

Prospects for Peace in Sudan

Briefing: October 2008

Overview

1. This briefing focuses on three principal issues that are currently particularly salient for the future of Sudan, namely the ICC, steps towards the elections, and the implications of a new administration in the U.S. with a more assertive policy.
2. The ICC issue dominates Sudanese politics and will continue to do so for the foreseeable future. It has sucked the energy out of every other issue. It is almost certain that the ICC Pre-Trial Chamber will issue an arrest warrant for President Bashir, probably in January. After that, the ICC issue will become *the* issue determining international relations with Sudan, making it difficult to pursue other objectives in the country.
3. The ICC process is inexorable: the horse has bolted. There are numerous deficiencies in the Prosecutor's case, which will ultimately weaken the ICC, but these will not affect the main decision before the PTC. The anti-ICC position by the African Union and the Arab League will not be sufficient to swing the UN Security Council or the P3. The next ICC indictment (of rebel commanders for the attack on AMIS) will not restore the Court's credibility in Africa.
4. Progress towards the elections is far behind schedule, for both technical and political reasons. The NCP and SPLM are engaged in a wary dance over the timing and organization of the elections, in the shadow of the ICC and the 2011 referendum. The NCP is best prepared for the elections and, in search of domestic and international legitimacy, has the strongest reason to hold them on schedule. It may surprise the internationals by doing exactly that—at least for the Presidential and National Assembly elections. The SPLM has floated the possibility of a delay but leading members are anxious not to get on a slippery slope that might lead to a delay to the referendum. There is a risk that flawed elections in Darfur would undermine the credibility of the national electoral process.
5. Much will depend on the line adopted by the new U.S. Administration. There are signs that Obama's Africa team is feeling more confident in taking a bold and assertive stand against Khartoum. A breakdown in communication between Washington DC and Khartoum would be problematic. Equally perilous is the likelihood of the SPLM taking U.S. rhetoric at face value and assuming that it can confront Khartoum with Washington's backing. However, it is unlikely that the new U.S. Administration would be ready to invest sufficient resources in its Sudanese strategy to be able to ensure success.

The International Criminal Court

6. Indications are that the Pre-Trial Chamber will take a further three months before issuing its arrest warrant against President Omar al Bashir. The PTC was preoccupied with other matters until its recess in August and the three judges are also dealing with other cases, so that it is possible that they will be unable to reach a decision before the Christmas recess. They have summoned the Prosecutor for one hearing, which reportedly focused on wider issues such as peace as well as matters of law. They have asked him for additional evidence in support of the application to be presented by 17 November. This may relate to the admissibility of evidence under confidentiality agreements that the Court has entered into with the UN and NGOs, a controversial topic in the light of the Lubanga case, in which the judges criticized the Prosecutor's heavy reliance on evidence provided on a confidential basis which is not being shared with the defence.

7. The OTP has informally adopted a principle of only presenting applications for arrest warrants when it possesses sufficient evidence that it is trial ready. This principle has not been followed in the case of Darfur 2 (the al Bashir case). The OTP essentially ceased investigations on Darfur in 2007 with the completion of Darfur 1 (Ahmed Haroun and Ali Kushayb) and the departure of the senior investigators on the team. That investigation involved confidential sources (redacted in the public applications), which may now be proving problematic. The evidence against al Bashir consists entirely of what was already available for Darfur 1, open source documents relating to the period 2005-07, plus some 'expert' testimony (an interview with Eric Reeves). This raises several questions about prosecutorial strategy, including why the Prosecutor chose not to name President Omar al Bashir in Darfur 1, why despite the alleged urgency of the case he took so long to make the application, and made such a complex application that it takes many months for the PTC to assess, and whether the Prosecutor believes that the case will ever come to court (reportedly, he does not).

8. The principal remit of the PTC is to ascertain whether the Prosecutor's public application of 14 July establishes that there is a reasonable case for prosecution. This is a very low standard of proof. The PTC does not need to determine whether the OTP is trial ready. The judges may want to criticize the Prosecutor for presenting such a lengthy application (120 pages, after 38 pages of corrigenda), which falls well short of trial readiness, but this is unlikely to stop them from issuing an arrest warrant. The PTC will certainly find sufficient grounds to issue an arrest warrant on the counts of war crimes and crimes against humanity, not least because substantial evidence for crimes in 2003-04 has already been presented in Darfur 1, and there is a strong *prima facie* case for superior responsibility by the President. It is less certain that the Chamber will find sufficient grounds to issue the warrant on the genocide charges as well.

9. Within the GoS, there is much speculation about other names. However, the OTP has no immediate plans for further applications against senior members of the GoS, despite the fact that several individuals are named incidentally in the Darfur 2 application and the Prosecutor's insistence that the entire government machinery is responsible.

10. The next application (Darfur 3) is an investigation into the rebel attack on Haskanita AU Group Site in September 2007. The OTP has evidence against three individuals, leaders of SLA-Unity and JEM breakaway faction. While fighters belonging to SLA-Abdel Shafi participated in the attack they do not seem to be sufficiently senior to warrant being named in an application. Khalil Ibrahim and other JEM leaders had departed the scene a few days before the attack and will not be implicated. The Prosecutor is proceeding with this despite concerns about the quality of the evidence, refusal to cooperate by the African governments whose soldiers died in the attack (they have not even provided death certificates), and evidence that the GoS representative at Haskanita was indeed cooperating with the Sudan airforce during the military engagements at that time—which would provide the defence with a strong case that it was indeed a legitimate military target. At first sight, the incident—an ill-planned raid to obtain fuel for rebel operations—would seem to be trivial in comparison to the charges laid against President Bashir. The Prosecutor will argue that attacks against peacekeepers possess particular significance because driving away peacekeepers can have far-reaching effects, for example allowing mass crimes to proceed without international scrutiny. (A parallel would be the murder of Belgian peacekeepers on the first day of the Rwanda genocide.) He is also concerned to appear balanced. The Darfur 3 investigation is a few weeks away from reaching a stage at which OTP is ready to make an application.

11. A probable Darfur 4 investigation would involve Minni Minawi, but this is at least a year away.

12. The Chief Prosecutor will come under further criticism. This will include his handling of the Thomas Lubanga case and a possible new lawsuit by Christian Palme, who was dismissed from the OTP following his complaint against the Prosecutor. These criticisms may damage the Prosecutor personally and the Court, and will give solace to the GoS, but will not affect the decision by the PTC. A major public scandal surrounding Luis Moreno Ocampo personally may help the AU-Arab League campaign to corral votes at the UN Security Council, but is unlikely to affect the calculations of the veto-wielding P3.

GoS Strategy for the ICC

13. The GoS is paranoid about the ICC. Doubtless because senior government officials know their own responsibility for the crimes of 2003-04, and are aware of the evidence that exists, they fear that the Prosecutor has got his hands on sufficient evidence to bring successful prosecutions in short order. There are regular rumours that the ICC will name new names. Uncertainty and speculation has contributed to a slow pace of decision-making in Khartoum.

14. The GoS domestic strategy for responding to the threat of the ICC is to insist that all the partners in the GoNU totally reject the ICC. A thin veneer of unanimity was achieved in the week of 14 July, but did not last long. Most of the SPLM leadership takes the line that they have signed the CPA with Pres. Bashir and are therefore committed, from principle and self-interest, to maintaining it. But there is a strong trend within the SPLM

that rejoices in the indictment of Bashir and supports any actions that will weaken him. The SPLM wants the GoS to engage with the Court.

15. The GoS has launched the Sudan People's Initiative for Darfur, a week-long conference at Kenana. As earlier envisaged, this had the opportunity to build consensus among all the major parties. The leadership of Sadiq al Mahdi was an opportunity for showing a degree of independence from the NCP. However, Sadiq al Mahdi failed to devote sufficient energy to the issue and did not succeed (or even try) in forging a common position with the SPLM. The conference is proceeding under NCP leadership without the participation of many opposition parties such as the DUP and the Communists. It is a missed opportunity.

16. The Qatar initiative for peace in Darfur is also losing its focus and may become another missed chance. Qatar is complicating its efforts and undermining its standing with Darfurians by linking its initiative to an Article 16 deferment.

17. An arrest warrant against President Bashir would be seen by many powerful figures in Khartoum as a declaration of war. In this context it is worth examining the security strategy of the GoS when faced with comparable threats over the last 19 years. When it was under the gravest military threat (in 1995-98) the Islamists saw Kordofan and Darfur as their strategic hinterland, where they could retreat even if they lost state power. They focused their energies on containing the regional threats (especially Ethiopia, which committed the largest combat contingents to the battlefield) and getting sufficient financial resources. Today, the strategic geography is different but the overall calculations will be similar. Faced with threats from the south and west, the NCP will focus on defending Khartoum, the riverain north, the oilfields and access to the sea. Its success will depend upon maintaining the export of oil and keeping Ethiopia and Eritrea friendly. It will therefore scale back its military presence in Darfur and parts of Kordofan and rely more on proxies. Under this calculation, the two UN missions are security assets to the GoS, because they provide a non-hostile security presence, with backup logistics, in the peripheries of the South and west.

The GoS's External Strategy for the ICC

18. The GoS external strategy is to encourage the AU and League of Arab States to take the lead in mobilizing opposition to the ICC. In dealing with the AU and LAS, the GoS has accepted that its maximum outcome is a deferral under Article 16. Its high expectations were rudely brought down to earth during the week of the UN General Assembly, when its delegates realized that they did not command enough support for a resolution in the General Assembly to have a chance of success, and that they would struggle to obtain the necessary nine votes to pass a Security Council resolution. And in gaining the diplomatic support that it has, the GoS has given much ground in terms of admitting the need for remorse, for justice, for civilian protection and for peace in Darfur.

19. Each of the P3 is entertaining the possibility of an Article 16 deferral, should the GoS take the necessary steps. But each is also deeply skeptical that Khartoum is capable of

taking coordinated, effective and verifiable steps within the time available. Some delay was caused by the lack of a common position among the P3 (and further uncertainty within the current U.S. administration and between this administration and its successor), which means that senior GoS officials spend time speculating rather than acting. The GoS is still clutching at straws, believing that proposals presented to it by the SPLM or by the Darfur Mediator Djibril Bassole may represent U.S. proposals.

20. The position of the U.S. is clear: it sees no serious efforts to implement the steps outlined by Special Envoy Williamson at the beginning of the year, and in the absence of such progress, will oppose any deferral. Although the U.S. does not on principle support the ICC, its abstention on the relevant UN Security Council resolution in March 2005 was tantamount to an approval of the ICC, and the administration is quite ready to use a veto. While the U.S. welcomes efforts by the SPLM to try to use the ICC as a point of pressure on the NCP to extract concessions, it is extremely unlikely that the GoS could make sufficient credible concessions quickly enough to make any deferral possible.

21. The French position was initially more sympathetic to a conditional deferral. That position has now hardened and Foreign Minister Bernard Kouchner rejected overtures by the GoS.

22. The GoS is deeply unhappy with what it sees as an abdication of responsibility by the UN Secretary General. Members of the GoS (and other African leaders) firmly believe that if the UNSG had wanted, he could have requested the P3 to block the Prosecutor proceeding with his public application. They simply refuse to believe the SG's assurances that the Court is independent. President Bashir has told the SG that he will consider an arrest warrant a hostile act by the UN.

23. The issuing of an arrest warrant gives the GoS every pretext it wants for taking action against the UN. Early speculation was that UNAMID would be a likely target, and UNMIS would be less probable, because of the value of UNMIS in guaranteeing the CPA. However, two factors serve to protect UNAMID. One is the African element: the GoS enjoys good relations with the AU and does not want to jeopardize that. The other is that the GoS security strategy in the event of a major threat to regime survival would be to withdraw from most of Darfur, in which case UNAMID would provide a minimum security presence in rural areas that would not be hostile to the GoS. Moreover, the GoS has learned that the factor that most efficiently disables UNAMID is UNAMID's own security rules and procedures, which could easily result in UNAMID evacuating itself irrespective of GoS actions.

24. The UNSG has already instructed his Special Representatives in Sudan to minimize contact with Pres. Bashir. This is an indication that when the arrest warrant is issued, it will become all-but-impossible to transact high level political business with the GoS.

25. The al Bashir case has helped galvanize AU opposition to the ICC. Much of this opposition is self-interested and cynical, but there is also a genuine element, reflecting both the dismay of many African civil society groups at the direction the Court is taking,

and African disappointment at what they see as second-best treatment after early African enthusiasm for the Court. Africa's opposition to the ICC will be extremely damaging to the Court, but will not alter the prospects for the Bashir case in the short run.

26. The AU expects that its anti-ICC position will help protect UNAMID from the repercussions of an arrest warrant. The AU is pressing its plan for a High Level Panel on Darfur and national tribunals with African judges. In the short term, these plans are unlikely to have much impact. In the longer term they could provide the foundation for a face-saver when the GoS and the internationals need to find a way out of the impasse created by the ICC. The AU could also provide mechanisms whereby bilaterals could transact business with Khartoum, when the ICC makes the GoS into a pariah.

Elections

27. The NCP says it is ready for elections. Partly it insists on this is because it does not want to be the one that asks for a delay. But it also is well ahead of the other parties in preparing for the elections. Since Awad al Jaz was moved to the Ministry of Finance earlier this year, a strategy for buying support ahead of the elections has begun to be implemented. This is based upon a division of the country into two areas, the metropolitan provinces (often called the "Hamdi Triangle" after Abdel Rahim Hamdi's leaked document proposing that the NCP focus on the area between Atbara, el Obeid and Sennar to the neglect of the remainder of the country), and the rest. In the inner areas, the NCP is investing in services and infrastructure, while also using its patronage machine. In the peripheries it is using its patronage machine alongside the security services. In Northern Sudan, the NCP would be ready to use the existing civil register as a voters' roll.

28. The NCP would like to hold elections as soon as it can in order to gain legitimacy, both domestically and internationally. It is prepared to contemplate delays, especially if they are delays only in some parts of the country, if the request comes from elsewhere (for example the National Election Commission, the SPLM, or the Chief Mediator for the Darfur conflict). Luka Biong of the GoSS has canvassed the possibility of delay until after the 2009 rainy season. He justified this on the grounds that a debate on election timing was needed. He has certainly succeeded in that aim.

29. While a delay to the elections is the most likely outcome, a rapid election should not be ruled out. The NCP is quite capable of holding rapid elections, perhaps only in Northern Sudan and only for the Presidency and National Assembly, taking the other parties and the international community by surprise.

Elections: Technical Aspects

30. In discussing the mid-term elections, it is important to recall that the rationale for the elections is to endorse the CPA and stabilize the GoNU, rather than function as a transformative act. Neither party at Naivasha initially supported elections during the Interim Period, but they were persuaded by the Troika's argument that only an elected

government would have the legitimacy to be able to hold a referendum on self-determination in the South. The CPA text includes elections in year 3 of the Interim Period but in the Implementation Modalities Protocol this is moved to year 4 (July 2008-July 2009) on the rationale that the implementation timetable was already very crowded. July 2009 is therefore theoretically the last date on which the elections could be held in conformity with the CPA/INC.

31. The preparations needed for the elections are about 15 months behind schedule. The National Elections Commission has yet to be set up. The census has been held late and is open to dispute in many areas. Constituencies need to be identified. The UN technical team in South Sudan estimates that the coming dry season is too short a time to complete the minimum preparation for the election. If everything is implemented promptly and efficiently from now onwards, the best estimate is that elections could be held in January 2010. For political reasons the UN prefers to give December 2009 as its feasible date.

32. The complexity of the voting procedure is a major concern. Southern voters will be choosing candidates for twelve separate lists, Northerners will be choosing eight. About 60% of the electorate will never have voted in a multi-party election, with an even higher percentage in the South never having voted at all. Voter education is important but has hardly begun. UN elections experts joke that they will be able to provide ballot boxes and electoral officers across Southern Sudan, but will people know how to cast their votes?

33. In addition to the direct technical preconditions for holding the election, the National Assembly has yet to pass important legislation that would make it possible to hold free and fair elections. This includes a new Political Parties Act (today the NCP is the only registered party) and a new National Security Act and Public Order Act. The Press and Publications Act passed last year has yet to come into effect.

The Political Context of the Election

34. The elections are overshadowed by the ICC. There is no doubt that Omar al Bashir would win a paltry share of the vote in any free and fair election. Until recently there was a vigorous internal debate within the NCP on the question of who would be the NCP candidate for the 2009 elections. While Bashir was the front-runner it was far from clear that he would win the selection process. But the ICC indictment has strengthened the hand of the army vis-à-vis the NCP civilians. The chance of an alternative candidate for the presidential elections has now vanished. On the insistence of the army, Omar al Bashir will be the sole NCP candidate.

35. The international community has not taken a clear position on elections in Darfur. The issue has been allowed to drift and threatens to become a problem handled at the last moment in a purely tactical manner, as happened with the census. Most of the rebels (including JEM and Abdel Wahid) are not interested in the elections, because they are too weak and poorly organized to contest, and do not trust one another and so fear that their rivals will be bought off by the NCP. Other rebel leaders fear that if half-way credible elections are held then their cause and power base will be undermined.

36. The sole reason why the NCP might consider postponing the elections in Darfur and instead agreeing to an interim arrangement less favourable to it, is the fear that badly-run or discredited elections in Darfur would undermine the legitimacy of the national elections. For this reason it is possible that the NCP would entertain a proposal from the Darfur mediator to postpone the elections there. This proposal would be attractive to the rebels as well.

37. The proximity of the election has obscured the more important date of the referendum on self-determination in Southern Sudan which looms. The date for this is fixed in the CPA for six months before the termination of the Interim Period, i.e. January 2011. If the elections are delayed into 2010, then the rationale for the elections in terms of preparing the way for the Referendum is reduced.

38. Preparations for the Referendum are well behind. Major issues remain to be resolved, including the question of who is eligible to vote, the status of Abyei and the North-South boundary.

39. There is a widespread misunderstanding among Southern Sudanese that a vote for secession in the Referendum will entail immediate separation. In fact, secession is a process and the CPA does not specify how long that process should take, though a strong case can be made that it should take six months, i.e. until the end of the Interim Period. There is also a widespread misconception in South Kordofan and Blue Nile that the ‘popular consultation’ included in the CPA for them is akin to the referendum in Abyei, i.e. it gives them the option of joining the South. It does not, but this fact has not been widely appreciated among the SPLM sympathizers in these states.

40. The NCP strategy is to make the Referendum into a problem for the SPLM. The internal divisions within the SPLM are aiding it. The SPLM cannot come to a decision on unity or separation without facing a very damaging internal split. A showdown was avoided at the Congress in May only by postponing the issue.

A New U.S. Administration

41. The likelihood of an Obama U.S. administration in January also overshadows the calculations of both the NCP and SPLM. Darfur has been mentioned in both the second Presidential debate and the Vice-Presidential debate. On each occasion it has served as a moral reference point for the candidates to establish their credentials in terms of standing against genocide by using force. An administration that includes several of the former Clinton team including Tony Lake, Susan Rice, Gayle Smith and John Prendergast, backed by a commitment by Barack Obama and Joe Biden, looms.

42. Such a new Administration will have very different communications with Khartoum. It is extremely difficult to imagine how any senior Democrats in Washington DC would enjoy the confidence of the NCP leadership in Khartoum, to the modest degree that the

Republicans have achieved. Leading members of the Obama team truly believe that all that is needed is additional pressure, on the grounds that ‘pressure works.’

43. An Obama Administration will also have different communications with Juba. Since the mid-1990s the SPLM has had excellent access in Washington DC. Under the Bush administration, however, the warmth of their endorsement by Congress has been modulated by discreet but frank signals from the Executive that this support is not unconditional. Several times during the last seven years, senior members of the Executive (including, late last year, President Bush) have had to remind the leaders of South Sudan that they cannot expect the U.S. to support an ongoing or renewed war. An Obama Administration may not send that signal.

44. A possible scenario is that an Obama Administration sends a message that it supports the peoples of South Sudan and Darfur against the government in Khartoum, and this signal translates into a calculation by militants in the SPLM that they have a green light for renewing the war. Whereupon the U.S. finds that it does not have a sufficient level of commitment to enter the war, and that former proxies such as Uganda, Eritrea and Ethiopia are unwilling to make the necessary commitment either. Under these circumstances, U.S. policy would revert to trying to salvage a peace agreement, having lost the confidence of both parties.

Implications

45. The ICC has slowed down the Sudanese political process and when the arrest warrant is issued, it may bring Sudanese politics to a complete halt. In particular, cooperation between Khartoum and western nations may cease, both because of a hostile attitude by the GoS and also because of the self-imposed constraints on western governments and the UN. While UNMIS and UNAMID may remain, albeit further constrained, it is not clear whether the CPA could survive under these circumstances. In this context, the position taken by the SPLM leadership on whether to support the CPA and GoNU or to dismantle the GoNU becomes the deciding factor.

46. The electoral process is unlikely to be clean. A combination of technical and political factors make it impossible for free, fair and comprehensive elections to held according to the CPA timetable. The international community has yet to agree the key criteria for recognizing the elections and their outcome. There will be dilemmas of whether to accept sub-standard elections because they help to stabilize the GoNU, and whether to recognize a poll that results in the election of an indicted war criminal as head of state. The continuation of confused, multiple objectives is likely to mean that no objectives are met.

47. The incoming U.S. administration has modest potential for making improvements in the prospects for peace and stability, and runs a risk of deepening the destabilization of Sudan.

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