

Commentary on the Darfur Peace Agreement
(as signed May 5, 2006 in Abuja and as made available on SudanTribune.org)

Comments welcome
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By

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The Darfur Peace Agreement has received remarkably little commentary since the signing on May 5, 2006. The agreement calls for the establishment of a Transitional Darfur Regional Authority (TDRA), a referendum on creating a single state as opposed to the current gerrymandered three states, a process of compensation of victims, a process of reconstruction (and development more generally), a peace and reconciliation dialogue process called the Darfur–Darfur Dialogue and Consultation, and a number of other changes in the structure of power in Darfur and Sudan. The agreement has a detailed section on humanitarian relief and disarming and demobilizing armed forces that will not be discussed here, though certainly they are the most important components of the agreement in terms of immediate relief of human suffering; my focus is on the longer-term power-sharing and wealth-sharing aspects of the agreement.

The centerpiece of the agreement is the Transitional Darfur Regional Authority (TDRA). This entity consists of 10 members, with the possibility of more if the parties agree. The language of the agreement is that the TDRA coordinates, reviews and recommends, and facilitates. The agreement is careful to note that, “The TDRA shall exercise the above functions without prejudice to the constitutional powers and functions of the three states of Darfur.” Since the TDRA has no actual enumerated powers, any broad interpretation of its powers

would be immediately sent to the GoS Presidency. This means basically that one of the warring parties, the National Congress Party of President Omar al-Bashir and Vice president Ali Osman Taha, makes final determinations. The Presidency is supposed to be collegial and consensual among the President and two Vice-Presidents (i.e. with the SPLA), in practice the original idea that the SPLA influences decisions in northern Sudan seems to have evaporated after the death of John Garang. So there would seem not to really have been any power-sharing involved in the Darfur agreement. There is an illusion of power-sharing, and perhaps that is enough to the rebel movements whose power is questionable in any case.

It is worth saying more about the chair of the TDRA. The agreement stipulates in article 8(65) that, “the President shall appoint a Senior Assistant to the President, who shall also be Chairperson of the TDRA, from a list of nominees provided by the SLM/A and the JEM.” Note that the President makes the appointment, and not the presidency. According to the CPA, the Presidency is supposed to operate on the principle of consensus. Involvement by the SPLA seems to have been neatly skirted by changing a “cy” to a “t”. In article 8(66)(e) the Senior Assistant’s nominees for the various Darfur agencies are submitted to the Presidency- we are now back to “cy” when it is lesser appointments.

This Senior Assistant position is clearly the symbol of the power wrested from the NCP by the rebel movements: “The Senior Assistant shall be the fourth ranking member in the Presidency.” But no special powers are given to the Senior Assistant in the Presidency, and the agreement is not clear whether the Senior Assistant has similar powers to the Vice-Presidents. Since the Interim National Constitution does not contemplate any powers in the Presidency for a Senior Assistant (other than mentioning that these positions may be appointed), presumably the Senior Assistant has no formal powers. Indeed, the articles that follow in the agreement enumerate a few powers that the Senior Assistant does have at the level below the Presidency, reinforcing the impression that the Senior Assistant has no powers at the Presidential level. The powers are to be a full member of “the National Council of Ministers, the National Security Council, and the National Planning Council.” The National Council of Ministers are ministers who serve the President (the President has to “consult” the First Vice President in their appointments, and there are formulas for their division in the CPA). The ministers are ‘underneath’ the President, so being a member of their council does not convey any significant power, even if the council can determine some policy by majority vote. The National Security Council is no laughing matter, but its constituting act has not yet been passed by the National Assembly.

The movements also got, “one additional post of Cabinet Minister and two additional posts of State Ministers,” twelve seats in the National Assembly, and more representation in the civil service.

Back in Darfur, the functioning of the TDRA will depend heavily on its relationship to the three state governors, who are also *ex officio* members of the TDRA. Who will these state governors be? Two will continue to be NCP governors, and only one will be from SLM/JEM. In 2008 or 2009, when national elections are held under the Interim National Constitution (INC) the new state governors will likely have different party affiliations, although the importance of holding the elections before the

referendum on unifying the three states is precisely designed to prevent all of the three governors from being anti-NCP.

A referendum will be held after the national elections of 2008. Darfurians would vote on whether to continue with three states or have a single state. If a majority votes for a single state, then a Darfur state constitution would be drafted and presented to the state assemblies. It is possible that one of these assemblies will be controlled by the NCP. In an earlier version of the agreement all three assemblies had to agree on the proposed constitution, in the later version of the agreement that provision seems to have been dropped and there is now vague language of the assemblies sitting in joint session and then the assemblies adopting the proposed constitution (if there is a single assembly, why is it referred to in the plural?).

One final point on powersharing, “Following the national elections, the elected Governors of the three states of Darfur shall present a joint list of three nominees as candidates for the post of Senior Assistant to the President and Chairperson of the TDRA. The President shall appoint from among the candidates presented.” Since one of the states was designed to have an “Arab” majority, this would seem to either lead to paralysis (the three governors do not agree on a joint list, though the language is vague as to whether “joint” means consensus agreement) or to a TDRA head who was picked by the “Arab” state and not the Fur or Masalit constituencies.

At the local government level, according to article 7(62), “Pending elections, six of the local government commissioners and six of the executive directors in Darfur shall be nominees of the Movements.”

At the wealth-sharing level, there are really only two things to remark on. There is a promise to pay the Darfur Reconstruction and Development Fund (DRDF) \$300 million right away, then \$200 million in 2007 and another \$200 million in 2008. This is in addition to the regular regional disbursements that are supposed to be monitored and made equitable under the CPA

(thought still basically unimplemented after 18 months).

More interesting is the absolute ambiguity of the language regarding local livelihoods, which I find particularly striking since the two years of negotiation leading up to the final agreement always seemed to emit rumblings about the importance of land tenure and pastoralist access rights. Should one have expected that a blueprint for reform would have been agreed upon? Possibly. Here is what the agreement calls for. In article 7(63) “Native administration shall have regard, where appropriate, to the established historical and community traditions, customs and practices. Where these are contrary to the provisions of the National or State Constitution or law, the latter shall prevail.” And then later, in article 17(110), “Recognition of traditional rights (including “hawakeer”) and historical rights in land is essential to establish a secure and sustainable basis for livelihood and development in Darfur. This Agreement sets out the mechanisms for recognizing and protecting those rights.” But it turns out that no mechanism is actually set out, and instead the same mechanisms of the CPA are set out. These are vague exhortatory language, “All levels of government shall institute a process to progressively develop and amend the relevant laws to incorporate customary laws, practices, international trends and practices and protect cultural heritage” and state level land commissions that have powers to arbitrate among willing parties and to study issues and make recommendations (in other words, not the proper powers of a land authority). According to article 20(166), “In carrying out its arbitration function, the state Land Commission shall have discretion to entertain applications, and with the consent of the contending parties, may apply traditional and customary law and/or principles of justice and equity. The outcome of the arbitration shall be binding on the contending parties and may be enforced in a court of competent jurisdiction.” Notice that the disputing parties have to consent. The General Agreement on Tariffs and Trade had this kind of language for its dispute resolution mechanisms, and one of the important innovations of the

World Trade Organization (the successor to the GATT) was to instead apply a rule of “negative consent”; both parties had to not like the ruling to invalidate it. Here, if either party anticipates a negative ruling, they go to the judiciary. (You mean the non-existent Darfur judiciary? Exactly.)

There is a school of thought in African politics that says that the content of peace agreements is basically irrelevant, and so no careful attention should be paid to them. This school of thought is ascendant; how else to explain the shocking lack of public commentary on the various peace agreements signed in Sudan. Why is a different matter. Perhaps language like this, from article 28(d) of the Darfur Peace Agreement helps us understand: “The State shall provide maternity, child care and medical care for pregnant women, children in need, persons with special needs and the elderly, in line with regional and international instruments ratified by the GoS.” Does any person of sound mind think that the state in Sudan or Darfur will provide such care? What is the purpose of including such a statement in a peace agreement between military parties? Perhaps only to underscore that the content of the agreement is irrelevant? Should not every pregnant woman in Darfur also get a donkey, with a new saddle, too? Sarcasm is hard to resist. No one can question the aspirational content of the statement: we would all like everyone to have these services. But are peace negotiations the place to have spent time discussing the language of this particular article? And if no time was actually spent discussing the article, why was the language lifted from some United Nations treaty and inserted into this agreement? I should point out that the Agreement does contain important provisions for the protection of women’s rights. For example, Paragraph 3(30)(c): “The death penalty shall not be executed upon pregnant or lactating women except after two years of lactation.” Everyone knows this was one of the major issues leading to the formation of the SLM and JEM, so it is nice to see that it has been resolved. Again, should a peace agreement induce sarcasm? Why were the negotiating parties discussing how the death penalty might apply to pregnant women? Who exactly sat in the room

and offered this as an important article in the peace agreement?

The specificity of inflicting death after two years of lactation on a convicted woman contrasts starkly with the vapidness of some of the more central issues pertinent to a peace agreement. The agreement would seem to contain much language that suggests the immediate incarceration of NCP members, or even the immediate suspension of the NCP. For example, article 3(38)(a) states, "The right to peaceful assembly shall be guaranteed." Oh, really? Just a few sentences later, article 3(38)(c) states, "Every association shall have the right to register and to function as a political party in accordance with the law and in particular if: (i) its membership is open to all Sudanese irrespective of religion, ethnic origin, gender or place of birth, (ii) it has a programme that does not contradict the provisions of the Constitution into which this Agreement shall be incorporated, (iii) it has disclosed transparent sources of funding." Since when has the NCP disclosed transparent sources of funding? Could it ever hope to meet even a minimal version of such a standard? The agreement reads as if many of these same exhortatory clauses contained in the CPA were not routinely violated by the NCP in Khartoum and northern Sudan.

Let me conclude on a note of humility. One of the mysteries of the agreement, for me, was the language scattered here and there, such as in article 12, that "the northern boundaries of Darfur shall return to the positions as of 1 January 1956." Why are the northern boundaries of the region significant? Would not the southern and eastern boundaries be even more important? The southern boundary is presumably handled as part of the process of the CPA, though the language of the Darfur agreement is a little vague. The eastern boundary is not mentioned, while the northern boundary is. The border with Chad and CAR? These are given over to the Government of Sudan to maintain, even though the movements apparently control a fair amount of this territory and some of their fighters will be integrated into the border police. I do not know what this clause means about the northern boundaries, nor do I understand why it is mentioned three times. I am sure many other clauses of the agreement will provoke similar consternation, hence the need for more public discussion. Let me close with one such clause, article 20(161): "The Parties agree that States in which oil or mineral resources are produced shall have the right to negotiate and to be granted the negotiated share of revenue generated there from." Huh?