the INC remain silent on the modalities for the adoption of the permanent constitution.

It has further to be remembered that the making of an interim constitution and of a permanent constitution are quite different. While reasons of time pressure, insecurity and an underdeveloped civil society often do not allow setting up an inclusive process, these restrictions are not applicable in the following process of the elaboration of a permanent

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before the end of the six-year interim period, there shall be an internationally monitored referendum […] organized by Southern Sudan Referendum Commission […]".

[128] *Machakos Protocol*, § 3.14. This wording is not entirely uncontroversial as it does not clarify if the 1998 constitution – which has, as has been outlined above, never been acceptable to the Southerners – should be taken as a basis for the new constitution and be "reviewed" or if the formulation refers to a review of the INC. Although the two documents differ very significantly, this question will probably not be of overwhelming importance in practice, as the terms of the new constitution will depend much more on a political consensus than on the respect of this particular legal terminology.

[129] *Agreement on Power Sharing* § 2.12.10.

[130] *Agreement on Power Sharing* § 2.12.10.

[131] See *Implementation Modalities*, point 45, listing in particular "Public rallies, workshops, seminars, meetings, media programs, etc." See also the INC, art. 140, which provides that the NCRC shall continue its work as stipulated in the CPA.

constitution.[132] It is therefore not necessarily permissible to conclude from the interim-constitution making-process on the process to ensue now.

In addition, the NCRC has shown to be responsive to external pressure. The enlargement of the NCRC may not have been in accordance with the terms of the CPA, but it allowed making the process slightly more inclusive. In this respect, it has also to be noted that the presidency was given the explicit possibility to review both the composition and the functions of the NCRC.[133] While this could serve as a tool to improve the representativeness of the NCRC, this instrument can also be dangerous in the hands of an irresponsible government. Again, in view of historical records of previous Sudanese governments and of the present exclusionary constitution of the Government of National Unity (GoNU), a critical look is certainly appropriate. Given these considerations, it will be critical to maintain constant internal and international pressure for a more inclusive constitution and process.

How the process will effectively be conducted remains still to be seen. So far, the efforts to create a more inclusive process and to spread the information on the INC to prepare for a more participatory approach have remained scarce, most visibly displayed by the fact that the NCRC did not meet since the entry into force of the INC.[134] This displayed absence of determination to truly engage in the agreed process is deplorable, and the international community should in the interest of international peace and security take a more active role to remind the Sudanese of their commitments, show own commitment to the process and provide technical assistance to the Sudanese.

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[132] Louis Aucoin, *Rule of Law in Post Conflict Societies*, Seminar at the Fletcher School of Law and Diplomacy, Class of Sept. 28, 2005 [notes taken by author].

[133] INC, art. 140.

[134] UNMIS, *The CPA Monitor: Monthly Report on the Implementation of the CPA*, March 2006, 2; available from http://www.unmis.org/common/documents/cpa-monitor/cpaMonitor_mar06.pdf [accessed April 10, 2006]. For a recent minimal development, underlining the scarcity of information on the topic, see for example "Alier and Idris appointed co-chairmen of the National Commission for Constitutional Revision," SUNA ENGLISH (May 1, 2006); available from http://www.upi.com/Arabia2000/view.php?StoryID=20060501-878367-8303-r [accessed May 4, 2006].

A second crucial moment during the interim period preceding the *referendae* will be the holding of first nationwide elections on different levels before the end of 2009.[135] Elections generally tend to trigger enormous attention in the political life of a nation, and this is especially true in the case of first post-conflict elections.

The CPA spells out the steps to be taken in the preparation of this crucial event, stating that

> *"every citizen shall have the right and the opportunity, without distinctions and unreasonable restrictions, to vote and to be elected at genuine periodic elections, which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors."*[136]

In order to guarantee this right, a national population census shall first be conducted during the first two years of the interim period.[137] This constitutes a necessary step in order to obtain more accurate information on the population and to establish in a next step electoral registers. While the 2004 *Agreement on Power Sharing* foresaw the holding of elections before the end of the third year of the Interim Period, this final deadline has been postponed by a year in the final phase of the CPA-negotiations.[138]

The implementation modalities of the CPA further specify the process leading to these elections. Most importantly, the National Legislature should enact an electoral law within six month after the start of the Interim Period.[139] This deadline has passed in January 2006, but "Llittle [sic] progress was made in the drafting of the Electoral Law and establishment of the

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[135] The *Implementation Modalities* specify in points 9c and 9d what elections are to be held:

> *c) General Elections comprising elections for the State Governors, National Assembly, the Legislature of southern Sudan, and State Legislatures all over Sudan.*
> *d) Presidential elections and elections for the post of President of the government of southern Sudan (GOSS).*

Note that this thesis will focus in particular on the Presidential elections and the elections to the National Assembly.

[136] CPA, *Agreement on Power Sharing*, § 1.6.2.11. Article 41(1) of the INC restates this provision in similar terms.

[137] CPA, *Agreement on Power Sharing*, § 1.81.

[138] Note that a certain flexibility on the deadlines was already built in the *Agreement on Power Sharing*:

> *1.8.4 Six months before the end of the periods referred to in Sub-Paragraphs. 1.8.1 and 1.8.3 the Parties shall meet and review the feasibility of the dates set out in the abovementioned sub-Paragraphs.*
> *1.8.5 Certain considerations, while not conditional upon their completion, should be taken into account with respect to the timing of the elections (including, inter alia, resettlement, rehabilitation, reconstruction, repatriation, building of structures and institutions, and consolidation of the Peace Agreement);*

[139] *Implementation Modalities*, point 9a.

Electoral Commission."[140] While this may be an additional piece to the undermining of the CPA, postponing the enactment of this law is not necessarily negative as such. Additional time could allow for a better reasoned decision, as in particular more information on the composition of the electorate through the census could be gained. A thorough analysis of the different options for electoral laws is a time consuming process. More time could also help to rectify to a certain extent the failure to spell out a clear drafting procedure for the electoral law by leaving all freedom in this respect to the National Legislature dominated by the two former warring factions, without providing for popular participation or the advice by an independent body. Such a more inclusive and participatory drafting of the electoral law could importantly help to increase the legitimacy of the poll.

Yet, it does not seem that the delay is caused by such honorable goals. Rather, unwillingness to pursue the process towards free and fair elections seems to be at the basis of the delay,[141] and no steps towards a more inclusive and participatory drafting procedure seem to have been undertaken. It is also doubtful if the international community provides sufficient technical assistance to promote an adequate drafting process of the electoral law.

The implementation modalities further specify that one month after the enactment of the electoral law, a National Electoral Commission (NEC) shall be created, consisting of "nine independent, competent, non-partisan, impartial and representative personalities to be selected and appointed by the Presidency […]."[142] This Commission will be in charge of organizing and supervising the elections and *referendae* according to article 141(2). Interestingly and disturbingly, while the implementation modalities designate the NEC as the executing body for the General Elections for the various legislatures and the state level executives together "with all levels of government plus International Community (IC)",[143] the NEC is seen as

[140] UNMIS, 5.
[141] See for example International Crisis Group, "Sudan's Comprehensive Peace Agreement: The Long Road Ahead," *Africa Report* no. 106 (31 March 2006): 18-20 (in particular footnote 131); available from www.crisisgroup.org [accessed May 4, 2006] for the position of the NCP with regard to elections.
[142] INC, art. 141§1. See also *Implementation Modalities*, point 9b.
[143] *Implementation Modalities*, point 9c.

solely responsible for the holding of the presidential elections both on the national and the Southern level. This has to be seen as a reaffirmation of the national sovereignty and as a clear signal for the international community to what extent its involvement is accepted.

The CPA and the INC outline the main steps of the process during the interim period. Consequently, the following parts will provide mainly substantive reflection on these upcoming events in the history of the Sudan. These reflections will however necessarily loop back throughout this thesis onto a critical analysis of specific points of this procedure.
As part of these reflections on the substance, the last part will elaborate on different electoral systems that should be considered for the 2009 elections in the Sudan.
Before turning to this part, the next part will address the broader question of different ways to organize a state and which form would be useful in the case of the Sudan. Although the NCRC will have to deal with many specific problems, the broad questions asked in this thesis also merit careful consideration, as the answers to them will have to constitute the spine of the future Sudan in which unity is attractive for all parts of the society.

Part II: State- and power-structures to support peace and to "make unity attractive"

1. Why not simply secession?

With the conclusion of the CPA on January 9, 2005, and especially since the death of SPLA/M-leader John Garang in summer 2005, the independence of the South after the six-year interim period is seen by many as inevitable.[144] Although it is difficult to conduct meaningful polls in the South, most agree that large majorities of Southerners seem to favor independence.[145] It can be argued that the South has after decades of marginalization finally achieved the right to decide its destiny, and has thus no reason to subjugate itself again to a central government which has exploited and fought it for over fifty years.

However, there are several good reasons to consider how a viable united Sudanese state could or should look like. In particular, several risks can be identified which should be considered carefully before opting blindly for the enchanting melody of the word "independence", emerging on the sub-national, national, and international level.

a) Sub-national risks

The creation of a new state bears a significant risk of new internal conflict in both the rump entity and in the new state. For the former, this risk stems mainly from the fact that the "success" of the seceding entity may awaken in other minorities the desire for greater power in the rump state or even for a similar secessionary claim. In the new state, a main risk is that fault lines which have been knit together by the common enemy will break up as the main goal has been achieved and the question of the power relations within the new state comes to the forefront.[146]

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[144] See for example International Crisis Group, "Garang's Death: Implications for Peace in Sudan," Update Briefing, *Africa Briefing* no. 30, 9 August 2005, 5; available from www.crisisgroup.org [accessed May 4, 2006].
[145] See for example Claire Metelits, "Reformed Rebels? Democratization, Global Norms, and the Sudan People's Liberation Army," *Africa Today* 51, no. 1 (2004): 72.
[146] That this problem can also play a significant role after the conclusion of a peace-agreement is for example underlined by Pierre M. Atlas and Roy Licklider, "Conflict among Former Allies after Civil War Settlement: Sudan, Zimbabwe, Chad, and Lebanon," *Journal of Peace Research* 36, no. 1 (1999): 35-54; and it is reasonable to assume that given the higher stakes in the case of a secession this risk is increased.

Both these risks are very real in the case of the Sudan.[147] The armed rebellion in Darfur and the imminent uprising by the Beja in eastern Sudan – both mainly triggered by the success of the SPLA/M – are just two examples that a secession of the South would not guarantee stability in the North.[148] In the South, the absolute authority of the Dinka-dominated SPLA/M does not go uncontested. The SSDF and other opposition forces are likely to voice their claims more vigorously as the unity of the SPLA/M will have to stand the test of being in power.[149]

b) National risks

On the national level – understood as the level of the current Sudanese state – new risks also emerge in the case of secession. The past has seen many cases of secession through conflict and even if the secession as such happens in a peaceful way, there is a risk of subsequently persisting tensions between the new neighbors. Experiences with secessions in the Horn of Africa do not give rise to excessive hope in the case of the Sudan.[150] Yet, the risk of an outbreak of an immediate new war in the case of an affirmative vote for independence by the Southern Sudanese seems significantly reduced through the presence of UN-troops along the dividing line.[151] This same presence does however not ensure future peaceful relations between North and South – and may even undermine them if this artificial division is used as a pretext not to actively seek reconciliation. The Sudanese oil resources as well as the unsatis-

[147] See for example Jan Pronk in Schneider and Debevois, 22.
[148] Or, as Rebecca de Mabior, the widow of John Garang and Southern Sudanese minister put it: "If the North tries to keep things as they were in the old Sudan, southern Sudan will vote to separate! And Darfur, Nuba Mountains, Southern Blue Nile, Eastern Sudan will also follow the same way." ("TEXT – Rebecca De Mabior Briefing in Washington on peace implementation," available from http://www.sudantribune.com/article.php3?id_article=13939 [accessed May 4, 2006]).
[149] These tensions also bear a high risk to turn violent. See for example "South Sudan SSDF, SPLA clash, killing seven," *Reuters*, February 6, 2006; available from http://www.sudantribune.com/article.php3?id_article=13941 [accessed May 4, 2006] or "Thirty two killed in south Sudan militia clashes," *Reuters*, April 12, 2006; available from http://www.alertnet.org/thenews/newsdesk/L12248317.htm [accessed May 4, 2006].
Positively, the problem is dealt with actively. See in particular the Juba Declaration of January 8, 2006 (International Crisis Group, "Sudan's Comprehensive Peace Agreement," 12-14).
On the tribal aspects of this opposition see also Branch and Mampilly, 1-20, or Jok and Hutchinson, 125-145.
[150] Note especially the case of the breakup of Somalia, but also the case of Ethiopia/Eritrea.
[151] See UNMIS, 41-43, for the current state of deployment.

factorily settled border issues between the North and the South (as in the 70s especially the Abyei-question[152]) are in our view a main factor which will "ensure" future tenuous relations.

c) International risks

As if these risks of secession were not sufficient, it is also important to keep in mind that secessions do not take place in a vacuum. Quite to the contrary, the international environment, and first of all the neighboring countries, take a vivid interest in such significant developments, the effects of which can go far beyond the borders of the state in question. Two main reasons generally let the international community favor unity over secession. Firstly, the emergence of a new state always bears the risk of destabilizing a fragile regional balance of power which may trigger new tensions or even wars. Secondly, every successful secession is also a precedent which may give rise to new demands in other states based on the right to self-determination and is therefore looked at by the international community with great suspicion. This latter effect is a factor in every secession and the Sudan is no exception to this. The first risk mentioned is also salient in the case of Southern Sudan, a secession of which could be perceived by Arab neighbors as a reduction of the Islamic sphere of influence in Eastern Africa. The potential effects of an independent South on instable situations in other neighboring countries are unclear and would deserve greater attention.[153]

In addition, the effect of an independent South on the sharing of the scarce water resources in the Nile basin should not be neglected. Several countries from Burundi to Egypt critically depend on the waters of the river Nile. The utmost downstream country, Egypt, so far defends a water sharing mechanism largely in its favor based on the Nile River Basin Agreement concluded in 1959 with the Sudan.[154] It is very likely that this agreement would not be

[152] For the current status of the problem see for example International Crisis Group, "Sudan's Comprehensive Peace Agreement," 4-6.
[153] In particular on the Ugandan civil war, as the Lord's Resistance Army (LRA) operates increasingly in Southern Sudan (see for example International Crisis Group, "Sudan's Comprehensive Peace Agreement," 14-17), but potentially also troubles in Northern Kenya or in Chad.
[154] On Egypt and the Nile Basin, see for example Magdy Hefny and Salah El-Din Amer, "Egypt and the Nile Basin," *Aquatic Sciences - Research Across Boundaries* 67, no. 1 (March 2005): 42-50; available through http://www.springerlink.com/ [accessed May 4, 2006].

accepted by a new Southern Sudanese state, requiring new negotiations, creating tensions over this security concern of primary importance.[155]

d) An obligation to consider options making unity "attractive"

Despite these risks and the resulting general hesitancy of states to accept secessions anywhere in the world, some scholars argue that the benefits of a secession to end a conflict may under certain circumstances prevail over its risks.[156] There is no clear answer to this question which will always also be influenced by politics. However, it seems to be largely acknowledged that secession as means of conflict resolution should only be adopted as an *ultima ratio*.

In the case of the Sudan, it can be argued that the conclusion of the CPA reflects the acknowledgement that the failure of all previous efforts has brought the *ultima ratio* into play. However, it is important to keep in mind that secession is not inevitable yet, and it is underlined that in the run up to the referendum, efforts should be undertaken to make unity attractive, as noted above.

It is thus a necessity to ask the question how viable the state structure defined by the CPA/INC is, and by what institutional means it could be further strengthened. A failure to answer this will make only one thing sure: the end of the Sudan within its current borders and a new era which will – as has been outlined above – not be without significant challenges.

As the following will underline, the state structure and the implied power sharing arrangements can be a crucial factor to create or appease tensions within the state. This part will therefore consider which state structure could help to promote the goal of "making unity attractive" for the Sudanese. After an analysis of theoretical answers to this question, the present solution will be examined in light of this theory. The section will end with some

[155] For a very critical evaluation of Egypt's role in the Sudan, see for example Eric Reeves, "Egypt and Darfur: Cruel Intentions," *The New Republic Online*, April 4, 2006; available from http://www.sudantribune.com/article.php3?id_article=14880 [accessed May 4, 2006].

[156] See for example Jaroslav Tir, "Dividing Countries to Promote Peace: Prospects for Long-Term Success of Partitions," *Journal of Peace Research* 42, no. 5 (2005): 545–562.

considerations how the structure could be adapted in order to improve the sustainability of the agreement, and how realistic it is that the parties will be ready to discuss such ideas.

Before venturing into this topic, it should be noted that even the term "unity" lends itself to some confusion in the present context, in particular as the South has been recognized the right to self-determination in the peace process. Accordingly, article 4(a) of the INC underlines that "the unity of the Sudan is based on the free will of its people," which has to be understood as confirming the Southern Sudan's right to self-determination.

Given this clearly stated right, it is surprising that several articles underline the importance of territorial integrity, elevating the safeguard of unity to a "duty of every Sudanese citizen."[157] As a literal interpretation of such provisions would be in contradiction with the above-mentioned principle, they seem in our view to have to be interpreted as a reaffirmation of the duty "to make unity attractive" and as prohibiting other parts of the Sudan to seek secession.

2. Different ways to deal with diversity in state- and power structures

Shifting the analysis to the question how unity can be made attractive through the organization of the state, the main question is how the state should deal on an institutional level with the enormous multidimensional diversity of the Sudan. Scholars have offered different taxonomies, which can be synthesized into the following options:

- separation;
- elimination;
- assimilation;
- accommodation; and
- integration.[158]

[157] INC, art. 23(1).

[158] This taxonomy most closely reflects the ideas expressed in Mengistu Arefaine, *Federalism and Accommodation of Diversities. With Special Reference to Divided Societies,* Etudes et colloques 45 (Fribourg: Institut du Fédéralisme, 2005), 64-89. See also John McGarry and Brendan O'Leary, "Introduction: The macro-political regulation of ethnic conflict," in *The Politics of Ethnic Conflict Regulation: Case Studies of Protracted Ethnic Conflicts,* ed. John McGarry and Brendan O'Leary (London, New York: Routledge, 1993), 4-38; or Timothy D. Sisk, "4.1: Power-Sharing Democracy: An Overview," in *Democracy and Deep-Rooted Conflict:*

These different options will in turn be analyzed, through what institutional measures they may be implemented, and what we see as the advantages and pitfalls of these approaches.

a) Separation

Separation entails in particular partition or secession. While these strategies start from the premise that more homogeneous and thus more peaceful states can be created by separation, the main risks of this strategy have been addressed above. As has been indicated, the option of separation will be presented to the Sudanese people in a referendum, and it will depend on their decision to adopt or reject it. Obviously, in the meantime, this solution is at the counterpoint of "making unity attractive", and is thus not further subject of this thesis.

b) Elimination

A strategy seeking the elimination of minorities is not better suited to "make unity attractive", as it is understood as the forceful suppression of diversity – by means such as genocide, ethnic cleansing or mass forced displacement. Obviously, the repeated use of such strategies – also on the African continent[159] – does not make them more legitimate and they are thus to be ruled out from the outset as options to "make unity attractive".

These first two "solutions" can be termed 'pre-' or 'extra-institutional'[160] – another reason to not reflect on them further in the consideration of institutional arrangements to "make unity attractive". On the other hand, the three remaining options deal with diversity by institutional means, and will thus be looked at in more detail.

Options for Negotiators, eds. Peter Harris and Ben Reilly (Stockholm: International Institute for Democracy and Electoral Assistance (IDEA), 1998), 139-146.

[159] The Sudan is no exception to this. Most recently, the ongoing Darfur-conflict has led to massive displacement and raised questions if the government is pursuing a genocidal strategy.

[160] Bojan Todosijevic, "Macro-Political Means of Ethnic Conflict Management in Southeast Europe. A critical examination," *Southeast European Politics* II, no. 2 (2001): 79; available from http://www.seep.ceu.hu/issue22/todosijevic.pdf [accessed May 4, 2006].

c) Assimilation: the unitary state in a divided society

The method of assimilation seeks to reduce the diversity in a society through a "process whereby individuals or groups of differing ethnic heritage are absorbed into the dominant culture of a society."[161] Members of minorities are thus encouraged – or in rarer cases coerced[162] – to change their identity by adopting the dominant culture. Such policies have been adopted, explicitly or implicitly, in a great number of countries around the globe.[163]

The main argument in favor of this approach stems from a belief that homogeneity is a condition for the long-term unity of the state, as giving room to diversities would weaken the (nation-)state, as the fractions of society will increasingly define their identity through the differences to other factions, which may ultimately lead to the dissolution of the state.[164] To prevent such a development, it is claimed that the state can be strengthened if the emergence of a corporate citizenship is favored through the equal (and fair) treatment of everybody.[165]

On the institutional level, following the French Jacobin tradition, assimilation is tried to be achieved by creating a unitary and centralized state, most commonly within the larger framework of a majoritarian model of democracy.[166] In brief, such a model will be characterized by a centralized and unitary state structure, and a dominant executive body of government normally constituted of members of a single party.[167] While in reality few states reflect the archetypal form of such a structure, many states in the world, including also states in the British tradition such as the Sudan, broadly have these characteristics.

The direct hierarchical structure and the clear majorities usually generated by such a structure facilitate the implementation of national policies and norms and provide straight avenues to

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[161] Encyclopedia Britannica Online, Academic Edition. *Assimilation*. Available from http://search.eb.com/eb/article-9009936?query=assimilation&ct=eb [accessed March 14, 2006]. Note that the dominant culture is not necessarily congruent with the culture of the majority.

[162] Arefaine, 67.

[163] *Ibid.*, 69.

[164] Alexander Geiger, "Territorial Management of Ethnic Conflict: Case Study Sudan" (Magdeburg: 2005 [unpublished, unnumbered pages]).

[165] Arefaine, 69.

[166] See also Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven and London: Yale University Press, 1999) on the relations between the unitary state and the majoritarian model of democracy, which he terms "Westminster model".

[167] See also the ten patterns generally characterizing the state- and power structure of such a model analyzed in Lijphart, *Patterns of Democracy*.

influence the society as a whole from the top. Following the idea to assimilate the population to a national model, this structure is normally used to adopt policy strategies intended to strengthen common patterns in the society, for example by defining a single national language, religion, culture and so on.[168]

While the idea of assimilation as a means to preserve national unity sounds compelling at first, it can be argued that the approach underestimates the force of identity and overestimates the role of policies and institutions. A main problem resides in the fact that in a fragmented society the majorities may not change, creating "structural" minorities, which are permanently excluded from governing power, creating frustration and a sense of alienation among these minorities, as well as a reduced sense of responsibility of the government towards them.[169]

It is nowadays increasingly argued that only few countries can adopt such a state structure, and that an approach of assimilation is inadequate for countries with a diverse population.[170]

The history of the Sudan since independence is a primary example underlining this point. Despite different attempts with "devolution" of power, the dominance of the central government in Khartoum has been evident at every point, and the real state structure came closest to the unitary and centralized model described here.[171] As this did not lead to unity and cohesion, but to conflict and resistance for fifty years, and as politicians are reluctant to

[168] Geiger.

[169] Walter Kälin, "Decentralized Governance in Fragmented Societies: Solution or Cause of New Evils?" in *Facing Ethnic Conflicts: Towards a New Realism*, eds. Andreas Wimmer et al. (Oxford: Rowman & Littlefield Publishers, 2004), 303.

[170] See for example Adolf Muschg, who is cited as saying that only few countries can afford a centralist state structure, while all the others have to find an appropriate form of federalism (in Andreas Ernst, "Die Suche nach der eigenen Verfassung," *Eine Welt* 4 (2005): 27; available from http://www.deza.ch/index.php?navID=21421&langID=6 [accessed May 4, 2006]).
While this recognition has been more broadly accepted since the end of the Cold War, leading to an increased use of accommodative and integrative approaches as described below, Lord Acton stated already in the 19th century that "[a] state which is incompetent to satisfy different races condemns itself; a state which labors to neutralize, to absorb, or to expel them, destroys its vitality" (Lord Acton, "Essay on Nationality," as cit. in Arefaine, 70).

[171] This is also underlined by the fact that the different governments in Khartoum have undertaken numerous peaceful and forceful attempts to assimilate the diversity into an Arab-Muslim state.

change their agenda of transforming the Sudan into an Islamic state;[172] it can be argued that secession represents the only viable option for the South.

Before hastily agreeing to this conclusion, two further ways to deal with diversity will be explored in order to evaluate whether they are likely to "make unity attractive."

d) Accommodation: different ways to achieve unity in diversity

Unlike the three previous strategies, accommodative approaches start from the premise that unity does not necessarily require homogeneity, but can be achieved by the interplay of diverse communities coming together for a common goal, all by preserving their diversities;[173] in short, by living "unity in diversity."

Theory suggests several ways to achieve this goal, and it has to be kept in mind that in reality clear-cut models are rare.[174] Lijphart's analysis provides a good starting point, as he underlines the commonality of different related concepts when talking about "consensus democracy", distinguishing it along ten patterns from the majoritarian democracy model.[175] The main features of this type of democracy are its federal and decentralized nature, while the government is characterized by power sharing among different forces, generally elected in a

[172] See for example Ahmed T. el-Gaili, "Federalism and the Tyranny of Religious Majorities: Challenges to Islamic Federalism in Sudan," *Harvard International Law Journal* 45, no. 2 (2004): 503-546, who argues that the recent developments "fall short of reversing the course of majoritarian tyranny in Sudan (504); or also Korwa G. Adar, "Theocracy and State Reconstruction in the Civil War–Ravaged Sudan: In Pursuit of an Illusive National Consensus," in *Politics of Identity and Exclusion in Africa: From Violent Confrontation to Peaceful Cooperation*, ed. Konrad Adenauer Stiftung (Papers presented at a conference at the University of Pretoria, July 25-26, 2001), 57-66; available from http://www.kas.de/db_files/dokumente/7_dokument_dok_pdf_5094_2.pdf [accessed May 4, 2006].

[173] Arefaine, 71.

[174] In fact, in many cases "some combination of devices may be required." (Yash Ghai, "4.2: The Structure of the State: Federalism and Autonomy," in *Democracy and Deep-Rooted Conflict: Options for Negotiators*, eds. Peter Harris and Ben Reilly (Stockholm: International Institute for Democracy and Electoral Assistance (IDEA), 1998), 156).

[175] The ten characteristics analyzed by Lijphart, 3-4, are: "
- […] executive power sharing in broad multiparty coalitions.
- […] executive-legislative balance of power.
- […] multiparty systems.
- […] proportional representation [electoral system].
- […] coordinated and 'corporatist' interest group systems aimed at compromise and concertation.
- […] federal and decentralized government.
- […] division of legislative power between two equally strong but differently constituted houses.
- […] rigid constitutions that can be changed only by extraordinary majorities.
- […] laws are subject to a judicial review of the constitutionality by supreme of constitutional courts.
- […] independent central banks."

proportional representation system.[176] The main idea is to devolve power to the different communities in order to accommodate them.[177] As to the state- and power structures used to achieve such a democracy, different accommodative mechanisms can be distinguished, in particular decentralization, federalism, and consociationalism and their variances.

i. Decentralization

Decentralization tries to address the pitfalls of a unitary approach by giving some groups a limited right to self-rule. The main restriction of the devolved power lies in the fact that this self-rule is not coupled by similar participation rights accorded on a central level. This bears the significant problem that the regional self-rule always remains dependent on the goodwill of the center. In the best case, this creates 'only' significant institutional insecurity, which is not likely to ease tensions in a climate of deep mutual mistrust. In the worst case, the effectiveness of the decentralized powers is *de jure* or *de facto* abolished by political acts on the central level beyond the influence of the minority[178] - a situation which reminds of the Sudan under Nimery.

In the case the approach is not consistently pursued with commitment from the central level, but only serves as a cover for continued centralization, it may in the longer run even be seen as worse than unitarianism by the minorities. It is therefore argued that an accommodative approach has to be associated with effective powers, as potentially granted under federalist or consociationalist models.

ii. Federalism

Federalism is the concept most commonly referred to with respect to ways to devolve power in a state. Rieker defines it as "a political organization in which the activities of government are divided between regional governments and a central government in such a way that each

[176] On this aspect, see part III on electoral systems below.
[177] Lijphart, 293, claims that such a democratic model not only outperforms the majoritarian model, but in general also produces a "kinder, gentler" type of democracy.
[178] See in this sense also Arefaine, 78.

kind of government has some activities on which it makes a final decision."[179] This definition remains broad, but refers to the devolution of power to a territorially defined lower level of governance.[180] Generally, such a federalization aims to create homogeneous sub-units in a heterogeneous state, thus drawing the borders along the fault lines of the main societal divides.[181] This state structure serves as an archetypal representation of the "unity in diversity" claim. Adopting the principle of subsidiarity, it allows enjoying autonomy as a community on issues "that do not require common action"[182] and thus to preserve cultural, linguistical, and religious particularities.[183] At the same time, it permits to remain united and to address critical problems collectively.

While the idea seems very compelling, several disadvantages of such a pure territorial federalism help to explain why it remains a rare phenomenon.[184] First, territorial federalism is only an option if the society is fragmented along clear cut fault lines.[185] In presence of geographically dispersed minorities, such a division is not possible without creating new minorities on the state level, and may lead, if imposed, to mass people displacements.

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[179] William H. Rieker, "Federalism," in *Handbook of Political Science, Vol. 5,* eds. Fred I. Greenstein and Nelson W. Polsby (Reading: Addison-Wesley Publishing Company, 1975), 101.
While Rieker does not clearly define what is meant by "some activities", it seems clear that it has amount to a "substantial portion" (Lijphart, *Patterns of Democracy*, 187) of effective powers exercised on the regional level in order to be meaningful (see Arefaine, 16-17, also for a critique of Rieker's definitional imprecision).

[180] See for example Lijphart, *Patterns of Democracy*, 186-187; or Hussein Solomon and Sally Matthews, "Transforming Ethnic Conflicts," in *Politics of Identity and Exclusion in Africa: From Violent Confrontation to Peaceful Cooperation*, ed. Konrad Adenauer Stiftung (Papers presented at a conference at the University of Pretoria, July 25-26, 2001): 137-154; available from http://www.kas.de/db_files/dokumente/7_dokument_dok_pdf_5094_2.pdf [accessed May 4, 2006].

[181] It can be created either through the aggregation of formerly independent units or the devolution of power from a formerly unitary state (Arefaine, 17-25). See also Stepan's distinction of "coming-together" federalism and "holding-together" federalism (Alfred Stepan, "Federalism and Democracy: Beyond the U.S. Model," *Journal of Democracy* 10, no. 4 (1999): 21-23).

[182] Arefaine, 21.

[183] It is also argued that this approach allows an easier identification with state institutions, preventing the alienation mentioned as a pitfall of assimilation. (See for example Kälin, 303, on this point).

[184] See Lijphart, *Patterns of Democracy*, 188-189. Historical reasons and a series of failures can be seen as additional reasons for this rarity (see for example Lidija Basta and Jibrin Ibrahim, Introduction to *Federalism and Decentralisation in Africa: The Multicultural Challenge*, Etudes et colloques 24, eds. Lidija Basta and Jibrin Ibrahim (Fribourg: Institut du Fédéralisme, 1999), 3-13).

[185] Solomon and Matthews, 142.

Second, in a society with different cross-cutting cleavages, territorial federalism may also be problematic, as a specific fault line would have to be favored over others, leaving some populations underrepresented.

Finally, federalist solutions are feared to endanger the unity of the state and to increase the risks of separatism, as the claims of minorities are recognized and they are given "a platform and the means to organize themselves politically."[186] Even if not leading to separatist claims, a federalization along ethnic lines can deepen the divide between different groups and lead eventually to new or intensified conflicts. In such cases, a federalist state-structure may have the perverse effect "to reinforce and perpetuate the causes of […] ethnic conflicts,"[187] the very reduction of which was most likely the impetus for the adoption of this structure.[188]

These are just some of the most often cited problems with federal solutions,[189] which hamper in a similar way adapted forms such as the main variances briefly mentioned in the following.

Asymmetrical federalism: A state is rarely composed of different minorities of about the same size and the same needs in terms of protection. Yet, the original idea of federalism implies an equal treatment of the different minorities, as the aim of federalism is precisely to avoid disadvantageous treatment on the basis of the size of a community. In cases where one

[186] Kälin, 305. As Basta and Ibrahim, 7, report, "[i]n many African countries, the word federalism is viewed with suspicion. Federalism is seen as a dangerous instrument that can be used to destroy national unity." As noted above, the Sudan represents no exception in this respect (Max Planck-Institut [?], "Engagement des Max Planck-Instituts," 3-4), and it has been argued that "as the civil war drags on and southern political consciousness grows, federation is increasingly seen as a compromise on the road towards secession rather than a permanent solution to the problems of national accommodation in Sudan." (Rohan Edrisinha, Lee Seymour, and Ann Griffiths, "Adopting Federalism: Sri Lanka and Sudan," in *Handbook of Federal Countries 2005*, ed. Ann L. Griffiths, coordinated for the Forum of Federations by Karl Nerenberg (Montreal et al.: McGill-Queen's University Press, 2005), 445.)

[187] Kälin 306.

[188] In addition, such a situation may also lead to the oppression of moderate forces that strive to overcome diversities, as the dividing factor has become legitimized by the creation of the federation (Kälin, 306).

[189] For a more detailed discussion of these and some other potential perils of federal solutions see for example Arefaine, 305-328.
One frequent claim is that the organization of a federal state is more costly than of a unitary one, as a federalist system implies duplications of functions and institutions (see for example Donald L. Horowitz, *Ethnic Groups in Conflict* (Berkeley, Los Angeles, London: University of California Press, 1985), 621-622). Yet, this argument does not go uncontested, as other factors, such as the efficiency of the organization of the state apparatus and the level of corruption are likely to be more important than the pure doubling of functions. In our view, a less hierarchical state apparatus can have advantages on both these levels, which could level out the abovementioned disadvantages (See also the argumentation by Arefaine, 305).

minority may be considered in need of special protection, either because of its size or because of its distinctive features, an original federalist approach may thus be inappropriate. In such cases, the idea of an asymmetrical federation has sometimes been adopted (see for example the status of Quebec in Canada or of Kashmir in India), devolving special powers to these communities not granted to others.[190] Such an adaptation of the federalist concept appears *prima facie* as the natural continuation of the federal thought, as it seeks to provide each group the needed position in the state. However, this is unlikely to be perceived in this way by minorities not granted the same benefits, leading to an increased sense of marginalization. It will also signal to other minorities that by deepening the divide to the majority, more benefits can be obtained. This reinforces the perverse incentive to use "ethnicity as the main factor in legitimizing political action."[191] Therefore, a strong case can be made against the adoption of asymmetrical federal systems, letting Kälin conclude that "measures aimed at granting more autonomy to regional and local levels should be generalized and applied equally all over the country."[192]

Non-territorial federalism: Given the problems to divide the territory adequately and the fears of separatism created by such divisions, a division not based on territorial distribution may be sought.[193] While the system has the advantage of potentially reaching each member of a community regardless of his or her residence, it also suffers a very important drawback as it requires the individuals to declare its membership to a certain group, tending to deepen the divides between the communities.[194] In view of this significant risk, this option should only be used with extreme care, and only for very limited rights and obligations. As a pertinent

[190] Ghai, 156. Giorgio Malinverni, „Le fédéralisme asymétrique," *Zeitschrift für Schweizerisches Recht* 124, Heft 2 (2005): 101-105, lists geographical (for example islands such as Sardinia or Sicily in Italy) and historic-political reasons (for example the historic autonomy of Catalonia in Spain), as well as the protection of national minorities (as for example in Quebec) as reasons for the adoption of such a structure.
[191] Thomas Fleiner, Walter Kälin, Wolf Linder, and Cheryl Saunders, "Federalism, Decentralization and Conflict Management in Multicultural Societies," *Politorbis* 32, no. 1 (2003): 52. For a more positive appreciation of the potential of asymmetric federalist structures see for example Malinverni, 97-113.
[192] Kälin, 309.
[193] It is often used in addition to territorial federalism, as in the prime example in this respect, Belgium.
[194] Arefaine, 334.

example for the Sudan, the application of religious laws such as the *Shari'a* on a personal instead of a territorial basis could be considered.

iii. Consociationalism

Federalism and consociationalism define two sides of an often similar coin: while federalism is first of all concerned with the state structure and its territorial division, the emphasis of consociationalism is more on the power-structure and -sharing within the government, and thus emphasizes different aspects of what Lijphart subsumed under the heading of consensus democracy.[195] While a federalist state structure is an essential part of most consociationalist approaches, it does not necessarily require such a structure, underlining that accommodation can also be sought in a unitary state.[196]

At the core of the consociationalist accommodative approach is the inclusion of the different components of a society on the central governmental level. Lijphart originally defined consociationalism as a "government by elite cartel designed to turn a democracy with a fragmented political culture into a stable democracy."[197] He identified in particular four different mechanisms to create a consociationalist government:[198]

A ***grand coalition*** tries to tackle the adversarial aspect of the majoritarian government directly by including all major segments of the society in the government. The approach is difficult for two main reasons: First, the selection of the minorities to include may not always be evident and may create a sense of marginalization among some groups in very fragmented societies. Second, Horowitz points out that the formation of such a coalition is "impossible where divisions are severe, because the very formation of such a coalition produces opposition based

[195] While the concept of consociationalism is seen for the purpose of this thesis as more encompassing, federalism has the advantage of being a well known and easily understood term, and may be used for the purpose of linguistic ease.
[196] For Todosijevic, 81, the concept is even completely de-linked from territorial considerations.
[197] Arend Lijphart, "Consociational Democracy," *World Politics* 21, no. 2 (1969): 216.
[198] Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven & London: Yale University Press, 1977), 25-44, as referred to in Arefaine, 73.

on the accusation that group interests have been sold out."[199] Sisk even sees the risk that "[e]lites may initiate conflict to bolster their power at the center."[200]

A ***mutual or minority veto*** can avoid that minorities are outvoted on an issue of vital interest despite being represented in the government. While this represents the safest guarantee for a minority, it has the same shortcomings as a grand coalition and may be viewed by the majority as a "tyranny of the minority,"[201] fueling tensions between the groups.

Proportionality: As the next part will show in greater detail, an inclusive government can also be achieved by appropriate electoral systems. While the strength and weaknesses of such elections will be analyzed below, it has also to be underlined that proportionality as part of a consociational system may go beyond elected position, and also include the proportional distribution of appointments to administrative functions. It bears the problem that it does not help to overcome the divides in the society, and encourages people to underline their membership to a certain group in order to increase their chances to be elected or appointed.

Segmental autonomy presents "the rule by the minority over itself in the area of the minority's concern." [202] This provision thus includes all forms of territorially or non-territorially based forms of decentralization of the state, from decentralization to federalism – and their respective advantages and problems as described above.[203]

As has been apparent throughout this section, consociationalism emphasizes the role of elites in the political processes. As a consequence, such an approach is only workable if there is an

[199] Donald L. Horowitz, "The Cracked Foundation of the Right to Secede," *Journal of Democracy* 14, no. 2 (2003): 15.
[200] Timothy D. Sisk, "Negotiating Democracy in South Africa: Conclusions for Constitution-Making as Conflict Management," Draft prepared for United States Institute of Peace Rule of Law Program, Working Group on Constitution-Making, Peace-Building, and National Reconciliation, April 22, 2006 [unpublished?], 2.
[201] Arefaine, 74.
[202] *Ibid.*, 76.
[203] *Ibidem*.

accommodative culture or a willingness to adopt such a culture among the accepted elites,[204] an assumption that seems far from clear, especially in war-torn countries.

Above all, the main shortcoming of federalism applies also to consociationalism: it tries to manage the differences in the society through a political system which tends to deepen the divides between the different groups. It is increasingly argued that this deepening of divides makes consociationalism no long-term solution. Or in brief, while the approach may help in a transitional period to peace and democracy, it does not help to stabilize this democracy, rather putting it at risk. Over time, solutions have to be found that help to move from group based politics to interest based politics.[205]

e) Integration: the third way?

The two latter models presented above bear besides arguments in their favor also important pitfalls: While majoritarianism risks creating opposition because of its inability to provide the different fractions of the society sufficient political space, the consociational model risk to deepen ethnic divides and may lead in the longer term to separation instead of integration.

The integrative model was thus presented with a claim to address the pitfalls of the other models by reflecting the diversity of the society in the political arena without deepening the divides. Donald Horowitz spearheaded this idea,[206] which is also called centripetalism "because it seeks to engineer a center-oriented spin to the political system".[207]

Even more than for other the other approaches, integrative power sharing relies on the effects of an adequately designed electoral system.[208] In this case, the elections should help to foster inter-ethnic coalitions, which will consequently lead to more representative governments without encouraging ethnic divides. Although this model is generally less concerned with the

[204] Todosijevic, 81, citing Lijphart, *Democracy in Plural Societies*. See also Lijphart, "Consociational Democracy," 216, who mentions four preconditions for the success of a consociational approach, which broadly relate to the willingness and ability of the elites to overcome the diverging interests of their subcultures.
[205] Aucoin [notes taken by author].
[206] in his famous work Horowitz, *Ethnic Groups in Conflict*.
[207] Sisk, "Negotiating Democracy," 6.
[208] See analysis in part III.

structure of the state, it is underlined that a "non-ethnic federalism that diffuses points of power"[209] can help further sustain the integrative approach to dealing with diversity. This should address the pitfall of the "traditional" federalist system where the presence of coinciding or reinforcing cleavages may lead to feelings of exclusiveness and competition, which will in turn negatively affect the functioning of the federation.[210] Cross-cutting sub-entities are not only sought to "neutralize the divisive forces,"[211] but also to give minorities the chance gain access to power in some regions in coalition with other groups, and the state governments can thus exercise a role of "training ground for national-level moderates."[212]

Although the integrative approach to diversity has been conceived to address the pitfalls of accommodative and assimilative approaches, this does not mean that the approach is flawless in turn. A main problem of a centripetalist approach lies in the difficulty to actually create accepted cross-cutting institutions and political movements, letting Arefaine to conclude that "the reality of coinciding cleavages cannot be avoided."[213]

It has also been argued that centripetalism is unfeasible if "deep-seated enmities that underlie ethnic disputes"[214] create unbridgeable divides between the parties, "especially when these are hardened during the course of a brutal civil war."[215] Consequently, experiences with such approaches are not less mixed than with other approaches.[216]

f) Conclusions and precautions

i. The cultural dimension

When studying the Sudanese "federalism" in the early 1990s, Elazar observed that:

> *"The Islamic dimension of Sudanese political culture is not conducive to power-sharing any more than it is in other parts of the Islamic world. The*

[209] Sisk, "4.1: Power-Sharing Democracy," 141.
[210] Arefaine, 310-311.
[211] *Ibidem*.
[212] Sisk, "Negotiating Democracy," 7.
[213] Arefaine, 312.
[214] Sisk, "Negotiating Democracy," 6, citing Lijphart.
[215] *Ibidem.*
[216] A few examples of successes and failures are discussed in the context of the different electoral systems associated with centripetalism discussed in part III.

> *Bedouin dimension, as elsewhere, is amenable to power-sharing. The tension between the two is reflected in the mixed results of the efforts to develop a decentralized regional structure for the country.*
> *In the south the tribal political culture is African in character, hence is highly separatist and more than a little authoritarian in the sense that it depends on strong leadership."*[217]

This analysis raises an issue that has so far received little attention in this thesis: the importance of cultural factors in the design and effectiveness of the approaches described above. While it has been underlined that it is crucial that the solutions are crafted on the realities on the ground, the question has not been addressed if these cultural factors make the models wholly inapplicable. As the Sudan has committed itself in the CPA – under international pressure – to a path based on the liberal model of democracy and free and fair elections to "make unity attractive," an analysis along these lines seems in our view appropriate, also as "the SPLA's original vision was focused around the concept of a 'New Sudan,' based on democracy, secularism, and equal rights for all."[218] If the commitments of Naivasha are defied, the prospects for peace and unity in the Sudan seem grim.

Nevertheless, especially one aspect of Elazar's inventory should be kept in mind: Islam continues to play a very important in the post-war Sudanese reality, and Islamic law remains a source of legislation in the North of the country.[219] This lets El-Gaili argue that the CPA has created a "convoluted form of Islamic federalism" [220] through the selective territorial application of *Shari'a* law. As "non-Muslim minorities continue to have an inferior legal and political status, particularly outside their areas of geographical concentration,"[221] he concludes

[217] Daniel J. Elazar, *Federal Systems of the World: A Handbook of federal, confederal and autonomy arrangements*, (New York: Stockton, 1994 [2nd edition]), 244.
[218] John Prendergast and David Mozersky, "Love Thy Neighbor: Regional Intervention in Sudan's Civil War," *Interventionism* 26, no. 1 (2004); available from http://hir.harvard.edu/articles/print.php?article=1220 [accessed May 4, 2006].
[219] INC, art. 5(1); *Machakos Protocol*; § 3.2.2.
[220] el-Gaili, 535.
[221] *Idid.*, 346.

that "[t]he protections that federalism offers to non-Muslim minorities are nullified by the conceptual and practical tyranny inherent in a religio-federal ideology."[222]

While el-Gaili's pessimism seems justified based on the historical weight of this question, several reasons can be mentioned to see the adopted solution as not inherently prone to failure and to pursue the analysis in this thesis in a less defeatist way. Most importantly, it has to be mentioned that the solution in the CPA presents a very delicate compromise between the two main parties of the North and the South.[223] While the exclusionary appearance of the peace deal may call for a renegotiation of the adopted solution in a more inclusive way, the deal remains very significant as the largest part of the Northern opposition – in particular the parties united under the NDA – is much less radical in religious questions than the GoS.[224] The existence of such parties as well as of a pro-democratic civil society[225] provides a second important argument and underlines that large parts of the Muslim society support a form of Islam which does not fundamentally oppose the principles of a multi-religious society.[226] In the same realm, and importantly with regard to the following considerations on electoral systems, it gives a clear sign that Islam and democracy are not necessarily seen as irreconcilable.[227]

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[222] *Ibidem*. See also Larbi Sadiki, *The Search for Arab Democracy: Discourses and Counter-Discourses* (New York: Columbia University Press, 2004), 222-223 on the "centrality of the centre" in the historic writings of different Arab scholars on rulership.

[223] On the finding of this compromise see for example Emeric Rogier, "Designing and Integrated Strategy for Peace, Security and Development in Post-Agreement Sudan," (The Hague: Netherlands Institute of International Relations Clingendael, September 2005), 9; available from http://www.clingendael.nl/publications/2005/20050400_cru_paper_rogier.pdf [accessed May 4, 2006].

[224] The NDA holds in the Preamble of its Charter that the Sudanese people "have freely opted for democracy as the only appropriate system of rule for our country, democracy such as is based on the sovereignty of the people, political party pluralism, cultural diversity, freedom to organize independent and effective trade unions and popular syndicates, independence of the judiciary and supremacy of the rule of law, guaranteeing of fundamental freedoms, protection of human rights and rejection of all forms of dictatorship, be they civilian or military." (Available from http://www.ndasudan.org/ [accessed May 4, 2006]). According to Dave Peterson, "Peaceful Change and the Rise of Sudan's Democracy Movement," *African Security Review* 11, no. 4 (2002), 64; available from http://www.iss.org.za/Pubs/ASR/11No4/Petersen.pdf [accessed May 4, 2006], even the very popular Muslim Sufi sects do "not adhere to the same brand of Islamic fundamentalism the NIF has tried to import."

[225] On the civil society and its potential role in the Sudan see Peterson, 59-69.

[226] See also Giampaolo Calchi Novati and Stefano Bellucci, "Islamic Governance in Algeria and Sudan: A Fading Quest for a Model?" *Mediterranean Quarterly* 12, no. 1 (Winter 2001): 113, who conclude that "[o]n the basis of the case studies represented by Sudan and Algeria […], it seems clear that Muslim society no longer supports the idea of Islamic governance that in principle is contrary to Western-style models of governance and may be created through violent means."

[227] Sadiki, in particular 374-376.

In sum, while the religious diversity in the Sudan adds an additional layer of complication, it does not fundamentally alter the considerations on an appropriate state- and power structure, as it is not excluded to find a compromise making unity "attractive" for the different communities, although the strong position held by radical forces in the North make it a difficult endeavor.

ii. Diversity and combinations

The overview of the main state- and power-structure models to deal with diversity has shown that they all present advantages and pitfalls. Not only will every solution have to be tailored on a specific situation, but also will the best design not present a guarantee for success, as this will depend on many other factors, too. However, we are convinced that adequate design of the basic institutions of the state can at least increase the chances of peaceful unity.

The design process will necessarily have to go beyond the basic models as presented above. In particular, the following aspects will have to be carefully considered by the Sudanese decision-makers:

Adaptations: Each of the models presented is vague enough to allow for the adoption of specific measures which are deemed particularly fit after a thorough analysis of the society.

Combinations: While some institutional elements of different models are mutually exclusive, many elements may eventually be combined if it is deemed useful in a particular context. However, it is in our view in this regard even more important to consider eventual perverse effects carefully in order to do no harm through an ill-designed institutional approach.

Successions: It is further crucial not to consider the post-conflict transitions in a static way. What may be useful in the immediate post-conflict may not be useful in the later consolidation phase. It has repeatedly been argued that the adoption of consociational approaches in the transitional phase may be a necessity, but that such an approach would harm unity in the longer term and would thus have to be succeeded by another approach.[228] In

[228] See for example Aucoin [notes taken by author].

such a case, specific attention will have to be paid to the process by which the transition could be effected.

These considerations will be crucial to our assessment of the way forward in the situation the Sudan finds itself now.

iii. Effectiveness

It is useful to remind that whatever solution is adopted, it will finally have to be judged according to its effectiveness. As has been seen in the historical overview and especially with the experience *post*-Addis Ababa, past "federalist" models in the Sudan were ineffective in reality as a very high degree of centralization persisted. Although the effectiveness of a system is not easy to predict, a detailed analysis of the institutional arrangements is necessary in order to make an informed judgment what state- and power-structure is effectively put in place with a new constitutional arrangement.

As has been done in previous chapters, this analysis will have to pay particular attention to factors such as the security of existence of an arrangement, the autonomous access to sufficient resources, the clarity and direction of accountabilities, the transparency of the system or the relation between the different levels of government.[229] Like this, the effective nature of the system created by the CPA will be tried to be better understood in the following.

3. The interim solution in the Sudan in light of the theoretical approaches [230]

While the previous chapter analyzed different models on an abstract level, it was also underlined that the divisions between the models are less clear cut *in concreto*, and that a thorough analysis of each case is necessary. It is argued that the current arrangement in the Sudan comes closest to the model of asymmetrical federalism described above, including however also consociationalist features. Yet, as this consociation is *de facto* limited to the two

[229] Kälin, 307-309.
[230] The analysis in this chapter largely builds on Martin Schüepp, "After Addis Ababa and Naivasha."

parties involved in the peace process, it bears traits of oligarchic power sharing rather than of a true consociationalist grand coalition.[231] To underscore this argument, a more detailed analysis of the INC and CPA is necessary.[232]

a) State structure

The INC describes the Sudan as "democratic, decentralized, multi-cultural, multi-lingual, multi-racial, multi-ethnic, and multi-religious".[233] This thesis will focus on decentralization and – especially in the last part – on democracy, which should reflect the different "multies".

The levels of government defined in article 24 INC are similar to the ones in 1973: besides the national level – responsible to protect "national sovereignty and territorial integrity," or in other words "to make unity attractive" – the INC foresees a level of Southern Sudan,[234] as well as a state- and a local level, thus creating *prima facie* an asymmetric federalism. This special Southern level "shall exercise authority in respect of the people and states in Southern Sudan,"[235] a wording that has been repeated for the state level in article 24(c).[236]

Given the fact that the word "unitary" does not appear in the INC unlike in the 1973 Constitution, and reference is simply made to Sudan's "unity", indicates that some form of

[231] Oligarchy can be defined as "government by the few, especially despotic power exercised by a small and privileged group for corrupt or selfish purposes." (Encyclopedia Britannica Online, Student Edition. *Oligarchy*; available from http://wwwa.britannica.com/ebi/article-9057016 [accessed May 4, 2006]). The term seems appropriate for various reasons in the present situation, especially as the agreement only includes the top levels of two of many parties, which in addition do not represent the majority of the population (see also Prunier, "Sudan peace accords won't end war.")

[232] Note that the INC is the "supreme law of the land" (INC, art. 3) and is based on the CPA and on the 1998 Constitution (INC, art. 226). The INC has always to be read in connection with the CPA, as it is "deemed to have been duly incorporated in this Constitution; any provisions of the [CPA] which are not expressly incorporated herein shall be considered as part of this Constitution" (INC, art. 225). The important position of the CPA is also underlined in the provisions on the amendment of the INC, as it is provided that "any amendment affecting the provisions of the [CPA] shall be introduced only with the approval of both Parties signatory to the [CPA]" (INC, art. 224(2). Note that this adds to the regular high threshold for amendment of the INC). While this gives increased stability by protecting the achievement of the CPA, it also means continued exclusion of other actors, as both the SPLA/M and the GoS maintain a de facto veto on changes to the agreed terms of Naivasha.

[233] INC, art. 1(1).

[234] INC, art. 24(a).

[235] INC, art. 24(b).

[236] Note that while the number and composition of states is subject to central state legislation, article 177(2) underlines that the 1956 boundary between the North and the South shall not be changed.

federalism is more in the spirit of the INC, although the formula "devolution of powers"[237] is officially used.

Yet, more important than these words is the effectiveness of the devolved powers, which will thus have to be analyzed both for the state and especially for the Southern level.[238]

b) "Devolution" of powers

The powers of the different levels of government are listed in a series of "schedules" attached as an integral part to the INC.[239] Unlike in 1973, the scope of issues under the power of the legislator and the executive in the South is the same according to the INC.[240] This fact should help to provide a more coherent division of tasks between the central and the Southern level, helping to address one of the lessons of 1973.

As in 1973, some powers remain exclusively in the hands of the central government, including matters of "National Defence, National Security and Protection of the National Borders,"[241] and further the responsibility for the national police, national prisons, national institutions as envisaged in the CPA or the INC, foreign affairs, nationality and naturalization, national states of emergency, as well as, and potentially very important, the "Laws providing for National elections and their supervision by the National Elections Commission."[242] For these very important powers, it will be particularly significant to analyze the power

[237] INC, art. 25. The guiding principles of this devolution are *inter alia* "the recognition of the Government of Southern Sudan and the states" (INC, art. 25(a)) as well as the "recognition of the need for the involvement and participation of all Sudanese people, particularly the people of Southern Sudan, at all levels of government as an expression of the national unity of the country" (INC, art. 25(d)). Note that the word federalism is still not mentioned in the INC, reminding of the above-mentioned skepticism to adopt federalism in Africa.

[238] Note that the INC defines the South also through its boundaries as of the date of independence (INC, art. 159), and that the question of Abyei remains on the agenda.

[239] Schedules A to C list the exclusive powers of the national, Southern, and state level respectively. Schedule D provides a list of concurrent powers, while schedule E and F entail schemes to deal with residual powers and indicate the conflict-resolution mechanism for concurrent powers.
This structure was influenced by South African constitutional mechanisms and can also be compared with systems such as used for example in Germany (Rüdiger Wolfrum, „Föderalismus als Beitrag zur Friedenssicherung: Überlegungen zu einer Verfassung für Zypern und den Sudan," in *Der Staat des Grundgesetzes – Kontinuität und Wandel, Festschrift für Peter Badura zum siebzigsten Geburtstag*, eds. Michael Brenner, Peter M. Huber and Markus Möstl (Tübingen: Mohr Siebeck, 2004), 1262).

[240] The relevant articles 161 and 170 both refer to "Schedules B and D read together with Schedules E and F".

[241] INC, Schedule A, point 1.

[242] INC, A.37. For the other powers mentioned see A.8, A.20, A.21, A.2, A.3, and A.28 respectively.

distribution on the national level, to see if it has the potential to make unity attractive for all; as will be done in a next chapter.

As to the powers vested exclusively in the legislative and executive powers of the South, some very significant changes to 1973 appear. The most significant change resides in the fact that the security and military forces remain under the control of the Southern administration.[243] Other particularly noteworthy powers include the control over the police and prisons in the South,[244] over the reconstruction and development of the South,[245] and over the public information utilities of the Government of Southern Sudan (GoSS).[246] In addition, the South enjoys a greater freedom in the planning of policies[247] as well as in the appointment of people[248] and with the development of financial resources.[249]

The residual powers are potentially very important and should be attributed "according to [their] nature,"[250] taking into account *inter alia* issues of sovereignty, autonomy, and subsidiarity.[251] Having to consider such differing principles provides the decision-maker considerable possibilities to ponder different arguments. The composition of the

[243] INC, B.3. It is however surprising that such an essential disposition is so poorly drafted. The disposition reads as follows: "The exclusive […] powers […] shall be as follows: […] 3. Security and military forces during the Interim Period." On the one hand, it should be obvious that the disposition is only supposed to apply during the interim period, as the final status will have to be decided in the permanent constitution. On the other hand, it is surprising that the security and military forces are not further specified.

[244] INC, B.2.

[245] INC, B.16. This point could however to stand in contradiction with provision D.1, which defines the "Economic and Social Development in Southern Sudan" as an affair where national, Southern, and state governments enjoy concurrent powers. Our reading of the provisions suggests that B.16 should prevail according to the principle of *lex specialis* at least for matters concerning immediate "development" projects. Yet, the practice will have to show how these slightly differently phrased provisions will be interpreted. Note also that financial resources are key to the exercise of this authority, and will be considered in a separate chapter.

[246] INC, B.17.

[247] See for example INC, B.9 (education) or B.20 (economy).

[248] See for example INC, B.7 for the appointment of officers and civil servants.

[249] INC, B.8.

[250] INC, Schedule E.

[251] See schedule F, which places the principle of efficiency at the center of considerations. This Schedule applies because INC, D.25 lists the residual powers mentioned in schedule E, and schedule F provides the conflict resolution mechanism for powers mentioned in schedule D.
With regard to the concurrent powers mentioned in Schedule D properly speaking, it appears that this delicate set of powers mainly deals with economic and social issues, and not with issues directly related to power. This fact may avoid some of the complexities associated to concurrent powers, and for the same reason these powers are not at the center of our analysis.

Constitutional Court, which will eventually have to adjudicate such cased, will therefore have to be studied more thoroughly.[252]

In sum, the powers vested in the Southern region are very significant, and with the control over the security forces during the interim period, a major concern has been addressed. Yet, the example of 1973 has shown that powers alone are insufficient if not coupled by an effective protection against interference. The independence of the Southern government as well as the means of influence from the central level has thus to be analyzed.

Before changing to this level of analysis, a brief analysis of the powers vested in the state levels is also required in order to broaden the view from the purely North-South perspective. As indicated, article 24(c) INC charges the states with the exercise of authority on their territory, and article 25(a) identically recognizes the state autonomy. It has thus to be analyzed if this identical formulation leads to identical powers of the state level.

Although the list of exclusive powers of the states is longest, most points list a series of social services the state level has to provide, representing rather duties than veritable powers.[253] It is very significant that while the powers on the Southern level expressly indicate the planning of services such as education, the powers in schedule C only indicate the duties to administrate these issues,[254] and the planning of state policy is left to the National Council of Ministers.[255] Some other very important powers recognized to the South are also not devolved to the state level, underlining the asymmetric nature of the federalist structure.[256] Although the states seem to be recognized as important players, given all the services they should provide, their ability to finance their powers has to be analyzed. If they are insufficient, the states will be unable to be more than just an administrative body for the center.

[252] INC, art. 122(f).
[253] See the 45 points in INC, schedule C.
[254] See for example INC, C.22.
[255] INC, art. 72(a).
[256] Most importantly, while the power over the state police is accorded (C.2), it does not extend to security and military forces.

c) Independence of the Southern and the state governments

While it has been shown that the president of the central government in the 1970s had many channels for powerful involvement through appointments, approvals, accountability to him, and so on, undermining the devolution of powers, the nearly complete absence of such provisions in the INC with regard to the South is striking, defining the relations between the different levels of government as one of respect of each others autonomy and powers and of a "harmonious and collaborative interaction."[257] The constitution conveys thus an image of perfect equivalence of the different powers within the limits of the assigned tasks.

This equivalence also finds expression in a near complete independence of the Southern governmental bodies from the central government.[258] Most importantly, the president of the GoSS is to be elected in an entirely Southern-driven process and shall take oath before the Southern Sudan Legislative Assembly.[259] The GoSS-president – and the whole executive branch of the GoSS[260] - is thus *de jure* not controlled by the center.[261]

Unlike in 1973, a Supreme Court of Southern Sudan with limited competencies is created.[262] While the appointment of judges to the court involves the Southern executive and legislative, the *de jure* absence of central government involvement is again noticeable.[263]

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[257] INC, art. 26(d). See also art. 26(b)(i) and art. 26(c)(ii). Note also that the INC specifies that the national government shall be linked to the states in Southern Sudan through the government in the South (INC, art. 26(1)(a)), thus depriving the national government *de jure* of direct influence on the Southern states.

[258] Note that the Interim Constitution for the Southern Sudan (ICSS) is more detailed on these issues. Its latest draft is available from http://www.sudantribune.com/IMG/pdf/Interim_Constitution_of_S._Sudan_2005.pdf [accessed May 4, 2006; hereinafter ICSS (Draft)].

[259] ICSS (Draft), art. 101. It is also the single power able to initiate and impeachment process against the GoSS-president (ICSS (Draft), art. 105).

[260] INC, art. 164-165 provide for the appointment of a vice-president and a council of ministers by the GoSS-president.

[261] A minor surprise in this regard presents INC, art. 163(1), which holds that the elections for the President "shall be in accordance with the provisions set forth by the *National* Elections Commission" [emphasis added; see also art. 99(4) ICSS (Draft)]. Although such a provision sounds disturbing, it is difficult to evaluate how much importance it will have in reality.

It is further noticeable that prior to elections the NCP is accorded 15% of the seats in the Council as Ministers and in the Southern Sudan Assembly, the same share as accorded to "other Southern Sudan political forces" (INC, art. 176(3) and ICSS (Draft), art. 125).

[262] INC, art. 172-175. Note that "any decisions arising under national laws shall be subject to review and decision by the National Supreme Court" (INC, art. 174(a)).

[263] ICSS (Draft), art.135.

This brief overview indicates that the INC provides for nearly *no* oversight by the center over the South. Yet, given the historical experience there can be little doubt that the center will importantly influence the Southern level of governance, and the representation of the South on the central level remains an important concern.

On the state level, the state government is to be led by an elected governor.[264] The provisions as to the executive, legislative, and judicial branches read much like summaries for the Southern level, and the absence of a statement of clear accountability to the national or Southern level respectively is interesting to note.[265]

d) Representation of the regions at the central level

Unlike in 1973, the INC provides several mechanisms for special representation of the South on the national level. Most significantly, article 62(1) assigns the post of First Vice-President to the President of the GoSS,[266] who holds a veto power over some of the most important decisions,[267] and has also to be consulted – though not necessarily heard – by the GoS-president prior to appointments and on other important questions.[268]

Until the first national elections are held, a Government of National Unity (GoNU) has now been formed,[269] where the SPLA/M holds 28% of ministerial posts, while the NCP continues to hold a majority with 52%.[270] The same percentages are used for the allocation of seats in the National Legislature prior to elections. After the elections, the composition of the two chambers of the legislature does not provide for special regional representation, as the CPA solely provides that "[r]epresentation of the north and the south at the National level shall be based on population ratio."[271]

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[264] INC, art. 179.
[265] INC, art. 179, art. 180, and art. 181 respectively.
[266] Unless in the unlikely case a Southerner should be elected as GoS-President.
[267] As listed in article 58(2) INC, encompassing decisions on the state of emergency, declaration of war, appointments (according to CPA), and on the summoning, adjourning or proroguing of the National Legislature.
[268] See for example INC, art. 70, art. 79, art. 117, art. 121, art. 129, art. 130, art. 141, art. 142, art. 184, art. 202, art. 214, or art. 221.
[269] according to INC, art. 79.
[270] INC, art. 80. In addition, 14% shall be held by other Northern-, 6% by other Southern political forces.
[271] *Agreement on Power Sharing*, § 1.8.8.

There are no provisions as to the representation of the states in the national executive, underlining the claim that the CPA has resulted in an "oligarchic power-sharing" among the two main factions. On the legislative level, the presence of the states should be secured by a bi-cameral approach, with a second chamber constituted as a Council of State composed of two representatives per state to be elected by the state legislature.[272] The primary functions of this chamber are related to the legislation concerning the system of decentralization.[273]

As to the balance between the legislator and the executive, the terms of the INC provide *de jure* for a much more balanced power relationship than in 1973. Yet, given its political tradition, there can be little doubt that *de facto* the executive will continue – at least for the time being – to exercise a dominant role.

With regard to the judiciary – and especially to the Constitutional Court[274] - the executive has considerable influence not only on a practical, but also on an institutional level, undermining a proper separation of powers.[275]

e) Financial autonomy

Article 194 INC lists the sources of revenue for the GoSS. Besides broader competences to collect taxes, the major difference to 1973 is the fact that the oil revenues are supposed to be split evenly between the North and the South.[276] This should generate a massive source of income to the South, and, if action is taken according to the text of the INC, ensure the

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[272] INC, art. 85.
[273] INC, art. 91, especially 91(4).
[274] Which enjoys the most significant powers with respect to matters dealt with in this thesis (see INC, art. 122).
[275] The Agreement on Power Sharing in the CPA summarizes this relation in a telling fashion:

> *"The Constitutional Court shall (i) be independent from the Judiciary and any other courts in the country. It shall be headed by the President of the Constitutional Court, duly appointed by the President with the consent of the First Vice-President, and shall be answerable to the Presidency; […]"*

Although this sounds far from an independent court, it is at least noteworthy that unlike for the appointment of judges at other courts – Supreme Court included – the (Southern) First Vice-President has to consent to the appointments to these significant posts.
[276] INC, art. 192. This split has to take place under the supervision of a National Petroleum Commission composed of an equal number of representatives from the North and the South (INC, art. 191).

financial autonomy of the South. This sharing is crucial as the limited rights for taxation[277] will be insufficient to meet the enormous needs for reconstruction and institution building.

This point reveals a major weakness of the state level autonomy. As has been noted, the states are the main actors to deliver services to the people. Yet, the oil revenue sharing does not extend to the state level, letting one doubt whether the states will be able to stand up to their duties and exercise their powers with the limited tax- and other revenues listed in article 195; underlining the claim that the present structure presents an asymmetric federalism.[278]

f) Armed forces

It has already been indicated that it was decided not to integrate the armed forces in a common army during the interim period, reflecting the problems that arouse with the earlier attempt to integrate the Anyanya into the national forces in the 1970s and the Southern suspicion after the many dishonored agreements in the Sudan's history.[279] While this will give the South (and only the South) the military might to stand up against an eventual abuse of powers by the government in Khartoum, in the longer term it can be doubted if this will help to "make unity attractive," and another solution should be discussed for the *post-interim* period.[280]

g) **De jure** *effective asymmetrical federalism with consociationalist features*

In sum, although the president has certainly less immense powers than under the 1973 Constitution and other earlier arrangements, he remains a key figure in the institutional framework.[281] Reasonably assuming that the president's post will continue to be taken by a

[277] INC, art. 194(d),(h), (j), (l).
[278] Note that INC, art. 195 does not mention any granted money transfers from the center or the states.
[279] see INC, B.3 and ICSS (Draft), art. 151-159. Note the exception of a few Joint/Integrated Units (ICSS (Draft), art. 153).
[280] Obviously the INC and the CPA does not tackle the role of other rebel forces than the SPLA/M, as these were excluded from the negotiation table. This question would thus have to be addressed in separate agreements with these different forces.
[281] This power is not always so obvious in the INC, but can have very influential consequences. As an example, the power to appoint the members of the National Elections Commission can be mentioned.

Northern Arab Muslim, the representation of the South and especially of the states on the national level remains fairly weak.

This underlines the importance of the fact that the central government has little control over the South, that the SPLA/M retains a veto over amendments of constitutional provisions affecting the CPA,[282] that it controls the Southern military forces, and that it enjoys a fair level of financial autonomy, making the asymmetric federal structure rather effective.

By the same token, the fact that the state level lacks powers precisely in these two latter respects raises the grave concern that the devolution of power to this level is not effective. This is further aggravated by the fact that the consociationalism at the central level is essentially limited to the two main factions, leading to what we termed an "oligarchic power sharing."

The next part will analyze the likely effects of this structure and possible ways to improve its shortcomings.

4. Beyond the interim solution: thoughts on a future state- and power structure in the Sudan

a) Expected problems with the adopted interim solution

Given the adopted interim structure, several problems can be expected based on the analysis above. A major problem, which has been repeatedly underlined, represents the exclusionary approach taken throughout the process. While this was a major cause for the outbreak of violence in Darfur and other parts of the Sudan already at an earlier point of the process, the state- and power structure enshrined in the CPA and the INC is *a priori* not amenable to correct this shortcoming: the asymmetric federalism and what we termed oligarchic power sharing at the central level are a direct expression of this exclusionary approach. The two only parties included divided the bread among themselves, leaving only crumbs for the excluded

[282] This in addition to a high threshold of an absolute three quarter majority in both chambers of the legislature sitting separately (INC, art. 224).

majority of the society.[283] It has already been underlined that asymmetric federalism presents the risk of creating opposition among other minorities not granted special benefits. It is reasonable to assume that the oligarchic power sharing only reinforces this effect.[284]

The further outstanding feature of the solution adopted in the INC is the clear division along the most extreme ethnic divide: at the negotiation table in Naivasha, the Northern Islamist Arab NCP-junta struck a deal with the Southern secular-Christian African Dinka-led SPLA/M. Accordingly, the pie was divided along this deep divide, hiding the many facets in the Sudanese society. The existence of multiple Arab-Christian, African-Muslim, and other groups between the two extremes has been continuously neglected. This shortcoming has led to an exacerbation in the perception of the differences both on the national and international level and let commonalities and inter-linkages fall into oblivion.

This shortfall has also found expression in the adopted federalist system, which tries to divide the asymmetric part of the system along this fraction line, the details of which are still to be settled by various commissions. In short, the approach has further "ethnicized" the conflict in the Sudan, making future unity an even more difficult endeavor.

These main expected problems and their first manifestations on the ground should not be understood as minimizing the positive effects of the solution – first of all putting an end to a 23-year long civil war. But this approach is also to be held at least in part responsible for the increasing tensions and violence in parts of the Sudan, which in turn threaten again the North-South peace deal. These problems have to be addressed to make the peace not only more inclusive, but also more sustainable. First experiences with the implementation underline this need, but also show the problems to effect such change.

[283] It should be recalled in this context that the GoS and the SPLA/M do not represent a majority of the population (see Prunier, "Sudan peace accords won't end war").

[284] . The Darfur peace talks in Abuja (Nigeria) show the reality of this risk, as the rebels repeatedly claim the same benefits as the Southerners, such as for example a vice-presidency in the central government (see for example "Sudan Darfur rebels demand vice presidential post," *AP / Sudan Tribune*, December 7, 2005; available from http://www.sudantribune.com/article.php3?id_article=12945 [accessed May 4, 2006].

b) First experiences with the implementation

As more than a year has passed since the adoption of the CPA, and nearly a year since the coming into force of the INC, first experiences with the implementation and application of these instruments should be observable in order to dissipate or add to the above-mentioned concerns. Most notably, the whole process has been plagued with delays since the very first day.[285] While considerable international pressure led to a timely adoption of the INC despite delays in its elaboration, its coming into force obviously had the effect to ease the pressure on the GoNU to continue the implementation process as agreed in the CPA.[286] The effects of this are dramatic: to mention just two examples, the NCRC stopped to function after July 2005,[287] and the elaboration of an electoral law – which should notably already had been published – has not made much progress to date.[288] Importantly and related to this, little seems to have been undertaken so far to fulfill the obligation under the CPA for an inclusive and participatory process.[289]

In addition, the steps that have actually been undertaken do not give reason for too much optimism: Most importantly, the creation of the GoNU was largely seen as a major defeat for the SPLA/M, as the most important ministries such as the ministry of energy and the ministry of finance – with the exception of the clearly pre-determined post of the vice-president – were allocated to Northerners.[290] The Southern ministers in the government are further weakened as they are mainly supported by an administration and advisors closely linked to the old GoS-regime.[291]

The lack of competences and especially the near complete absence of infrastructure are even more striking on the level of the Southern government, which makes it difficult for the GoSS

[285] See International Crisis Group, "Sudan's Comprehensive Peace Agreement," addressing various points where the implementation has been delayed, describing the whole implementation process as an "uphill battle" (i).
[286] See in this sense also International Crisis Group, "Sudan's Comprehensive Peace Agreement," i.
[287] *Ibid*., 6.
[288] UNMIS, 5.
[289] See in particular *Agreement on Power Sharing* § 2.12.10 and *Implementation Modalities*, point 45.
[290] International Crisis Group, "Sudan's Comprehensive Peace Agreement," 3-4.
[291] *Ibid*., i-ii. As another blatant example of the improper implementation of the CPA, the National Judicial Service Commission Act could be mentioned, which "is not consistent with the INC or the Interim Constitution of Southern Sudan (ICSS) as it incorrectly provides for the President of the Republic to appoint all judges throughout the Sudan" (UNMIS, 4).

to effectively exercise its functions.[292] The GoSS' problems are accentuated by the fact that the equal sharing of oil money between the North and the South is still not effective. The National Petroleum Commission remains weak against the NCP-Energy Minister, and the Southerners still lack access to vital data to control the effectiveness of the revenue sharing.[293] These delays can also be seen in the broader context of a general interest on the part of the NCP to undermine the implementation of the agreement.[294] If this pattern persists, the independence of the South after the interim period appears as a foregone conclusion. Yet, a more appropriate state- and power structure may help to repair some of these shortcomings.

c) A more sustainable state- and power structure?

i. The necessity of peace agreements

The ongoing violent conflicts on the territory of the Sudan are the clearest hampering factors for the attractiveness of unity for the country's different communities. Finding peace agreements with the multiple rebelling parties that had been excluded from the Naivasha-process is thus crucial and has to be an utmost priority. Discussing changes to the power structure without addressing these problems directly first or concomitant to such a discussion will be a vain endeavor. Careful attention should be paid not to pursue an exclusionary approach again by taking only the armed factions into consideration, which would send a further signal to other groups that only armed struggle can yield benefits.

The CPA and the INC are in principle amenable to provide an acceptable solution for the various other groups based on the stretchable terms of the federal arrangements. In particular, the essential powers of the regions will have to be interpreted liberally. For example, given the agreement found between the NCP and the SPLA/M, it seems clear that the conflict in

[292] See for example Opheera McDoom, "South Sudan government lacks equipment, people," *Reuters*, March 1, 2006; available from http://www.alertnet.org/thenews/newsdesk/L01322061.htm [accessed March 3, 2006]. For an earlier, but still pertinent account on the needs and constraints of a Southern administration, see Peter Blunt, "Governance Conditions, Roles and Capacity-Building Needs in the Rebel-Held Areas of Southern Sudan," *Public Administration and Development* 23 (2003): 125-139; available from http://www3.interscience.wiley.com/cgi-bin/fulltext/104525109/PDFSTART [accessed May 4, 2006].
[293] International Crisis Group, "Sudan's Comprehensive Peace Agreement", 7-8.
[294] See *ibid*., in particular 6-7.

Darfur and in other parts of the Sudan will have to be resolved by providing in particular some assurance to take part in oil revenues, as well as in the planning of policies on the national level. It is thus suggested that the asymmetry in the federal system is flexibly adjusted to minimize the differences in treatment between the different groups. While a certain degree of asymmetry will persist – as it is for example inconceivable to include all the parties on the vice-presidency-level in the government – it should be significantly reduced to a level acceptable to the smaller minorities.

Dealing with the status of the various armed factions during the interim period will be one of the most sensitive points of immediate concern. While solutions to this problem will have to be found on a case by case basis, it will again be difficult not to grant commensurate advantages to other rebel groups than have been granted to the SPLA/M. This point underlines again the problematic implications of asymmetric approaches.

The challenges posed by these negotiations and peace processes are enormous, and their successful conclusion is far from obvious. However, if unity ought to be attractive for the different communities in the Sudan, tackling these issues is an unavoidable prerequisite.

ii. A more inclusive process

Taking up these challenges could be facilitated if discussions ensue at the same time on a broader level to offer longer term perspectives to all Sudanese. In the end, unity will only be attractive if the state- and power structures in the "new Sudan" do not continue to grossly marginalize parts of the society on a political, economic, or social level. This will require the building of new institutions capable of standing up to this task in a multi-fractioned society.

These institutions will have to emerge from a broad consensus including all the different communities and political actors. The NCRC offers in theory an adequate forum to spearhead these discussions and to involve the broader society according to its task to pursue an

"inclusive Constitutional Review Process."[295] Yet, as a precondition, the NCRC will also have to be constituted in a more inclusive fashion than it has been the case so far. As the earlier experiences have shown, continued internal and external pressure will be necessary to push the GoNU to make use of its right to review the constitution of the NCRC in order to ensure a more representative composition of the body.

iii. A new state structure?

Apart from these procedural considerations, it is also important to envisage what a possible permanent state- and power structure could look like that could help to "make unity attractive" – all by remaining mindful that it will finally be the task of the Sudanese actors to decide how unity may best be achieved.

As noted, it is important to acknowledge that the federalist and consociationalist solution adopted with the CPA has helped to stop the fighting and that a more inclusive peace with other parts of the Sudanese society will have to be found within this approach. Yet, it has also been underlined that the approach came at the cost of deepening the main dividing lines at the expense of the multiple variations in the Sudanese society. It also builds on the fiction that a territorial division is able to create internally more homogeneous sub-units; and the exact delineation of the border between the "North" and the "South" and the faith of territories such as Abyei consequently receive considerable attention.

Given the multiple cross-cutting divides in the Sudanese society, this approach will only be able to accommodate certain factors, while heterogeneity will persist with regard to others. In short, the traditional aim of federalist approaches to create homogeneous sub-units is not a realistic option for the Sudan, where heterogeneity will persist in any reasonable federalist division if mass displacement is ruled out as a policy.

On the other hand, given the size of the Sudan, its history of overly centralized decision-making to the detriment of large parts of its society, and the problems associated with assimilative approaches, a unitary organization of the state is not amenable to create a

[295] *Machakos Protocol*, § 3.14.

situation making unity attractive. Pursuing assimilation by imposing uniformity has proven to be an impossible solution for the Sudan, being at the root of much of the internal violence.[296] This fact has now been recognized in the CPA and the INC, and there is no reason to re-discuss this achievement when thinking about a permanent solution.

In view of these limitations, it is suggested that the Sudan uses its problem of multiple cross-cutting cleavages in its society as a strength by consciously forming heterogeneous sub-units that can serve as a "training ground for national-level moderates."[297] In the past, the Sudan has experimented with several federalist divisions, all of which created more or less heterogeneous sub-units. Yet, if the federal system should purposefully be conceived to create heterogeneous states, it seems desirable to create rather larger units. The effect of this may be especially psychological, signaling the impossibility to define the geographic entity in ethnic, religious, linguistic, or other dividing terms. As a beneficial side-effect, such states will be better positioned to counterbalance the dominance of the center. This effect should be further strengthened if the federal units are not too uneven in their size and respective powers.

At the same time, by consciously cutting through the different fault lines in the society, the strength of the federal states should not lead to a weakening of the Sudan's unity. On the contrary, living diversity on a smaller scale could have an educating effect to live unity on the national scale.

While this proposition sounds attractive *in abstracto*, geographical constraints – not to mention political ones – make it difficult to significantly deviate from the strongly enshrined historical precedents. All the different federal divisions of the Sudan in the past, and most – if not all – of the suggestions for the future broadly follow the main lines as drawn by the British, dividing the states further or merging some of them. Yet, following the above-mentioned goals and the centripetalist model would suggest to think outside of this box and to

[296] Or, as John Obert Voll and Sarah Potts Voll, *The Sudan: unity and diversity in a multicultural state* (Boulder, Colorado: Westview Press, 1985), 1-2 put it: "[U]nity in the Sudan has been possible only when the variety of identities has in some way been preserved and guaranteed."
[297] Sisk, "Negotiating Democracy in South Africa," 7.

create a division which tries to knit the parts closer together instead of dividing them further. For example, the most contentious areas Abyei, Southern Kordofan and Blue Nile could be integrated in larger states, cutting clearly through the 1956-North-South border, and creating units within which neither "Northerners" nor "Southerners" could rule at the exclusion of each other. This would avoid the nitty-gritty battle over exact delineations which are a major source for increased tensions along the deepest fault lines.

Enshrining such an approach in a concrete solution presents various problems. The lack of accurate census data could be just mentioned as one of the easier among them.[298] Despite this and many other obstacles, in the following it has been tried to suggest one possible reorganization of the state structure in order to give an example what "thinking outside of the box" could entail.

The suggested division into seven new states as listed in *Table 1* tries to defuse the most contentious geographical questions by integrating these areas in larger states of about the same demographic size, as far as possible with a geographic orientation towards the center. In addition, an demographic and economic internal power balance between the parts closer to the center and the more remote part has been tried to establish. While the exact delineation would have to follow reasons of geography and existing infrastructure, the suggestion takes the current states as a *proxy*.

[298] Still, this presents an enormous challenge, which is coupled by rapid demographic changes as refugees and IDPs start to return home. While the envisaged census will have to provide more accurate data on the distribution of the population, re-opening the discussion on the territorial division based on these results should only be done very prudently, in order not to encourage forgery of the census-results.

Table 1: A proposed future state structure for the Sudan

State [299]	Approximately represents the territory of the following current states	Approx. population (millions) [300]	Main advantages (+) and problems (-)
North-Eastern state	Northern Nile Red Sea Kassala	4	+ integrates dominant Northern Nile region in a larger state where it constitutes about 40% of the population - Geographical barrier (desert) between Nile Valley and Eastern states
Eastern state	Gedaref Gezira	4,7	+ closely linked states - economic heartland of the Sudan clearly dominated by "North"
Khartoum state	Khartoum	4,7	+ largely recognized that Khartoum holds a special position and has to be a melting pot for all Sudanese
Western state	Western Darfur Northern Darfur Northern Kordofan White Nile (North)	5	+ brings Darfur institutionally closer to the center - large differences in development between White Nile and Western Darfur bears problem of dominance of the parts close to Khartoum
Upper Nile state	White Nile (South) Sennar Blue Nile Upper Nile Jonglei Eastern Equatoria	5	+ "North" and "South" have about equal power in terms of population - large differences in development from North to South bears problem of dominance of the parts close to Khartoum
South-Western state	Southern Darfur Western Bahr El-Ghazal Northern Bahr El-Ghazal Western Equatoria	5	+ brings various tribes together and obliges to cooperate; cutting through North-South divide - far from the center
Central state	Central Equatoria (Bahr El-Jabal) Warap Unity Southern Kordofan Western Kordofan Lakes	4	+ cuts the North-South divide and creates an equilibrium of a more developed "North" and a more populated "South" fostering cooperation - geographic construct with no infrastructure or cultural heritage linking the parts

Although everybody with knowledge of the Sudan will consider such a suggestion as out of touch with reality, a brief consideration of the benefits of this hypothetical order should be made. First, the states are not too unequal in terms of their population, protecting against claims of largely asymmetrical treatment. Second, the structure tends to orient the states

[299] State names are purely indicative and do not represent past or present states with the same names.
[300] Based on rough estimations for the year 2000. See GeoHive, *Sudan: Administrative Units*, http://www.geohive.com/cd/link.php?xml=sd&xsl=neo1 [accessed May 4, 2006], based on figures published by the Sudan Central Bureau of Statistics. Additional numbers from Seekers of Truth and Justice, *The Black Book: Imbalance of Power and Wealth in Sudan, Part 2* (2002), Table 16; available from www.sudanjem.com/english/books/blackbook_part1/book_part1.asp [accessed January 20, 2006].

towards the center, while giving more weight in terms of population to the parts located in the periphery, creating a balance between these forces. Third, the populations within the states are largely heterogeneous[301] and composed of various groups without creating absolute majorities or structural minorities. Fourth, the most contentious geographic questions are defused by integrating these areas into larger states, reducing the stakes for the exact delineation of these zones. Coupled with appropriate institutional measures, this is intended to create a situation where moderation by all parties is needed in order to be able to have power in the state.

In particular, it is hoped that:

- by making the Northerners[302] a significant minority in a new North-Eastern state, this traditionally dominant force in Sudanese politics will have to get accustomed to power-sharing already on the state level.
- the conflicts over the status of Blue Nile, Abyei and Southern Kordofan can be made superfluous by creating two new states (Central and Upper Nile) which balance a slight "Southern" demographic dominance with an economically stronger "North."
- Darfur can be brought closer to the center by creating a new Western state, in which the Darfuri should have enough power to avoid future marginalization.

In addition, to "make unity attractive," it seems important not to define the states in religious terms, even if some of them are largely populated by Muslims. In order to take account of the close connection between religion and state for many Muslims,[303] a non-territorial federalist layer could be added to the above-mentioned structure, applying some specific legislation based on the personal religious affiliation of every Sudanese. Although it seems that such a solution could help to "make unity attractive" for large parts of the Sudanese society, it has already been underlined how fragile compromises on these issues are in the Sudan, and it would thus be important to come to such a solution after a broad inclusive deliberation.

[301] The suggested Eastern state seems to represent the most significant exception to this.
[302] They traditionally had their own state (either one Northern or a Northern and a Nile state).
[303] See for example Bernard Lewis, *The Multiple Identities of the Middle East* (New York: Schocken Books, 2001), 28–29, stating that "[i]n Muslim theory, church and state are not separate or separable institutions."

Optimally, the structure outlined above should over time help to overcome the many divisions that have brought the Sudan to the brink of disintegration. Also, by creating states with no structural majorities, unity should be made more attractive for the different communities. While such a state structure would obviously only be effective with appropriate institutions,[304] the situation on the ground, historical precedents, geographical barriers, and *Realpolitik* make it very unlikely that such a structure will be adopted at the end of the interim period.

As already indicated in the table above, the presented suggestion also contains several shortcomings. In particular, ruling such states would be extremely difficult due to their size and the very insufficient geographic linkages between the parts.[305] Yet, the planned investment and development programs could, if implemented, importantly help to support such a new structure and promote change.

More than these physical barriers, the political and psychological barriers seem to make even thinking about such a solution impossible. The CPA presents a fragile compromise none of the dominant parties is willing to reconsider. Also, it is unlikely that a "redivision" of the South is acceptable to "Southerners," as it could too easily be perceived as a renewed attempt of *divide et impera* – in particular in view of the experience of 1983. The "Northerners" for their part could perceive the close linkage of some Northern provinces with the South as an attempt to enlarge the influence of the South. The Darfuri are also unlikely to accept this division, which would cut Darfur in two parts. In sum, while theoretically conceived to bring the parts of the Sudan closer together and to make unity more attractive, it threatens the immediate self-interest of most groups and seems thus not politically viable.

If the aforementioned suggestion seems out of reach, the less radical proposal of a return to the pre-1994 division into nine states could be considered in order to reduce asymmetries and increase heterogeneity in the federal units. Slightly adapted to better achieve these two

[304] [see considerations on this topic below].
[305] While any territorial distribution has to face this problem to a certain extent, the parts of some of the states presented have historically had less interaction with each other, and are barely linked by a road.

aims,[306] it could be seen as compromise solution between the radical proposal above and the status quo of 26 small states with an asymmetrical Southern level.

While this "solution" would probably meet less immediate – but still significant – political resistance than the abovementioned proposal, its integrative effect would be considerably lower, eventually posing the same longer-term problems as the present interim solution. In particular, the division in the nine "old" states would not help to bridge the North-South divide, nor would it better integrate the eastern and western parts of Sudan.

In sum, given the general unwillingness to discuss the state structure adopted in the CPA, the considerations in this chapter are likely to remain hypothetical, although they could play an important role to "make unity attractive" in the longer term. It has however also to be kept in mind that the powers vested in the sub-units are just as, if not even more important to consider than the territorial division. The following thoughts on this issue should thus remain valid regardless of the state structure adopted. However, as will be seen, the current asymmetrical approach could work in several regards as an impediment to build a power-structure making unity more attractive in the longer term.

iv. Devolving power in a way to "make unity attractive"

As indicated, the seven-state structure is presented above in an attempt to level out at best power-asymmetries among the states. This should also find expression in similar powers devolved to the different regions – again following the claim that unity can not effectively be made attractive if certain groups obtain significantly more benefits than others. Given that the states should be conceived as heterogeneous, protecting against separatist claims, the devolution of significant powers to the federalist units is suggested, granting them significant autonomy. In particular, all states should be attributed rights in many ways similar to the

[306] In particular, the Northern- and Eastern state could be merged similar to the abovementioned suggestion, to diffuse some of the dominance of the Northern Nile Region and to create more symmetrical states; as a Northern state with only about 1,4 million people would be disproportionately influent if vested the same powers as for example the Central state with a population more than four times as large.
In addition, the three Southern provinces would probably have to be subsumed under a single state as in the present interim solution in order to gain the approval of the Southern leadership.

powers devolved to the South in the INC. This has to include in particular rights for the planning and implementation of certain important state functions such as education or state police. Further, the financial autonomy of the federalist units will have to be guaranteed by a clear distribution key for the oil revenues, which has to be implemented and supervised by a Commission composed of representatives of all states.

In view of the risks of the approach to the South in the interim solution, the autonomy of the states should however be more limited in two respects: First, some supervision by the central level should be introduced, which is *de jure* nearly completely lacking over the South in the CPA/INC.[307] In particular, the central government should have oversight over the effective use of the financial resources to the benefit of the state population, paying special attention to the treatment of minority groups within the states. Second, the presence of different armies is not conducive to "make unity attractive," although the adoption of such an interim solution has been important to gain the trust of the Southerners. While it is suggested to create a single armed force over time, the experiences of the 1970s underline that it should be made sure that the different states are appropriately represented on the various levels of the army – especially in the leading functions, where civilian control has to be ensured – and that the merging of the different troops should follow a clearly outlined and mutually agreed reasonable time frame.

As to the representation of the states on the national level, ways should be found to ensure the representation of the different states without undermining the national sentiment that should be created to bring the parts of the country closer to each other. While centripetalist theories normally suggest the creation of a single legislative body to achieve this goal, the present solution of a weaker upper body assuring each state the same representation appears as a reasonable solution. A clear division of powers among the two bodies should help to enhance the legitimacy of the legislature and thus strengthen the checks and balances.

[307] However, the other extreme, such as adopted in the aftermath of the AAA in the 1970s, should also be avoided, in order not to undermine the effectiveness of the federalist structure.

Given the traditional predominance of the executive body of government in the Sudan, the adoption of a parliamentary system instead of the presidential system should be considered to allow for a better balance of power.[308] Yet, even if the Sudan should opt for a parliamentary system, the executive will continue to enjoy the most visibility in the state, and will thus have a particularly important role to represent the unity of the country credibly. A predetermined division of roles within the government along state lines, or even worse along dividing lines such as under the present interim solution, is thus not suggested. Rather, an appropriate electoral system as discussed in the last part of this thesis should try to ensure an integration of the divisions in the country under an integrative, uniting government.

v. Centripetalism or consociationalism?

While this last part as well as the federalist structure proposed corresponds largely to the form of federalism suggested by centripetalist theories, other proposed elements such as the bicameral legislature are based on traditional federalist and consociationalist theories. The use of such approaches may be dictated by circumstances in the shorter term, but it is generally suggested to follow a centripetalist approach in the Sudan, especially as it tends to rely less on a consensus among elites, but rather on the moderating influence of the population *at large* on their leaders.[309] As the population is exhausted after long decades of war, the desire of peace works as an important moderating factor, a moderation which the leaders of the warring factions are not sufficiently ready to display. Also, there seem to exist at least seeds of a sense of nationhood among many Sudanese, who may first of all feel Dinka, Nuer, Arab, or so on,

[308] This topic alone could be a thesis-topic and is here suggested without further elaboration. For fundamental texts to this discussion see for example Juan Linz, "The Perils of Presidentialism," *Journal of Democracy* 1, no. 1 (1990): 51–69; Alfred Stepan and Cindy Skach, "Constitutional Frameworks and Democratic Consolidation: Parliamentarism versus Presidentialism," *World Politics* 46, no. 1 (1993): 1–22; or Arend Lijphart (ed.), *Parliamentary versus Presidential Government* (Oxford: Oxford University Press, 1992).

[309] Remember in this context for example consociationalism as a "government by elite cartel" (Lijphart, "Consociational Democracy," 216) as well as the emphasis of centripetalism on elections (see for example Ben Reilly and Andrew Reynolds, "4.4: Electoral Systems for Divided Societies," in *Democracy and Deep-Rooted Conflict: Options for Negotiators*, eds. Peter Harris and Ben Reilly (Stockholm: International Institute for Democracy and Electoral Assistance (IDEA), 1998), 204, making the same argument with regard to electoral systems generally associated with consociationalism and centripetalism).

but then also Sudanese rather than Southern- or Northern Sudanese.[310] A centripetalist structure could thus in the longer term also help to strengthen the Sudanese civil society.[311]

The population will yet have to be given appropriate channels to exercise its influence on the leaders. In this respect, an appropriate electoral system to determine the government both on the state- and the national level will be of crucial importance, and the next part will look more closely into the question how such a system may be conceived. Yet, before turning to this part, it is also important to consider the chances that such a model could be adopted for the post-interim period in the Sudan and how a transition to it could be realized.

d) The difficult transition and the constraints of reality

It has already been indicated that consociationalist approaches can bear longer-term risks for the unity of the state, but that the transition to a more integrative approach (or, if sought appropriate, to a more assimilative approach) is difficult and stories of outright successes of such a transition is rare. The Sudan's present position is unique in a sense that the interim solution has been enshrined for a six year period which should be used to find a more permanent solution. While this timeframe is significantly more realistic than in many other post-conflict transitional periods, given the huge task it still seems to be too short to prepare the country for a new approach to the state- and power structure.[312]

The second particularity, the referendum on independence in the South, may help to push the parties to discuss viable solutions for the future of a united Sudan seriously. Yet, if a party is determined to seek independence, the prospect of a referendum may also have the effect to extinguish the last sparks of interest in the negotiation of a durable agreement. In the case of the Sudan, while large parts of the SPLA/M favor independence, Garang's mantra of a "New [united] Sudan" is still alive, and the movement should thus have a vested interest to consider

[310] This presents a major argument against the claim that a centripetalist approach is not feasible in the presence of deep ethnic divides in post-war situations.
[311] Against leaders who have tended to foment radical divides in order to gain and strengthen their constituencies. On the civil society see also Peterson, 59-69.
[312] The opinion that the interim period was still too short was also expressed for example by Jäger [interview].

measures that would "make unity attractive".[313] The Northern forces have a clear interest in maintaining the unity of the country, first of all for economic reasons, but also for reasons of political influence. On a more general level, the abovementioned seeds of a Sudanese national sentiment also make such a discussion a necessity.

It has to be repeated that the endeavor to find a more suitable structure for the Sudan has to be organized in a more inclusive and participatory way to be meaningful. The required precondition of peace can only be achieved if generous benefits are offered to other (rebel) groups – knowing that any arrangement found will only be valid for the interim period. Even under the challenging hypothesis that peace and a more integrative process can be achieved within a meaningful timeframe, the hurdles to change from the present consociational to a centripetal state structure will remain numerous. First, the Southerners – meaning still first of all the SPLA/M – will have to be convinced that a centripetal structure guarantees the same protection against marginalization as has been achieved through the asymmetric federalist structure of the CPA. While in theory the shortcomings and problems of the asymmetric accommodative approach, which will hardly be able to guarantee peace and unity, should serve as an incentive for the SPLA/M to be open to alternatives, there is a large risk that in practice the SPLA/M's veto could only be overcome by guaranteeing special prerogatives.
Similarly, the interim solution grants the NCP also a very strong position.[314] Even more than the SPLA/M, the NCP risks to loose its prerogatives if the process is continued as agreed upon in the CPA. Regardless of the future power structure, it is widely acknowledged that the NCP will be ousted from power by democratic elections. It has thus an incentive to block any progress in the discussions, and the experience with the implementation of the CPA so far proves this strategy.[315] Yet, it has to be underlined again that this policy will certainly not help

[313] On the different positions within the SPLA/M and the unclear course of action after the death of John Garang see for example John Young, "John Garang's Legacy to the Peace Process, the SPLM/A & the South," *Review of African Political Economy* 106 (2005): 535-548.
[314] Which represents however already an important reduction of its formerly near absolute power.
[315] See for example International Crisis Group, "Sudan's Comprehensive Peace Agreement," 18-20.

to "make unity attractive," nor will it enable Khartoum to pacify the other regions in the North – facts that should lead the NCP to reconsider its obstructionist position.

Finally, other rebel groupings could also be found to be a hindrance to the adoption of a centripetalist approach. As noted, the CPA will have to be made more inclusive during the interim period by providing federal benefits also to these groups, benefits they will be unlikely to "give up" based on the little confidence in the new government.

It appears thus that none of the major political players has an incentive to promote the adoption of a more integrative approach in the future organization of the Sudan. The population at large, which might have the most clearly vested interest in a solution promoting unity and reconciliation over dividing lines, largely lacks the knowledge and awareness on these issues as the inclusive and participatory approach prescribed in the CPA has so far not been undertaken. Not surprisingly, the war-ravaged society has to deal with many more immediate concerns than such seemingly abstracts discussions. Further, the rampant absence of appropriate channels to express its wishes and to hold the leaders accountable has also to be underlined; a lack largely due to insufficient infrastructure, the absence of a sufficiently free press, as well as a resistance by the leaders to engage in a dialogue.

In sum, the chances that the NCRC will seek to challenge the present consociationalist approach in the constitutional review process are very slim.[316] In this situation, the international community could help to promote the discussions over a permanent solution and help to explore options. Already today, international actors assume very important tasks in the capacity-building processes on various levels, and massive education and awareness-building

[316] Although this does not necessarily preclude the adoption of such a state- and power structure at a later point if more trust among the parties has been built, it has to be underlined that this is unlikely to happen – if the alternative model works, the need to change the approach will likely not be seen, and if the model fails, there is a risk that the dividing lines in the society will have deepened even more, making the adoption of an integrative approach more unlikely and risky.

programs on the problems with the present solution and on risks and opportunities of an integrative approach could foster the discussions on a permanent solution in the Sudan.[317]

5. The next steps: Elections within the broader transitional process

As this part has shown, the challenges the Sudan is facing during the interim period are huge, and many practical, political, and psychological hurdles stand in the way of the adoption of a more sustainable solution that could help to make unity more attractive in the long run. As has been repeatedly underlined, the inclusiveness of the process of elaboration and decision-making is among the most important things on the way to the adoption of such a solution.

Although the chances of a successful transition of the Sudan to such a more sustainable and unity-fostering state based on principles of democracy are not at their best to say the least, the discussion above remains crucial in order to open a perspective on possible ways forward. First, this helps to overcome the tendency in a post-war situation to focus on the past instead of the future. Second, it can help to identify better feasible solutions keeping an ideal in mind.[318] Lastly, thinking both about optimal and feasible permanent solutions will help to identify which and how next steps on the way to achieve these goals should be conceived.

One crucial step will come by the end of 2009, with general elections to be held throughout the Sudan. Held about two years before the final word on the future of the Sudan in terms of separation, accommodation, or integration will be spoken, it is important to consider how these elections should be conceived in order to support the goals of making unity attractive and to open the possibilities for the adoption of a more sustainable state structure.

[317] Note that the Sudanese leaders also repeatedly showed to be responsive to international carrots and sticks. Yet, not only is there no unanimity among important international actors if and how unity should be made attractive, especially the use of carrots and sticks to influence the future form of the Sudanese state is problematic with regard to the principle of international law of non interference into the internal affairs of a state.

[318] In this sense, if the adoption of a centripetalist system is seen as desirable to "make unity attractive", the same considerations can also be useful to help to improve the present federalist / consociationalist system if a sea change is seen as not feasible within the given timeframe.

This importance is further enhanced as the Sudanese 2009 elections will present the most visible test for the whole process started in Naivasha since the adoption of the INC, and their successful organization could have a significant psychological effect on all involved actors.

Consequently, the last part of this thesis will look more closely at various options in the design of electoral systems in order to suggest an option seen as most appropriate for the Sudan. In this, it has to be kept in mind that the 2009 elections are special in the sense that they are held during the interim period and that they are the first post-conflict test to put "the swords into ballot boxes."[319] For this reasons, the following considerations will be geared specifically towards these elections, acknowledging the fact that changing requirements and circumstances will influence the design of electoral systems for subsequent elections.

[319] To use an expression by Karl J. Irving, "The United Nations and Democratic Intervention: Is 'Swords into Ballot Boxes' Enough?" *Denver Journal of International Law and Policy* 25 (1996): 41-70.

Part III: Using "free and fair" elections to "make unity attractive"

1. Introduction

Elections have been recognized by many as a centerpiece in political processes. Especially since the end of the Cold War and the more and more universal proclamation of "Western style" liberal democracies as *the* organizational form of the state, the focus on elections has increased, and they are seen by some as "la clé de voûte de la démocracie."[320]

This importance attached to elections is partly to be explained by the fact that they constitute the most visible aspect of a democratic country's political life. In addition, given the different goals that are intended to be achieved by post-conflict elections, the holding of elections will have important psychological effects on a post-conflict society. It is also argued that the behavioral consequences of any electoral system are important, shaping political practices that have an effect far beyond the poll.[321] These are just some of the reasons calling for particularly well reasoned decisions as to the "rules of the game" for elections.

As the Sudan has committed itself in the CPA to a democratic process based on such free and fair elections, it is important to review the "menu" of designing options before suggesting a system seen as most appropriate for the Sudan's 2009 elections. Yet, before diving into these technical considerations on elections, it is also important to be clear on what has to be understood by "free and fair" elections and what roles elections are supposed to assume in the political process.

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[320] Pierre Cornillon, "Avant-propos" to *Élections libres et régulières : Droit international et pratique*, Guy S. Goodwin-Gill (Genève: Union Interparlementaire, 1994), vii. See also Luc Reychler, "Democratic peace-building and conflict prevention," in *International Law: Theory and Practice. Essays in Honour of Eric Suy,* ed. K. Wellens (The Hague: Kluwer Law International, 1998), 98-100, who sees "free and fair elections" as the first of ten "building blocks of genuine democracy."

[321] Donald L. Horowitz, "Electoral Systems: A Primer for Decision Makers," *Journal of Democracy* 14, no. 4 (2003): 115. The task of electoral systems can be described to "translate the votes cast in a general election into seats won by parties and candidates. The key variables are the electoral formula used […], the ballot structure […] and the district magnitude […]." (Andrew Reynolds, Ben Reilly, Andrew Ellis et al., *Electoral System Design: The New International IDEA Handbook* (Stockholm: International Institute for Democracy and Electoral Assistance (IDEA), 2005), 5). See also *ibid*., 5-9, for more information on the importance of electoral systems.

2. "Free and fair" elections defined [322]

The evolving field of human rights has also touched upon the right to participation in public affairs.[323] Although holding elections in the Sudan is *as such* a big step and it is idealistic to believe that the 2009 elections will correspond to all international standards, using the main international norms as reference points remains important.

The designation of a country's government and of its political system is essentially an internal matter and a fundamental expression of national sovereignty, and it pertains primarily to the state to determine the modalities of the determination of its government and of its electoral consultations.[324] Yet, international legal instruments enshrine the principles that governance has to rely in some form on popular support, and that "democracy is inconceivable without elections held in accordance with certain principles that lend them their democratic status."[325] The most basic rule in this regard is expressed in the Universal Declaration of Human Rights (UDHR), enshrining the most fundamental principles for free and fair elections:

> *"The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections, which shall be by universal and equal suffrage and shall be held by secret ballot or by equivalent free voting procedures."*[326]

Article 25 of the *International Covenant on Civil and Political Rights* (ICCPR) develops the principle in a legally binding instrument.[327] Still, such a "formal right"[328] could only exert a very limited impact if not coupled by political rights that constitute "the essential

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[322] The analysis in this chapter largely builds on an earlier analysis in Martin Schüepp, "Exit-Strategies in Peacebuilding: Significance and Effects of Free and Fair Elections," (Geneva: 2005 [unpublished]).

[323] Goodwin-Gill, *Élections libres*, 6.

[324] See for example also United Nations, General Assembly, *A/RES/44/146*, December 15, 1989, §4:

> *"[E]fforts of the international community to enhance the effectiveness of the principle of periodic and genuine elections should not call into question each State's sovereign right freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preferences of other States."*

[325] European Commission for Democracy through Law (Venice Commission), *Code of Good Practice in Electoral Matters: adopted Guidelines and Explanatory Report*, CDL-AD (2002) 23, Opinion no. 190/2002, Strasbourg, 30 October 2002; available from http://venice.coe.int/docs/2002/CDL-AD(2002)023-e.asp [accessed May 4, 2006].

[326] United Nations, General Assembly, *res. 217(III), Universal Declaration of Human Rights*, December 10, 1948, art. 21§3.

[327] *International Covenant on Civil and Political Rights* (ICCPR), 999 U.N.T.S. 171, 1966. Entry into force March 23, 1976. Ratified by the Sudan on June 18, 1986.

[328] Guy S. Goodwin-Gill, *Codes de conduite pour les élections* (Genève: Union Interparlementaire, 1998), 1.

preconditions for an open electoral process."[329] Article 25 ICCPR has therefore to be read in particular in the context of the right to freedom of expression, the right of peaceful assembly, as well as the freedom of association.[330] Coupled with the collective right to free and regular elections, these rights build the centerpiece of a right to a representative government.[331] Several not legally binding instruments add an important body of soft law providing important guidelines to the effective application of the basic rights set out above.[332]

In addition to these universal norms, regional instruments help to further clarify the rules in their respective context. Article 13 of the *African Charter on Human and Peoples' Rights*, which clearly asserts the right to vote and to be elected, is the most important provision applicable to the Sudan in this respect.[333]

This brief overview indicates that international norms underline the importance and set the right to elections, but do not infringe upon the freedom to determine the electoral modalities and abstain from prescribing a particular electoral system. The fundamental, well established values are essentially obligations of result,[334] leaving several ways to achieve this goal.

In their application, these requirements are normally summarized in the expression of "free and fair" elections, which "has become the catchphrase of UN officials, journalists, politicians, and political scientists alike."[335] As the CPA also foresees the holding of "[f]ree and fair elections for the National Assembly,"[336] the content of these terms and the possibility to measure them in practice has to be considered.

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[329] Thomas Franck, "The Emerging Right to Democratic Governance," *American Journal of international Law* 86 (1992): 61.
[330] See in particular articles 19, 21 and 22 of the ICCPR.
[331] Goodwin-Gill, *Codes de conduite,* 1; and Goodwin-Gill, *Élections libres,* 13-14.
[332] Note in particular Inter-Parliamentary Union, *Declaration on Criteria for Free and Fair Elections,* March 26, 1994, constituting to date one of the most comprehensive articulations of the right to free and fair elections. UN General Assembly Resolution, *A/RES/55/96*, *Promoting and consolidating democracy,* could also be mentioned.
[333] The Sudan ratified the Charter on February 18, 1986. Compare also to article 23 of the *American Convention on Human Rights* as well as the less clear Preamble of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and Article 3 of its *First additional Protocol*.
[334] Such as the right of the individual to take part in the direction of public affairs as well as the principle that the will of the people is best expressed by elections with universal suffrage and secret ballot.
[335] Jorgen Elklit and Palle Svensson, "The Rise of Election Monitoring: What makes Elections Free and Fair?" *Journal of Democracy* 8, no. 3 (1997): 32.
[336] *Agreement on Power Sharing*, § 2.2.3.3.

The concept appeared already back in 1956,[337] and has since been continuously used, although a clear cut definition of the two terms is lacking. Generally, "freedom" entails the opportunity to choose – not only formally, but also in reality. A free election thus includes primordially the possibility for voters to express their will without restrictions or limitations other than allowed by international law.[338]

On the other hand, the concept of "fairness" is linked to the notion of impartiality. This implies not only that the rules of the game should be transparent and find unbiased application, but also that the distribution of resources among the competitors should not be too unequal.[339]

To assess the freedom and fairness of an election, it is necessary to translate these abstract concepts into measurable variables. Importantly, the assessment of an election has to go beyond the poll itself, as the electoral process starts at least with the drafting of the electoral law and the inscription of the voters and does not end before the elected have been sworn into office and eventual recourses have been dealt with.[340] The definition of the exact scope of international requirements and their translation into measurable variables for each of these phases is complicated and remains necessarily marked by subjective assessments due to the ambiguities of international law on many substantive issues.[341]

Given that the guidelines provided by international law and the concepts of freedom and fairness are scarce especially as to the procedures, the adoption of precise and largely

[337] In a report on Togoland's independence referendum (as reported in Elklit and Svensson, 33).
[338] Elklit and Svensson, 33-35.
[339] *Ibidem*. This latter aspect, which is regulated to a lesser extent by international norms, can be summed up to the necessity of a level playing field.
[340] Goodwin-Gill*, Codes de conduite,* 1-2. Note in this respect also the "five overlapping phases" described in United Nations, DPKO, Peacekeeping Best Practices Unit, *Handbook on United Nations Multidimensional Peacekeeping Operations* (New York: United Nations, 2003), 152-157.
[341] See Elklit and Svensson, 37-43. Given the fact that post-conflict elections are held in a very difficult environment, it would be unrealistic to expect them to be completely free and fair. For this reason, it has been argued that the criteria of acceptability would be more useful (Rafael Lopez-Pintor, "Reconciliation Elections: A Post-Cold War Experience," *Rebuilding Societies After Civil War: Critical Roles for International Assistance*, ed. Krishna Kumar (Boulder and London: Lynne Rienner Publishers, 1997), 54-55). Although the "acceptance" of an election might well be the result of an international observation of an election, the concepts of freedom and fairness remain in our view relevant as guidelines.

accepted rules on the national level represents the most appropriate way to guarantee elections that satisfy best the legal standards and the different aims pursued with post-conflict elections. Beyond the drafting of an appropriate electoral law – on which this thesis will focus – the adoption of codes of conduct for elections represents an important tool to provide concrete and easily understandable guidelines in the electoral process, especially in countries emerging from conflicts such as the Sudan.[342]

3. Particular roles and challenges for post-conflict elections

Elections are a key element of democracy and democratization. Invariably, the explicit task of an election is to designate representatives for the exercise of public functions. Further, in any election latent functions play an important, more or less prevalent role.[343] These additional functions can help to achieve specific goals with an election, and an electoral system will have to be judged in terms of its capacity to foster the achievement of the goals considered most important.[344]

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[342] The need for clear rules to build confidence and to serve as terms of reference is larger in such situations than in well established democracies. Such codes are normally not legally binding and serve as guidelines for the behavior of the competitors throughout the electoral process. Further, they can appear as an important step back to the rule of law after a period of lawlessness, increase the confidence in democratic proceedings and can also encourage the emergence of a democratic culture. To be meaningful, a code of conduct should use a clear and precise language to reduce the margin of appreciation and therefore the risk of interpretative conflict. It is also crucial for the code to be adopted by consensus among the competing parties in order to ensure compliance.
The content of a code of conduct is open to the ideas of the competing parties, but should clearly reiterate the relevant obligations of international law. It might in addition include a whole bunch of dispositions. Most often, issues of fairness are addressed, including for example questions related to the financing of the campaign, or the access to the media. A code might also address questions of the (international) observation of elections and sketch out the rights and duties of the observers or set the rules for the national administration of an election. Above these more or less technical issues, a code of conduct might even address behavioral questions, for example by banning "hate speeches" as a means of electoral campaigning (see Goodwin-Gill, *Codes de conduite,* in particular 1-62).

[343] For example, an election normally provides legitimacy to governments, reactivates feelings of group membership through its social liturgy or serves as a test of the capacity of the political system (Béatrice Pouligny, "Promoting Democratic Institutions in Post-Conflict Societies: Giving Diversity a Chance," *International Peacekeeping* 7, no. 3 (Autumn 2000): 21).

[344] See also the "Criteria for Design" outlined by Reynolds, Reilly, Ellis et al., 9-15; the six goals identified by Horowitz, "Electoral Systems," 116; or the three objectives identified by Krishna Kumar, "Postconflict Elections and International Assistance," in *Postconflict elections, democratization, and international assistance*, ed. Krishna Kumar (Boulder and London: Lynne Rienner Publishers, 1998), 6-7.

In post-conflict situations, different additional goals are often pursued by the holding of elections. First, they can be intended to help to overcome the logic of war and to initiate the process of reconciliation.[345] Further, elections have in several cases been used to play an important role in war termination.[346] Elections have also often served as an exit strategy for international actors, taking the successful organization of elections as an argument to disengage from the process, building on the doubtful idea that elections mark the key step in the transition from war to peace.[347] Yet, as an election will not necessarily end the transitional process,[348] it seems laudable that the 2009 elections in the Sudan seem not to be necessarily conceived as an exit-strategy for the international actors on the ground.[349]

It may often prove difficult to pursue such diverse goals at the same time, as they may require irreconcilable strategies,[350] thus making the evaluation of the most important goals in each case necessary.

In the case of the 2009 elections in the Sudan, the most obvious role of the elections will be to design new governments on different levels. Given the current oligarchic power-sharing among the warring factions, the elections have to serve as a tool to build a government which is not designed by the leaders themselves, but democratically legitimized and representative.

Beyond this most obvious goal, the 2009 elections should play several additional roles. First and foremost, they will be a test for the peace in the (entire) Sudan.[351] A peaceful election

[345] For this, elections should induce competitors to adopt a moderate behavior rather than to deepen the divides in the society.

[346] The priority of this aspect is advocated for example by Stephen John Stedman, *Implementing Peace Agreements in Civil Wars: Lessons and Recommendations for Policymakers* (New York: IPA Policy Paper Series on Peace Implementation, 2001), 17.

[347] Terrence Lyons, *Voting for Peace: Postconflict Elections in Liberia* (Washington: Brookings Institution Press, 1999), 3-7.

[348] See for example the experience of the early elections in Cambodia under the United Nations Transitional Authority in Cambodia (UNTAC), which arguably paved the way for the rapid backslash to authoritarianism (see for example Steven R. Ratner, *The New UN Peacekeeping: Building Peace in Lands of Conflict after the Cold War* (New York: St. Martin's Press, 1995), 177-180).

[349] See in particular the open terms of UNMIS' mandate adopted in UN Security Council, *Resolution 1590 (2005)*, 24 March 2005.

[350] Stephen John Stedman and Terrence Lyons, "Conflict in Africa," in *Democratic Reform in Africa: The Quality of Progress*, ed. E. Gyimah-Boadi (Boulder, London: Lynne Rienner Publishers), 153-154. For example, when used as an instrument for war termination, the holding of elections as soon as possible might be a necessity. Yet, this can heavily infringe on the capacity of an election to serve the purpose of democratization and the competitive aspect of an election may reactivate old tensions instead of promoting reconciliation.

without major fraud and calls for boycotts would be a huge step for the Sudan on its way back to normality. Like this, the elections could secondly kick-start a process of reconciliation among the different warring factions. A third, no less important aim presents the central topic of this thesis: the elections should play a major role to "make unity attractive," as the government emerging from these elections will be the first and last democratically legitimized government during the interim period, and will thus play a very significant role in the perceived attractiveness of unity.

Together with several additional goals, such as the formation of democratic political parties and the increased accountability of the government, these most important goals in the case of the Sudanese 2009 elections will have to be kept in mind when designing the electoral law.

4. Designing an electoral system: crucial choices

It has already been emphasized that among the many institutional aspects that have to be considered when analyzing a state, elections hold a particular place. As noted, the choice of an electoral system will be crucial for the outcome of an election and is thus "one of the most important institutional decisions for any democracy."[352] This choice will not only influence importantly the state structure, but will in turn also be influenced by it.[353]

As earlier parts of this paper underlined the importance of accommodative and integrative approaches to "make unity attractive" in the Sudan, the main question of this part will be the possibility for electoral systems to promote such accommodation and integration. While this seems to call for consensual approaches, the options offered within majoritarian systems should also be considered.[354]

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[351] Note that this requires the prior peaceful settlement of the currently ongoing conflicts as previously indicated.
[352] Reynolds, Reilly, Ellis et al., 1.
[353] This leads Lijphart, *Patterns of Democracy*, 143, to write: "The typical electoral system of majoritarian democracy is the single-member district plurality or majority system; consensus democracy typically uses proportional representation (PR)."
[354] In the following, only a very brief and incomplete overview over various systems is provided. For a recent more extensive analysis on the various models see for example Reynolds, Reilly, Ellis et al., 27-120.

a) Advantages and problems of traditional plurality and majoritarian elections in divided post-conflict societies

Majoritarian and plurality models for elections come in different forms, but invariably "[t]he plurality and majority single-member district methods are winner-take-all methods – the candidate supported by the largest number of voters wins, and all other voters remain unrepresented – and hence a perfect reflection of majoritarian philosophy."[355]

First Past the Post (FPTP) plurality rule is "the world's most commonly used system",[356] where "the candidate who receives the most votes [in a single-member district], whether a majority or a plurality, is elected."[357] This apparent simplicity and the English tradition to rely on this model have contributed significantly to its widespread use around the world[358] - including the Sudan.[359] Beyond its simplicity, FPTP has the main merit to ensure a close connection between the representative and its electorate.[360]

Although FPTP is and was also used for presidential elections in some countries,[361] majority formulas, and especially ***Two Round Systems (TRS)***, are more frequently applied in such elections in order to ensure a majority support for the president instead of a possible plurality outcome.[362] This system again appeals through its simplicity, as it just adds a "run-off second ballot between the top two candidates"[363] if no candidate gathered a majority of votes in the first round. The spread of this system has also been importantly facilitated by historical reasons, especially as France relies heavily on this system.[364]

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[355] Lijphart, *Patterns of Democracy*, 145.
[356] Reilly and Reynolds, 193. While this is true in terms of population, it does not hold when considering the number of countries using this system on the national level (see statistics in Reynolds, Reilly, Ellis et al., 31-32).
[357] Ljphart, *Patterns of Democracy*, 146.
[358] In particular in the former British Empire (Reilly and Reynolds, 194).
[359] See also International Institute for Democracy and Electoral Assistance (IDEA), *Country View: Sudan*; available from http://www.idea.int/vt/country_view.cfm?CountryCode=SD [accessed May 4, 2006].
[360] Reilly and Reynolds, 192-193.
[361] Lijphart, *Patterns of Democracy*, 146.
[362] Again, this also applies to the Sudan (IDEA, *Country View: Sudan*).
[363] Lijphart, *Patterns of Democracy*, 146.
[364] Not only for its executive, but in an adapted version even for the election of its legislative body (Reynolds, Reilly, Ellis et al., 52).

Additional benefits of these systems generally include their efficiency to determine a government and the creation of strong, single party governments which are less likely to be shattered by internal divisions.[365] It is also claimed that they give rise to broad integrative movements spanning across the societal divides.[366]

However, this last claim does not necessarily hold if parties find it more profitable to maximize their votes in their ethnic stronghold without striving for nation-wide vote gathering.[367] In addition, majoritarian systems have led in several instances to disastrous outcomes in divided post-conflict societies. While the run-up to an election is inherently marked by competition which can destabilize a society shattered by war, this competition can become particularly harmful in such majoritarian systems due to their "winner-takes-all" outcome. If the stakes are so high, this leads to a pooling of resources, resulting essentially in a two-party system.[368] However, as such a situation has similar patterns to the characteristics of many armed conflicts which are marked by the opposition of two main factions to which the minor factions are allied in a way or another, a "winner-takes-all" election tends to perpetuate this division and the associated wartime-logic, as for example illustrated in the 1992 post-conflict elections in Angola.[369] The absence of robustness for adversarial politics

[365] *Ibid*., 36.
[366] See for example the Malaysian Barisan National government composed of Malay, Chinese, and Indians (*Ibid*., 36).
[367] *Ibid*., 43, referring to the cases of Malawi and Kenya.
[368] Lijphart, *Patterns of Democracy*, 165-170. This virtual exclusion of smaller movements and of minorities (as well as often of women) can also be seen as problematic with regards to the fairness of the elections (Reynolds, Reilly, Ellis et al., 37).
[369] Although the Bicesse peace accord stipulated that Angola should be transformed into a "multiparty democracy", the emergence of multiple parties was precluded from the outset through the adoption of a TRS electoral system. This system put thus the two emblematic wartime leaders, Savimbi and dos Santos, in direct competition, just as they had been during the war. As a consequence, as soon as it became apparent that Savimbi would loose the elections, he decided to resume the war (Roland Paris, *At War's End: Building Peace after Civil Conflict* (Cambridge: Cambridge University Press, 2004), 63-69).
This example shows a critical difference of post-conflict elections compared to elections in consolidated democracies: In well established democracies with a majoritarian rule, competitors are aware that the system might present itself as a zero-sum game in the light of the single poll, but that this is not true over the longer run, where the effective alternation of power gives the parties an incentive to abide by the rules in the prospect of a future electoral success. In essence, although inviting to run a highly competitive and divisive electoral campaign of "us" against "them", such an electoral system requires the confidence that the winning opponent will not abuse of his powers during his term – a confidence that has grown over centuries in countries such as the United Kingdom. Under these circumstances, FTPT and TRS are probably the easiest ways to hold meaningful democratic elections.

which is generally found in post-conflict situations is thus a major factor calling for larger inclusiveness.[370] In addition, as post-conflict elections often also go along with a redrawing of administrative boundaries, the strong non-proportional element of these systems opens the door to gerrymandering. In general, recent years have seen a shift away from such systems in several countries.[371]

b) The prominent role of proportional representation (PR)

The perverse effects that FPTP or TRS may generate have let scholars promote less adversarial approaches. The most prominent among these models, advocated in particular by Arend Lijphart, is called proportional representation (PR) and "has the appeal of affording each group or faction a parliamentary vote roughly equal to its proportion of voters at the polls."[372] Such an approach overcomes some of the problems associated with FTPT or TRS, as it opens the space for some form of power sharing, reduces the stakes for the electoral campaign and maintains in most cases the incentive for the "defeated" party to continue to follow the democratic path.[373] The most common PR systems is ***list PR***, which comes as "an essential component of the constitutional engineering package known as consociationalism."[374] Under list PR, voters select a party list containing the names of the party's candidate in its particular multimember district, and the seats are then distributed in proportion of the number of votes for each party list.[375]

However, this confidence and the resulting long-term perspective is lacking in societies emerging from civil conflicts. After having fought for power by violent means, losing a "winner takes all"-election will be perceived as tantamount to a loss of what has been fought for. This is particularly true if the parties have been entrenched in war for decades – as for example in the cases of the Sudan or the earlier example of Angola. In this case, it is unlikely to assume that the parties will have sufficient confidence in their adversary to simply look forward to the next election and to an alternation of power.

[370] Benjamin Reilly, "Post-Conflict Elections: Constraints and Dangers," *International Peacekeeping* 9, no. 2 (Summer 2002): 134.

[371] Reynolds, Reilly, Ellis et al., 23-24, 43-44.

[372] Samuel H. Barnes, "The Contribution of Democracy to Rebuilding Postconflict Societies," *The American Journal of International Law* 95 (2001): 95.

[373] Reilly, "Post-Conflict Elections," 129.

[374] Reilly and Reynolds, 196.

[375] Note that there are different formulas to calculate the distribution of the seats. The most frequently used is the d'Hondt formula (Lijphart, *Patterns of Democracy*, 147). Other variances of PR include the district magnitude,

Some benefits of list PR have already been briefly indicated. Most importantly, the inclusion of the different segments of the society can be a very important factor in divided societies, especially if the democracy is not consolidated yet. The fact that list PR translates the choice of the electorate more adequately into seats and thus reduces the degree of disproportionality created by the system is also generally seen as an advantage.[376]

Yet, this same point is also source of weakness of list PR: the allocation of power to many different groups often leads to coalition governments which may decrease their stability – especially in an instable environment such as a post-conflict situation.[377] In addition, the fact that the electorate has only the chance to vote a party in a large multimember district can bear the problem of an insufficient geographic link of the voter and its representative, and thus reduced accountability of the latter to its constituency.[378]

Lastly and most importantly, the consociational approach rests on the idea of including all societal fractions – in particular the different ethnic groups. In highly divided societies, this may "create incentives for fragmentation rather than amalgamation of political tendencies."[379] The example of Bosnia's election under the consociational approach adopted in Dayton has given a particularly salient example in this respect. Trying to guarantee political representation of each national group at the institutional level, it had the disadvantage that no representative had to seek support beyond its own community.[380] This worked as an incentive to play the ethnic card to gather votes – a card the populist and extremist wartime leaders knew to play particularly well.[381] The case of Bosnia underlines that a post-conflict electoral

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the minimal threshold required or the choice between open, closed and free lists (for more details see for example Reynolds, Reilly, Ellis et al., 60, 77-90).

[376] For more details on the degree of disproportionality see Lijphart, *Patterns of Democracy*, 157-159.

[377] Reilly and Reynolds, 195.

[378] In the case of Cambodia's 1993 post-conflict elections for example, this fact has been found to have contributed importantly to the back-slide to an authoritarian regime within a few years (Reilly, "Post-Conflict Elections," 130-131).

[379] Horowitz "Electoral Systems," 121.

[380] Roberto Belloni, "Peacebuilding and Consociational Electoral Engineering in Bosnia and Herzegovina," *International Peacekeeping* 11, no. 2 (Summer 2004): 336.

[381] Although it can be argued that subsequently improved electoral systems failed just as miserably, it has to be kept in mind that this first election sets a very strong precedent by encouraging divisive policies which certainly had an impact on subsequent elections. More on the different Bosnian elections for example in Belloni, 334-353; or, with a particular emphasis on the limits of electoral engineering as discussed in this chapter, Carrie Manning

system not only has to foresee some kind of power sharing, but that it should achieve this power sharing by means favoring reconciliation. In particular, any incentive to play the "ethnic card" should be strictly avoided.[382]

Still, list PR and consociationalism in general are still widely used. The fact that list PR is by far the most popular system in new democracies[383] shows that they are still advocated as means to overcome conflict. But as their effect is often to "merely entrench ethnic politics, rather than work to encourage inter-ethnic alliances,"[384] the system is now mostly advocated as a strategy which can be useful for divided societies in democratic transition, but seen as inappropriate for democratic consolidation.[385]

c) Alternative options: AV, STV, SNTV and beyond

Despite the clear shortcomings of FPTP, TRS, and PR, it remains that slight variances of these prototypes remain the main electoral approaches. Historical factors and simplicity may have a large part in this fact, serving also as a protection against fraud. Nevertheless, the important shortcomings of these paradigmatic models have led to many efforts to combine the advantages of the different approaches by limiting their shortcomings. In the following, a few of the main adaptations are presented, keeping in mind that there are numerous further adaptations, expressing the case-specificity of electoral systems. It has also to be underlined that the following approaches are more or less clearly related to the main models. This is particularly true for PR, which allows for a large variety of adaptations.[386]

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and Miljenko Antic, "Lessons from Bosnia and Herzegovina: The Limits of Electoral Engineering," *Journal of Democracy* 14, no. 3 (2003), 43-59.

[382] Reilly, "Post-Conflict Elections," 134.

[383] See Reynolds, Reilly, Ellis et al., 30.

[384] Reilly and Reynolds, 197.

[385] *ibidem*.

[386] For this reason, Glickman sees PR as "adaptable to many types of democracy, whether parliamentary, presidential, combinational, or other. As such, it is applicable to any situation in which minority representation and minority voice in national affairs is required." (Harvey Glickman, "Conclusion: Managing Democratic Ethnic Competition," in *Ethnic Conflict and Democratization in Africa*, ed. Harvey Glickman (Atlanta: African Studies Association Press, 1995), 405).

i. Preferential voting

The ***Alternative Vote (AV)*** electoral system, which "is a true majority formula,"[387] underlines that there are also further variations to majoritarian or plurality systems. This assertion stems from the fact that AV is used in single-member districts, where the successful candidate will have to pool a majority of votes to be elected. The specificity of AV lies in the fact that the electorate ranks the candidates according to their preferences. If no candidate obtains a majority of first-preferences, "lower order preference votes are transferred until a majority winner emerges."[388] This system acknowledges that the first preference of voters in divided societies will normally be strongly attached to the representative of their specific community. Therefore, moderation is sought to be achieved by pushing competitors to compete for lower preference votes in order to obtain a majority. Horowitz thus concludes that "AV does not stand in the way of majoritaniarism, but makes majorities responsive to the interests of others as well."[389] However, such an effect can only be achieved if the competitors can not be sure to win a majority relying only on their original constituency or on constituencies closely related to them, in the worst case from the more radical end of the political spectrum. For this reason, AV is suggested to work best if "a few large ethnic groups are widely dispersed and intermixed."[390]

If the intermixing is less clear, larger entities will have to be created to achieve a vote-pooling effect. Yet, in such a situation another shortcoming of AV electoral systems emerges more clearly: the counting of votes in this system can become very complicated due to the multiple transfers of votes, requiring important administrative capacities. In post-conflict situations, this capacity is often lacking, opening the door to fraud and/or creating a tense situation if too much time passes between the holding of the elections and the announcement of results.

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[387] Lijphart, *Patterns of Democracy*, 147.
[388] Reilly and Reynolds, 194. Note that there are variations as to which candidate is eliminated first (see for example Horowitz, "Electoral Systems," 123).
[389] Donald Horowitz, *A Democratic South Africa? Constitutional Engineering in a Divided Society* (Berkley, Los Angeles, Oxford: California University Press, 1991), 202.
[390] Reilly and Reynolds, 198.

Single Transferable Vote (STV) includes more aspects of a PR-system, but is hampered by similar problems as AV. As in AV, voters order the candidates according to their preferences, but this time in multi-member districts; and a quota is set to be elected. While the candidates achieving the quota in first-preference vote are directly elected, the second preferences of the candidate with the fewest votes as well as of the ballots above the quota of elected candidates are distributed among the remaining candidates, until all seats are allocated.[391]

This system is even more complicated than AV, with the problems that this brings in post-conflict elections. In addition, the integrative effect of vote-pooling tends to be more limited than under AV.[392] Therefore, despite being lauded as "perhaps the most sophisticated of all electoral systems,"[393] its applicability in divided post-conflict societies remains questionable.

ii. Semi-proportional systems

Semi-proportional systems also try to combine the advantages of proportional and majoritarian system. ***Parallel systems*** are clearest in this respect as they simply use list-PR for a part of the seats in parliament and FPTP for the other part.[394] Similarly, ***Mixed Member Proportional systems (MMP)*** use also both elements, but the PR is used to adjust for disproportionality created by the plurality element.[395] Although introduced frequently in democratic transitions since the end of the Cold War, the systems do not necessarily incite for a more integrative behavior, and they bear the disadvantage to increase the administrative task by having to hold two different types of elections for the same body, especially significant if several elections are hold at the same time – as planned in the case of the Sudan.

Single Non-Transferable Vote (SNTV) systems leave each voter one vote in a multi-member district, thereby reducing the threshold to be elected and potentially reducing the disproportionality of the outcome. This system leaves a lot of leeway for tactical decisions

[391] Reilly and Reynolds, 195, 198. Note that there are also variations as to the system of elimination.
[392] Horowitz, "Electoral Systems," 124. The few examples of STV elections in divided societies underline this claim (see elections in Northern Ireland (1973 and 1982) and Estonia (1990)) (Reilly and Reynolds, 199).
[393] Reilly and Reynolds, 198.
[394] Reilly and Reynolds, 194-195.
[395] Reynolds, Reilly, Ellis et al., 29.

both for the parties as to the wise number of nominees, and for the voters, who should choose the members of their favorite party evenly in order to maximize the number of seats won. In a system where candidates of a same party have to run directly against each other, it can also contribute to contentious intra-party relations. More generally, the system bears the particular problem in post-conflict elections not to help to strengthen the party system, but rather to weaken it, as the 2005 legislative elections in Afghanistan showed.[396] This is problematic in cases such as the Sudan, where the emergence of new nationwide movements instead of divisive regional or ethnic groupings could contribute significantly to "make unity attractive".

iii. Distribution requirements

Although conceived to achieve the representation of different groups, even PR elections have led in many instances to majority rule.[397] In light of this, several other options have been adopted to ensure such representation. The easiest way to achieve this is by dividing the electorate along the fault lines in the society and let each group elect its own representatives. Used in Fiji for parts of the seats (so called communal seats), it has not surprisingly failed to promote reconciliation or moderation between the groups.[398] In addition, in a society divided by multiple cross-cutting cleavages, the determination of the different groups is highly political and nearly impossible.[399]

More often, seats are guaranteed to certain groups without trying to divide the electorate into these groups. For example, electoral laws can require including candidates of the different groups on their candidate lists – such as in past Lebanese elections along religious lines. This

[396] See Thomas H. Johnson, "The Prospects for Post-Conflict Afghanistan: A Call of the Sirens to the Country's Troubled Past," *Strategic Insights* V, Issue 2 (February 2006); available from http://www.ccc.nps.navy.mil/si/2006/Feb/johnsonFeb06.asp [accessed May 4, 2006].
[397] Reilly, "Post-Conflict Elections," 129, even argues that this is the outcome in "most" cases, mentioning the examples of Namibia, Mozambique, and Liberia.
[398] According to Fraenkel and Grofman, "In the [2001 Fijian elections for the] communal seats […] [t]he majority in both communities voted for the most strident political representatives of their perceived ethnic interests." (Jon Fraenkel and Bernard Grofman, "Does the Alternative Vote Foster Moderation in Ethnically Divided Societies? The Case of Fiji," *Comparative Political Studies* 39, no. 5 (2006): 643).
[399] Reilly and Reynolds, 199-200.

should force the electorate to decide on other grounds than religion, ethnicity, and so on.[400] In the 1994 South African elections, such an approach was followed by a voluntary understanding,[401] helping to strengthen the legitimacy of the measure.

Although the usefulness of a particular system has to be evaluated *in casu*, such pre-electoral distributive measures bear the conceptual inconvenience of infringing directly on the voters' freedom of choice and might therefore lead to reduced legitimacy and accountability. It seems therefore in our view generally more appropriate to use incentives instead of restrictions to steer the electorates' choices.

A particularly interesting system in this respect has been used in the February 1999 Nigerian presidential elections, which used a distribution requirement that forced the parties to get minimal support levels across the different regions. Candidates had to obtain not less than one-quarter of the vote cast in at least two-thirds of the states. In order to get cross-ethnic support, leaders had thus an incentive to adopt a more moderate language – also towards their main constituents.[402] Such a system can also favor the emergence of cross-regional electoral alliances, representing an important step towards national reconciliation.[403]

It can yet bear the problem to produce a non-result, if no candidate succeeds to fulfill the requirements. For such cases, the system has to "Attend[…] to Vital Details"[404] and provide a clear solution how to resolve such an impasse.[405]

It is also imaginable to impose such a requirement on the level of the regulations concerning the formation or campaigning of parties. For example, in the 1999 Indonesian elections parties

[400] Logically, a closed-list system is required for such an approach, in order to avoid a "picking and choosing" along religious lines (Reilly, "Post-Conflict Elections," 136).
[401] *Ibidem.*
[402] *Ibidem*. This system was first introduced in 1979. For an account of its mixed success see Veronica Nmoma, "Ethnic Conflict, Constitutional Engineering and Democracy in Nigeria," in *Ethnic Conflict and Democratization in Africa*, ed. Harvey Glickman (Atlanta: African Studies Association Press, 1995), 311-350.
[403] Note that the approach uses the territorial division of the state as a "proxy" for the dividing lines in the society (Horowitz, "Electoral Systems," 118).
[404] Horowitz, "Electoral Systems," 125.
[405] For different options adopted in different systems see Reynolds, Reilly, Ellis et al., 137.

were required to establish a branch structure in more than half of Indonesia's provinces.[406] Yet, such more subtle measures bring the problem back they set out to resolve, as they do not necessarily ensure the creation and success of integrative, moderate movements.

d) Choosing the electoral system-star in a galaxy of options

This selection of electoral systems gives a glimpse of the broad range of measures that can be used to create a suitable model for nearly any particular situation – keeping in mind that what has to be understood by suitable will also be influenced by political preferences. Such a broad freedom of choice is also in accordance with international law, as long as it does not pose an obstacle to the freedom and fairness of the election and the result remains broadly proportional, reasonable and non-discriminatory.[407] However, an electoral law designer has also to be aware that the far-away stars of electoral systems that can be imagined may be out of reach as the system always has to remain understandable for the population.[408]

Before venturing into the question which electoral system could be appropriate for the Sudan, it should also be recalled that electoral systems are not immutable and that they can change over time according to the requirements of the moment. For this reason, it is generally not advisable to enshrine a particular electoral system in a constitution, but rather to adopt an appropriate electoral law. However, complete reversals of an approach remain rare, changes occur rather within the broader framework of one of the models.[409] Also, although it may be desirable to change from one system to another in order to support a change in the broader state- and power structure, such changes are not easily achieved.[410] This underscores the

[406] Reilly, "Post-Conflict Elections," 134-135. Note that in its 2004 presidential elections, the Indonesian system used a distribution requirement similar to the one in Nigeria, with a 20% in at least half of the provinces requirement (Reynolds, Reilly, Ellis et al., 137).
[407] Goodwin-Gill, *Élections libres*, 29-34.
[408] Note in this respect for example the remark of Belloni, 342, on the Bosnian system of 2000: "[…] the sheer complexity of the system was likely to be difficult for voters to understand."
[409] See Lijphart, *Patterns of Democracy*, 143. Note however a few such reversals in recent years, for example in Iraq, Rwanda, Sierra Leone, South Africa, or Moldova (Reynolds, Reilly, Ellis et al., 24).
[410] Letting Sisk, "Negotiating Democracy in South Africa," 2, conclude that "South Africa remains one of the very few cases of a country that has successfully moved from the power-sharing bargain that ended the war into a new social compact […]."

"need to locate any electoral system into a wider historical and institutional context"[411] which has been analyzed above.

It has thus to be kept in mind that the following considerations are geared towards the next, 2009, elections in the Sudan, and that future elections will have to reconsider the electoral system in view of the most important goals to be pursued by these elections.

5. A proposed choice for the Sudan: a framework for the 2009 elections

The 2009 elections in the Sudan present a crucial test for the ongoing transitional process and a crucial step either towards separation or unity of the country. While the CPA orders the holding of elections on all levels,[412] the main consideration of this thesis will be on the national level, including the elections for the presidency and for the National Assembly, as these supreme and most powerful bodies are to play the most crucial role in making unity for the whole country attractive – one of the identified aims of these elections.

The goals identified above have to be used as guidelines in the design of the electoral law, as they are important to be pursued irrespective of how the future state structure may look like. While the elections are to be held within the current interim structure, they may also help to increase the chances of the adoption of a more sustainable state structure by promoting an output making unity attractive for the different communities.

In view of the multiple options for electoral design, it is suggested that an approach is used which could support the broader goal of a centripetalist state- and power structure, without being incompatible with the present and eventual future consociationalist structures. While national authorities – in particular the legislature – will have to decide on the 2009 electoral system, the following considerations are intended to feed into the discussion on the most appropriate electoral system – a discussion which is still largely to be held.

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[411] Roger Southall, "Democracy in Africa: Moving Beyond a Difficult Legacy," Democracy and Governance Research Programme, Occasional Paper 2 (Cape Town: HSRC Publishers, 2003), 15; available from http://www.hsrcpress.ac.za/user_uploads/tblPDF/1949_00_Democracy_in_Africa.pdf [accessed May 4, 2006].

[412] See again *Implementation Modalities*, point 9c and 9d.

Yet, in legal terms, one of the most important questions has already been answered: While article 84 of the INC leaves the determination of the number and composition of the National Assembly to the electoral law, the electoral system for the presidential elections has already been determined, as the INC holds that:

> *54. […] (2) The Presidential candidate who wins more than fifty percent of the total votes of the polling electorate shall be the President elect;*
> *(3) Where the percentage mentioned in sub-Article (2) above is not achieved, there shall be a run off election between the two presidential candidates who have obtained the highest number of votes;*

While this adoption of a TRS for the presidential elections stands for continuity and supports the claim that radical changes in electoral systems are rare, this should not be used as an excuse to forego a discussion on potentially more appropriate systems, and the decision to set it in stone by writing it into the constitution can be deplored. The choice in the INC will thus be critically analyzed before turning to the discussion of options for the legislative elections.

a) Presidential elections

The TRS system prescribed in the INC for the 2009 presidential elections is relatively simple compared to other systems, presenting a significant protection against fraud in the electoral process given the important percentages of innumerate and illiterate people.[413] Yet, the administrative costs and requirements are very significant,[414] and will thus challenge the Sudan's scarce infrastructure. In addition, the adversarial zero-sum game created by this electoral system presents a real risk for the peace process, especially if the opposing parties are a mere cover for the former warring factions. While this would mean an opposition of the NCP and the SPLA/M in the Sudan, the country's extreme diversity could in this case work as an advantage: As mentioned, these two parties only represent about one third of the

[413] The literacy rate in the Sudan was 59,9% in 2002 (as reported in E. Gyimah-Boadi, "Africa: The Quality of Political Reform," in *Democratic Reform in Africa: The Quality of Progress*, ed. E. Gyimah-Boadi (Boulder, London: Lynne Rienner Publishers), 17).
[414] Reynolds, Reilly, Ellis et al., 153-156.

population, and the diversity of the society has found expression in the existence of a broad variety of interest groups, alliances and political parties,[415] many of which are in turn internally fractionalized. An electoral process would thus probably not result in an "Angola-like" run-off between the two main warring factions in the case of the Sudan.

Rather, the TRS is likely to incite – at least in view of the second round – to the creation of larger coalitions,[416] a process which will necessarily lead to a dilution of the most extreme standpoints. Therefore, the adoption of the TRS system in Sudan is not necessarily prone to failure. Yet, this does not guarantee that the expected coalition-building process will bridge the main divides in the society, as majorities can be won in the Sudan despite ignoring large parts of the society. For example, it is possible that the second round of the elections would consist in a run-off between two Northern alliances (most probably a more "moderate" and a more "islamist" coalition). In such a case, the integrative effect is more than doubtful and it is unlikely that this would make unity attractive for the South and other parts of the Sudan.

Such a situation could call for an AV-system. Yet, the application of this system on such a large scale seems unprecedented and its complexity makes it inappropriate to be applied in the dire circumstances under which the 2009 Sudanese elections are to be held.

A distribution requirement such as the one used in Nigeria could be a more useful tool to increase the likelihood of an integrative effect of the elections without excessively complicating the process. In particular, this would mean that a successful candidate would have to gain a minimal percentage of votes in a certain number of the present 26 states. Yet, as the evolution of the process, of the party creation, and of the formation of alliances is hardly predictable, the bar would have to be put at a very low level in order not to run the risk

[415] A list of the most important political groups would include for example: Muslim Brotherhood; United Democratic Salvation Front (UDSF); Umma Party; Umma Party Renewal and Reform; Nile Valley Congress; Islamic Umma Party; Justice Party; Alliance of Working People Forces; Democratic Unionist Party; Popular National Congress Party (PNC); Communist Party of the Sudan (CPS); Baath Party; Republican Brothers; Federal Alliance; Sudan Liberation Army/Movement (SLA/M); Justice and Equality Movement (JEM); Beja Congress; Union of Sudanese African Parties (USAP); United Sudan National Party.
A few of these parties are briefly described on Sudan.net, *Major Sudanese Political Parties*, http://sudan.net/government/parties/html [accessed on May 4, 2006].

[416] Such as the already existing National Democratic Alliance (NDA).

of a non-result which would severely hamper the transitional process. The focus of the requirement should thus be on a wide outreach (e.g. about 20 out of 26 states reached), while a lower bar as to the minimal percentage of votes should be chosen (e.g. 10-15%).

Given the difficulties to find thresholds which will have an integrative effect, but virtually exclude a non-result,[417] non-legal integrative requirements seem more promising in the present situation. For example, the parties or coalitions running for presidency could agree beforehand on a code of conduct, pledging to open party branches in all states and including representatives of a broad variety of states, language-, religious-, or tribal groups in their party organs. This should help to avoid the alienation of some communities from certain parties as well as the campaigning on a divisive message by "playing the ethnic card." As for any measure related to the electoral process, its effective result will only be measurable *ex post*, but it is hoped that such a public commitment to integration *ex ante* would help to reduce the disillusionment among defeated groups and make unity attractive for all communities under the new government.

Given the overhasty determination of the system for the presidential elections 2009, the adoption of such a broadly agreed upon voluntary code seems to be one of the most promising ways to strengthen the chances for an integrative outcome. In addition, such a voluntary commitment could significantly increase the legitimacy of the process, which has so far too often been scantily lacking.

b) Legislative elections

The integrative effect of the elections can arguably further been strengthened by the design of the electoral law for the legislative elections, which are to be "free and fair", and the details of which are to be regulated by the electoral law.[418] The INC thus leaves more leeway for the

[417] In addition, this solution would defy the terms of the INC.
[418] INC, art. 84.

design of the electoral process than for the presidential elections.[419] This opportunity should be used by the Sudanese drafters of the electoral law on the one hand to support the sought effects of the presidential elections, and on the other hand to strengthen the legislative body by providing it increased legitimacy.

Keeping the Sudanese electoral history and the TRS adopted for the presidential elections in mind, the adoption of a FPTP electoral system could appear as the most logic choice. As indicated above, this system would bear the significant advantages to be simple and lead to locally endorsed leaders. Yet, most importantly, it would not necessarily provide an incentive for integrative behavior, as a likely outcome could be the campaigning of moderates *versus* Islamists in the North, and of the SPLA/M against other Southern groupings in the South, with a broad variety of local specificities in the different states. As in the past, this could lead to an absolute dominance of some form of Northern coalition in the legislative, at the exclusion of significant parts of the society. As this would defy the very aim of integration and the prospects for the future adoption of a more integrative approach, the adoption of a FPTP electoral system in its pure form is discouraged.

At the other end of the spectrum, the adoption of a PR electoral system in its "pure" form would represent a significant reversal for the Sudan, making its adoption politically more difficult. Yet, several arguments would favor the adoption of such an electoral system. Following Lijphart's view, it would appear as the most logic choice under the present consociationalist structure and a likely similar future system, and it would accurately reflect the political composition of the society in parliament. In addition, PR is also often advocated in transitional periods to democracy, such as in the Sudan. Yet, in our view, the 2009 elections in the Sudan can not be seen as transitional elections in their pure sense. Especially as the elections will have to prepare the referendum on the constitution and on the Southern independence, some aspects of democratic consolidation will already have to be found in the

[419] Read together with articles such as *Implementation Modalities*, point 9c, providing for larger international involvement in the organization of these elections, this can be interpreted as an indicator of the reduced importance attached to the legislative level of government.

system in order to stand up to this task. It has further to be mentioned that the time-frame of four years leaves significantly more time for parties to constitute and campaign than in many other post-conflict transitional elections.

This is not meant to preliminary rule out the adoption of PR, but its "pure" form bears a most significant additional shortcoming, which should advocate against its adoption: it fails to enhance moderation and integration, which is crucial to achieve several of these elections' goals. Rather, it risks deepening divides which have should be reduced by the elections in order to promote reconciliation and make unity more attractive.

It is argued that the additional time available should be used to discuss, explore and eventually adopt and implement an electoral system that goes beyond the "pure" models and their main advantage of outright simplicity.[420]

However, it remains that conceivable alternative systems such as AV or STV are unlikely to be feasible options in the case of the Sudan. Although the administrative hurdles are significantly lower if the system is used on a smaller scale, where less complicated vote-transfers have to be calculated, the significant innumerate and illiterate part of the population makes this option unattractive – at least for the 2009 elections. Similarly, the adoption of an SNTV system is not encouraged. As Afghanistan's recent history has shown, the system does not strengthen political parties, while the integrative aim relies heavily on the creation of stronger parties cutting across the societal fault lines.

Given these considerations, one of the simpler systems may be adapted in order to provide an incentive for more integration by simpler means than AV or STV do. While it has to be underlined again that the effective system adopted should finally be the result of an inclusive decision-making process among Sudanese actors, the following proposal could be used to encourage this discussion.

[420] This does not mean that the adopted electoral system should not be conceived as simple as possible, but that the goals to be achieved in the elections should not be hastily traded for the ostensible advantage of simplicity.

It is suggested that the electoral system rewards the nationwide gathering of votes, providing an incentive to comply with the code of conduct for the presidential elections suggested above. *In concreto*, a list PR system could be used in state-wide districts, providing for a bonus for nationwide success of a party.

Table 2: Electoral system with bonus seats

PARTY A - "INTEGRATIVE"			
State	**% of votes**	**Seats won**	**Bonus seats**
A	50	8	
B	35	6	
C	33	5	
D	32	5	
E	30	5	
F	28	4	
G	28	4	
H	27	4	
I	26	4	
J	25	4	
K	25	4	
L	24	4	
M	22	4	
N	21	3	
O	21	3	
P	21	3	
Q	20	3	3
R	18	3	3
S	15	2	2
T	15	2	2
U	12	2	2
V	10	2	2
W	8	1	1
X	7	1	1
Y	6	1	0
Z	2	0	0
	avg: 22%	**90**	**16**

Total seats	**106**

PARTY B - "DIVISIVE"			
State	**% of votes**	**Seats won**	**Bonus seats**
Z	65	10	
Y	60	10	
X	54	9	
W	52	8	
V	49	8	
U	47	7	
T	44	7	
S	43	7	
R	42	7	
Q	41	7	
P	32	5	
O	25	4	
N	5	1	
M	2	0	
L	2	0	
K	1	0	
J	1	0	0
I	0	0	0
H	0	0	0
G	0	0	0
F	0	0	0
E	0	0	0
D	0	0	0
C	0	0	0
B	0	0	0
A	0	0	0
	avg: 22%	**90**	**0**

Total seats	**90**

To achieve this easily and effectively, the electoral law could for example provide that the seats won by each party are doubled in the ten states where it scored the lowest number of seats. While this does not require additional capacity from the electorate or in the organization

of the poll if a closed-list PR is used, this means that a party which is able to gather seats in more than 16 states will see the number of its seats won in state 17 and onwards doubled.[421]

Table 2 shows the effect of such a measure with dummy variables for two fictive parties in a simplified model of 26 equally large states and a list PR system with a 5% threshold. One of the parties (A) campaigns on a national scale with an integrative message, while the other one (B) concentrates its efforts on a part of the states and may be campaigning by "playing the ethnic card". While the two parties score about the same number of votes in total, the party with a more equal distribution of its electorate would in this case gather a significantly higher number of seats through bonus seats won in the states where it had the least, but still significant, support. The idea of such a bonus is obviously to favor integrative behaviors that find support throughout the country. This should not only help to support the effect sought with the code of conduct for the presidential elections, but should also help to prepare the ground for a centripetalist restructuring of the state which has been identified above as helpful to make unity attractive.

As for every electoral system, the proposed model is not free of flaws, and several criticisms can be addressed to it. For example, it is certainly noticeable that this system would be unprecedented for the Sudan, and has to our knowledge not found application in any country so far. However, the distribution of bonus seats is not new as such,[422] and the Sudan has traditionally used "graduate seats" reserved for examples for federations, unions, or women.[423] It is thus not uncommon to "distort" the electoral result to achieve a particular distributive goal, and this can also be used as a major argument against the claim that such a system would be unfair.[424]

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[421] The use of open-list PR is not advisable, first of all for reasons of complexity, but possibly also to avoid a "picking and choosing" along ethnic lines.

[422] See for example the allocation of "best loser seats" to underrepresented communities in past elections on Mauritius reported by Reilly and Reynolds, 201.

[423] Graduate seats are seats to which only certain categories of people can be elected. See Nuba Survival, *Constitutional Challenges of the Transition*, Steering Committee for Human Rights in the Transition in Sudan, Issue Paper C1; available from http://www.nubasurvival.com/conferences/kampala1/c1.htm [accessed May 4, 2006] for more details.

[424] As to the change to PR from FPTP, it is in theory also conceivable to use the same bonus system in an FPTP election. However, while in PR the bonus seats will logically be accorded to the candidates following the elected

The fact that the exact number of MPs will only be known after the elections, depending on the number of bonus seats distributed, should not represent a major problem, and is known from other systems such as the elections to the German *Bundestag*.[425]

It can also be claimed that the system places too much emphasis on small states, as the chances are higher to obtain the double amount of seats in these states as there are less seats to be won. While there is certainly truth to that argument – underlining again the earlier claim for equally large states – many of the smaller states count among the traditionally most marginalized, and a limited special emphasis on these states can thus be justified.

Further, the system clearly favors nationwide political parties, while regional movements will be unable to profit even if they promote moderation. Yet, such a development is sought in order to strengthen centripetal forces in the society, and conciliatory parties should have less difficulties to find partners "on the other side" to build nationwide movements.

It is further true that even a movement such as party "A" would not necessarily be integrative for all communities, given the heterogeneous composition of the 26 states. While this presents a limit to the proposed model, an incentive to care for the whole territory will generally still leave the different communities better off, even if not directly targeted by a party such as "A".

Finally, the problem of the reduced accountability of the representatives elected in PR to their constituencies has not been addressed. Ways should be sought in connection with the concomitant elections on the lower levels to address this important shortcoming.[426]

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candidates on the party list, the attribution of bonus seats under FPTP would be plagued by some degree of arbitrariness. In addition, it seems important to counter the strong majoritarian aspect of the presidential TRS system with the more consociationalist outcome of PR.

[425] Germany uses a MMP electoral system, where each voter has a party-list (PR) and a district seat (FPTP) vote. Normally, each party obtains the number of seats representing the percentage of list-PR votes won. These seats will thus be attributed to level out the difference to the district seats won. If for example a party wins 20 seats according to its vote share on the list-PR votes, and 15 members of its parties have been elected through district seats, it will further obtain 5 list-seats. The number of total seats in the *Bundestag* can thus vary if a party gains more district seats than it would obtain based on its list-PR votes, as these directly elected candidates keep their seats as so-called *Ueberhangmandate* (overhanging seats) (for more details see for example Michael Honikel, *Bundestag*, http://www.staatsrecht4u.de/de/bundestag.htm [accessed May 4, 2006]).

[426] An additional argument can be made that either the effect of the measure will not sufficiently protect against divisive electoral campaigns, or, on the contrary, that it would excessively favor a few nationwide movements.
In this respect, it should again be noted that the concrete decision on the electoral system will have to be taken after an inclusive discussion and that the proposed model here is indicative. If there is a consensus that the effect of the bonus seats is not sufficiently large, the number of states counting for bonus seats could be enlarged, or

While the suggestions above reflect thoughtful decisions based on the circumstances, the goals, and the different options for electoral systems and their likely effects, it remains that the effective results will only be seen in the aftermath of the poll and are only predictable to a limited extent, depending *inter alia* also on more detailed dispositions than have been outlined in this broad model.[427] It is thus crucial that the choice of a system is taken in an inclusive forum after careful consideration, in order to give the elections the necessary legitimacy and to protect against fraud and boycotts. It can only be reiterated that it is unfortunate in this respect that no efforts seem to be undertaken to lead such a discussion or even to create the necessary forum for an inclusive dialogue.

6. The system is not enough

The limits of electoral systems and of elections have to be kept in mind, as the poll only presents a pixel in a larger image. To get a glimpse of this picture, some other factors to be kept in mind in relation to elections will be addressed in the following.

a) Timing and sequencing of elections

The ***timing*** of elections plays a crucial, yet often underestimated role.[428] In the past, the holding of some elections within a year or two after a peace agreement was frequent, especially if international actors used them as a strategy to rapidly disengage.[429] Yet, such a short timeframe has several shortcomings: In particular, the risk that radical non-democratic forces will succeed is significantly larger, due to the polarisation of the society during and in

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the amount of extra seats could be increased within certain limits. If the fear of an ultra-dominance of a nationwide movement prevails, the number of bonus seats per state could be limited to the number of seats that would be gained for example with 20% or 25% of the votes in that particular state.

[427] As an example, the question how refugees and IDPs should be able to partake will have to be carefully considered (see also Reynolds, Reilly, Ellis et al., 124-126).

[428] Reilly, "Post-Conflict Elections," 119.

[429] *Ibid.*, 121, noting the examples of the 2001 elections in Kosovo and East Timor.

the immediate aftermath of war and the insufficient time for integrative political parties to form and campaign.[430]

As already indicated, the adoption of a longer transitional period in the Sudan is laudable. However, the simple comparison of the length of time between a peace agreement and the holding of elections is insufficient.[431] Rather, the timetable of the electoral process should be linked to concrete achievements on the ground.[432] The rescheduling of the electoral calendar in the post-conflict Mozambican elections permitted a significant improvement of the conditions before the polls, underlining the merits of a flexible timing.[433]

In the case of the Sudan, the CPA foresees a reconsideration of the feasibility of the proposed schedule.[434] While this is generally positive, it will be important to ensure that this reconsideration follows generally accepted standards and is not based on the individual interests of the two former warring factions.[435]

In addition to the timing of elections, the ***sequencing*** of elections on the different levels of governance has also been subject to discussion. While advocates of a top-down approach (holding national elections first) laud its effect to help the creation of nationwide movements,[436] advocates of a bottom-up approach of holding local elections first advocate that its learning effect is particularly helpful for 'state-building' elections,[437] and also

[430] The post-Dayton elections in Bosnia are telling in this respect, where inadequate timing added to the flaws in the electoral system (see for example Belloni, 337-338, or also Reilly, "Post-Conflict Elections," 121-122).
[431] Compare for example the successful 1989 Namibian elections with the disastrous 1993 Angolan one – which both took place within a short time after the start of the mission (see for example Paris, 63-69 and 135-141).
[432] In particular the completion of the DDR-process and the establishment of appropriate, firmly implanted institutions (Lyons, *Voting for Peace*, 2, 67). See in this respect also Angola's 1993 elections, where the insufficient disarmament facilitated the resumption of the war for Savimbi (Paris, 69).
[433] From the international perspective, it has to be said that the success of the flexible approach in Mozambique came at a cost, which frustrated the sponsoring governments despite the more sustainable outcome (Lyons, *Voting for Peace*, 16).
[434] See *Agreement on Power Sharing,* §§ 1.8.4. and 1.85.
[435] The reality of this risk is underlined for example by John Young, "Sudan: A flawed Peace Process Leading to a Flawed Peace," *Review of African Political Economy* no. 103 (2005): 106.
[436] See for example Juan Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore: Johns Hopkins University Press, 1996), 98-107.
[437] Reilly, "Post-Conflict Elections," 122; also Larry Diamond, "Building Democracy After Conflict: Lessons from Iraq," Journal of Democracy 16, no. 1 (2005): 18-20.

proposed it for the Sudan.[438] However, this latter approach fails to have an integrative effect on the national level, and as the holding of national elections first can result in a detachment of national from local authorities, the holding of elections on both levels simultaneously as done for example in El Salvador's post-conflict elections and as foreseen in the case of the Sudan seems most promising.

The staggering of legislative and presidential elections can also be considered. It is however suggested to hold these elections at the same time despite higher administrative needs in order to strengthen the combined integrative effects of the more majoritarian presidential- and the more proportional legislative elections.[439] The main shortcoming of the approach to hold several elections at the same time is its greater administrative need, pointing to the need to analyze the key parts of the electoral administration.[440]

b) Electoral administration

Good electoral administration is not only a necessity in view of a regular and legitimate poll, but can also serve to enhance other parts of the administration,[441] and should thus receive particular attention in a post-conflict transition. Some of the major points a briefly addressed below.[442]

The ***electoral commission*** plays a key role in the organisation of the elections. As its tasks are mainly administrative,[443] it is preferable to constitute it as an independent body of civil servants to prevent it from being overly politicised.[444] This lesson has been learned in the case

[438] As reported in Reynolds, Reilly, Ellis et al., 126.
[439] See also Reynolds, Reilly, Ellis et al., 124.
[440] A point that also remains largely understudied (Reilly, "Post-Conflict Elections," 125).
[441] John Harbeson, "Elections and Democratization in Post-Mengistu Ethiopia," in *Postconflict elections, democratization, and international assistance*, ed. Krishna Kumar (Boulder and London: Lynne Rienner Publishers, 1998), 129.
[442] For further analysis see for example Reynolds, Reilly, Ellis et al., 153-156; or Terrence Lyons, "Post-conflict Elections and the Process of Demilitarizing Politics: The Role of Electoral Administration," *Democratization* 11, no. 3 (2004): 36-62.
[443] see for example Goodwin-Gill, *Élections libres*, 42-43, indicating a large number of tasks.
[444] The partisan composition of the 1995 Haitian electoral commission has shown the problem of a polarized commission in a particularly telling fashion (see Sue Nelson, "Haitian Elections and the Aftermath," in *Postconflict elections, democratization, and international assistance*, ed. Krishna Kumar (Boulder and London: Lynne Rienner Publishers, 1998), 76).

of many recent post-conflict elections,[445] and it is laudable that the NEC is in principle also to be constituted of "nine independent, competent, non-partisan, impartial and representative personalities".[446] As the presidency is in charge to select these personalities, other members of the GoNU, opposition forces, and international actors should pay careful attention that the selection stands up to the standards set out in the INC.

The ***voter registration*** constitutes a further particularly important aspect of the electoral administration, and it has to follow clearly defined, transparent and systematically applied criteria to allow for free and fair elections.[447] In post-conflict situations, the lacking registers and the presence of large displaced populations make this a particularly difficult and expensive task.[448] It will thus be crucial for the Sudanese elections to allocate sufficient time and resources to the completion of this important task, and international support could play an important role in this.

The adoption of a suitable ***electoral technology*** should also be considered. While the use of basic technology may open the door to fraud, the introduction of modern technology may not be suitable and sustainable in the absence of other infrastructure.[449] The aims of sustainability and of credibility will thus have to be carefully balanced in the Sudan.

The choice of electoral technology will also impact on the ***counting of the votes and the publication of the results***. As to the counting, it is obvious that it should happen as quickly as possible, without reducing its accuracy. In the time between the poll and the announcement of results, the country is left in limbo, and if this situation persists for too long, uncertainty and mistrust rise, increasing the risk of violent incidents in a post-conflict situation. Yet, the

[445] See for example the cases of the Cambodian, Namibian or East Timorese post-conflict elections (Reilly, "Post-Conflict Elections," 125. See also Goodwin-Gill, *Élections libres*, 38-42).
[446] INC, art. 141§1. See also *Implementation Modalities*, point 9b.
[447] Further, an effective mechanism to correct errors has to be in place (Goodwin-Gill, *Élections libres*, 50-54).
[448] See for example the experiences in Cambodia's post-conflict elections (Reilly, "Post-conflict elections," 125).
[449] For example, UNTAC in Cambodia and ONUMOZ in Mozambique both relied on modern technology for the conduct of the election. Yet, this technology was not sustainable under the prevailing circumstances and consequently the following (locally organised) elections were unable to efficiently use it, hampering the anyhow difficult task to organise elections even further (Reilly, "Post-Conflict Elections," 126).

prevention of this by hastily announcing partial results is not advisable, as this may rather contribute to increased uncertainty.[450]

While there are no clear cut answers how these and other tasks can best be organised, it is important to agree on clear rules among all political actors on these issues.

c) Limits of electoral engineering

The choice of an appropriate electoral system and of a good electoral administration will be crucial for a positive outcome of the 2009 elections. However, it has also to be kept in mind that all these factors are insufficient to guarantee elections that will help to promote the intended goals of the elections. Most importantly, the sustainability of the outcome will also depend on the legitimacy of the whole electoral process, in the absence of which the elections can prove to be the "undoing" of the democratic process.[451]

In turn, the legitimacy of the election will to a large part depend on the integration of all political actors in the process. If the "rules of the game" are agreed upon and accepted by all, the chances for a successful election can be significantly increased. Given the reluctant attitude by the parties in power towards the pursuit of the process, achieving this integrative process may be one of the most difficult parts of the elections. Both national and international actors will have to remind the different parties of their commitment to the democratic process, as another "dishonoured agreement"[452] will most likely lead to the demise of the Sudan within its current borders.

[450] See for example the experiences in Cambodia (Lopez-Pintor, 56-58) or in Angola, where Savimbi defected after the announcement of partial results.
[451] Reilly, "Post-Conflict Elections," 121.
[452] Which has been a continued pattern in the Sudan's history (Abel Alier, *Southern Sudan: Too Many Agreements Dishonoured* (Exeter: Ithaca Press, 1990)).

Conclusion and outlook

The conclusion in the previous part with regards to the need for inclusiveness in the electoral process applies also to the transitional process in the Sudan *at large*. In the end, any decision of substance as to the future institutions of the state will have to be taken by the Sudanese political actors, and unless these decisions enjoy broad legitimacy among the different political players, their sustainability will be at considerable risk. Striving for an inclusive process providing also for adequate public participation should thus be the first priority, which will first require the successful conclusion of peace agreements with the various factions. Further, the process as it is currently conceived will have to be adapted to allow for more inclusiveness. If this adjustment is made, there are chances for a sustainable peace, since there can be no doubt that "[t]he people of Sudan are ready for peace. They are exhausted by war, isolation, and lack of development."[453]

These aspects have been highlighted throughout this thesis, although the main focus has been on the substantive aspects of both the 2009 elections and the possible future conception of the state- and power-structure, in order to provide input to these discussions.

With regard to the future state- and power structure of the Sudan, it has been proposed to broadly follow an integrative approach, which is seen as most conducive to "make unity attractive." In particular, it is suggested to rethink the current federalist division and to create federal entities which are:

- large,
- cutting through the major fault-lines in the society,
- of similar size.

This last point should address the potential problems that occur with significantly asymmetrical structures.[454] The first two points should ensure a clear heterogeneity of the states, avoiding their identification over divisive attributes, and by the same token barring the

[453] Andrew Natsios, "Implementing the Comprehensive Peace Agreement in Sudan," *Yale Journal of International Affairs* 1, no. 1 (2005): 97.

[454] It is certainly appropriate to recall at this point that the current uprising in Darfur was importantly triggered by a feeling of having been left out in the CPA, which assured the South important (asymmetrical) benefits.

risk of secessionist claims. Yet, their large size should allow them to counterbalance the dominance of the central government. In the actual proposal,[455] the states have further been conceived as remaining geographically oriented towards the center in order to address the centripetalist claim, while the risk of marginalization of the peripheral societies is reduced through a demographic advantage at the "far end" of these new states. By the same token, this structure tried to create an internal balance between the different communities of the state, avoiding the creation of structural minorities or majorities, but "forcing" them to cooperate in state-level governance, in order to foster moderation at the national level as well.

In addition to this federalist structure, the option to introduce a non-territorial federalist element to address religious matters on a personalized- rather than on a territorialized level has also been highlighted.

As to the power structure, it was in particular suggested that the asymmetries in the treatment of the different regions should be equalized by granting a significant effective level of autonomy to all states, in order to make unity more attractive for all parts of the country.[456]

Besides making unity "attractive", the democratic legitimization of the government and the enhancement of the reconciliation process were identified as main goals to be pursued in the 2009 Sudanese elections. In order to best achieve these goals given the constraints of reality and the many uncertainties in the run-up to the elections, it was suggested to strengthen the TRS-electoral process prescribed by the INC for the presidential elections by inviting all competitors to agree upon a code of conduct, committing them to a nation-wide, integrative electoral campaign. In order to counterweigh the majoritarian presidential elections, the adoption of a proportional list-PR system for the legislative elections was proposed. Given that list-PR often fails to promote integration, it was therefore suggested to add a system of

[455] See Table 1, page 66.

[456] However, the powers should be more restricted than the current autonomy of the South in two respects: first, the armed forces should over time be integrated into a single force to underline the unity, following however a careful process. Second, the central level should be able to exercise some limited overview over the state level governments, in particular with respect to the treatment of minorities in the states as well as to the allocation of financial resources.

bonus-seats to reward parties gaining nation-wide support. This should provide an incentive to campaign on a nation-wide, integrative message rather than on a divisive one, and would therefore add a material benefit to committing to a code of conduct in the presidential elections.

This brief restatement of the main suggestions of this thesis gives a glimpse of the wide array of issues and options that could and should be discussed in the Sudan to "make unity attractive." Yet, as already underlined, there seems to be a general unwillingness to consider such options, and in particular to "think outside the box" when deliberating such questions. This thesis claims that the careful evaluation of radically new options – such as a new territorial division of the Sudan or an adapted PR-electoral system for 2009 – should not be neglected when debating the future of the Sudan, in particular given the persistent failure of past "mainstream options" to "make unity attractive." International advisors could play an important role to assist the Sudanese actors to consider these options and to find most suitable answers in an inclusive process.

In the light of the ongoing conflict in Darfur and of the demonstrated unwillingness of the NCP to stand up to the democratic process agreed upon in the CPA, there seems to be little hope for such a process and for the consideration of these options, and the pledge to "make unity attractive" remains an empty phrase. Yet, failing to do so will only ensure that the South will opt for independence, either releasing either two new states with an uncertain future into the middle of a region in turmoil, or, if the agreement is once more dishonoured, leading the Sudan back to war.

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