Dilemmas of Confrontation and Cooperation: Politics in Sudan during Ocampo v Bashir

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Important debates about peace versus justice do not get us very far in understanding what is happening in Sudan after the ICC Prosecutor outlined charges against President Bashir. Sudan, for its entire unrelenting calamity, has frequently exhibited a practice of well-oiled political calculation. To know what lies ahead, it is these calculations that we must focus on. I begin by making the case for Ocampo’s political objectives in boldly seeking justice in the way he has. Well-prepared days before the Prosecutor outlined his charges, Khartoum is employing well-tested strategies of confrontation and cooperation. Similar strategies adopted by those opposed to Bashir and his National Congress (NC) party explain the current state of calm, but also portend the challenges ahead. Justice is indeed having an impact politically, and it may yet turn out to be a positive one.

Any outside actor foraying into Sudan is highly politicised, whatever its business: ‘humanitarians,’ ‘peacemakers,’ and now the ‘justicemaker’. When Khartoum failed to hand over two middle-level indicted suspects and dismissed the ICC, Ocampo first successfully buttressed his mandate with a statement from the UN Security Council in June that all parties in Sudan must ‘cooperate fully with the Court’. He then went for the jugular and ‘command responsibility’: the President; Genocide. Mired by doubts over his ability to deliver the critical successes needed by a nascent ICC, Ocampo has gone for bust. But surely this cannot be because he banks on Bashir’s arrest or surrender following any future indictment? And the genocide charge too is, for reasons most accept, not the easy win option in Darfur.

The risk of nothing happening is high, as Phil Clark explains, but perhaps it is the reward of something not necessarily judicial happening that Ocampo finds tantalising. Has Ocampo wagered that an indictment will be a dam-breaker, possibly in obtaining Khartoum’s cooperation on the two already indicted suspects, but more hopefully in making the ICC a player in conflict management? In a BBC interview on Monday, he was at pains to emphasise that it was the Security Council with its referral that decided that justice was an ‘important component of conflict management’ and ‘genocide management’. Ocampo focused on this, not future legal proceedings: ‘If the judges confirm the charges, I’m sure the Security Council will take the measures to stop the genocide’. Seen from this perspective, even an Article 16 deferral is a possible success: if it prompts international action and comes at a price for Khartoum. Ocampo might well settle for being Bashir’s Damoclean sword for an indefinite period.

If this assessment of Ocampo’s strategy is right, it is risky to play such politics with Khartoum. Bashir’s NC certainly sees Ocampo as a minion in its longstanding battle with a liberal interventionist West. For 19 years, Bashir and company have seen off more potent ‘aggressors’. We can expect a wily mix of confrontation and cooperation that is purposefully contradictory, fits-and-starts-then-fits-again, good-cop bad-cop. It has worked before: humanitarian access, peace talks, peacekeepers, counter-terrorism. Externally and internally, the NC will choose to keep the ICC political, because that is the game it plays best.
Externally, confrontation has been the first line of defence. Already Khartoum has drummed up support against the ICC and for an Article 16 one-year deferral of the Bashir case by the UN Security Council. On Khartoum’s side are the African Union, the Arab League, Russia and China. The strength of this support dilutes any need to cooperate with the Court. Thus, the NC has refused to bite on hints that it could hand over the two indictees as part of a deal on Bashir. This will not change unless the NC feels under far more pressure. A key question is whether the Article 16 debate in the Security Council happens before or after the three trial judges decide about an indictment.

Other, messier avenues for external confrontation play to the fears held by many diplomats and commentators: Vice-President Ali Osman Taha said, ‘Southern Sudan are the first to be harmed by the disruption of the peace implementation if the procedure is engaged to its end’; on the current Abyei dispute, Sudan’s ambassador to the UN said, ‘It will create a very bad situation within the presidency’; a wait-and-see approach by Darfur rebels on peace talks, a senior official predicted, ‘produces a stalemate’. Violence, to civilians or to peacekeepers or humanitarians, looms silently but darkly over all of this.

Internally, so far confrontation has taken the guise of successful reaching out to political adversaries to build united opposition to an indictment of Bashir. And cooperation has focused on showing progress on Darfur and the Comprehensive Peace Agreement (CPA) to demonstrate what is at stake and to expand the divide between the ICC and its detractors. There is a new national unity government initiative for peace in Darfur headed by Saddiq al-Mahdi, former prime minister and opposition Umma party leader. The much-heralded adoption of election laws was timed to be on 14 July, the day Ocampo filed his charges.

So why the level of cooperative support that Bashir enjoys against the ICC from northern opposition parties, and even the southern-based Sudan People’s Liberation Movement (SPLM)? Surely this is a precious chance for them to confront their old foe? Saddiq al-Mahdi, hitherto a vocal supporter of the ICC, has now declared for constitutional stability over justice. The Communists, Democratic Unionists and al-Turabi’s Popular Congress all agree. Northern opposition parties are collectively far more popular than Bashir’s NC but toothless in the face of the latter’s military-security domination. They are banking on elections in 2009 or a new unity government, stubbornly optimistic that the NC may yield its absolute power. A presidential palace besieged by the ICC, they know, will batten down the hatches. Hardliners will dominate decisions, probably given succour by the emboldened belligerence of Darfur rebel groups. When politics gets more violent, these northern opposition parties become less relevant. Mixed with a strong patriotism, to date they have stood behind the state and its president. But they have yet to name their price.

For the SPLM, a Bashir indictment would be a new addition to the ‘can’t live with or without you’ CPA dilemma. Bitterly or not, the NC is their ‘partner’ in the national ‘unity’ government; the sole co-signatory to their precious peace deal. With much to lose, confrontation is not an option. Not yet. Although they talk up the country’s unity, the SPLM is split between secessionists and ‘New Sudanists’. The latter, especially those in northern Sudan frustrated with the CPA, have a lot more to gain by capitalising on NC vulnerability. So far, after heated debates in Juba, the SPLM is backing its partner. Again,
the SPLM will expect the NC to pay up, starting perhaps with resolving the Abyei dispute.

As for the Darfur rebel groups, they have predictably rejoiced with loud support for a possible indictment of Bashir, but so far they have limited themselves to words. JEM won few friends in Sudan or abroad with its recent attack on Khartoum, and right now a repeat effort would be very risky given northern opposition and SPLM support for the NC.

Thus far, things are much calmer than predicted. But we should remember that the trajectory of events in Sudan before 14 July was already dire. The CPA was shaky at best after the Abyei crisis in May. Last week, the NC railed against SPLM secretary-general Pagan Amoum for calling Sudan a ‘failed state’. As for democratisation, the security crackdown on Darfuris after the JEM attack, redoubled attacks of press freedom, a shambolic census and bitter debates over the election laws all boded badly. A peace deal for Darfur was more of a long shot than ever. And the unconfirmed defection of sole rebel signatory Minni Minawi to the ‘bush’ may kill off the Darfur Peace Agreement once and for all.

Vulnerable and distrusted, the NC needs to offer more substantial concessions and guarantees on Darfur, Abyei, and democratisation and reform under the CPA to maintain vital domestic support ahead and beyond any Article 16 decision by the Security Council. Even a one-year deferral puts Bashir in an invidious position come the time of elections next year. Relinquish power and he is exposed to the indictment. Gerrymander the elections and lose important domestic support. Northern opposition parties could decide that justice now trumps stability. Darfur rebels could go for broke, while SPLM ‘New Sudanists’ might resurrect the objective of the Movement’s late founder to take Khartoum. Bashir could dig in and fight but, 20 years on, one wonders whether he has the wherewithal. And a lurking fear would be that some quarters in the NC might decide to sacrifice him.

Bashir’s best option may be accepting an inclusive national agreement that deals him and his lot some kind of enduring role in government and a local reconciliatory version of justice. It will cost him serious reforms and the NC’s relinquishing its absolute hold on power. It would have to bring in the numerous armed Darfur political groups and protect the CPA gains for the southerners. This is improbable and hard to stomach for those in the NC used to a free hand. If an indictment, deferred or not, is considered to have played a role in delivering any of this, Ocampo may yet have cause to argue that his was a job well done. The deterrence effect may flow not only from successful prosecutions but because powerful politicians are forced by international institutions to respond and change their behaviour.

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