

TRANSITIONAL GOVERNMENTS

INTRODUCTION

This chapter identifies the core elements of an agreement establishing a transitional authority through comparative state practice. This chapter also outlines the provisions of the Darfur Peace Agreement related to a transitional authority and provides sample language parties may wish to consider when drafting provisions establishing a transitional authority in Sudan.

Peace agreements often provide for a transitional period before the implementation of the permanent political settlement. Peace agreement provisions creating a transitional government in the conflict region may include: (1) start date for the transition period; (2) end date for the transition period; (3) powers of the transitional government; (4) the structure of the transitional government; (5) the method of selecting members of the transitional government; (6) procedures for the transitional government; (7) specific tasks assigned to the transitional government; (8) legal and administrative continuity; (9) supervisory mechanisms; and (10) the role of the international community.

The 2006 Darfur Peace Agreement (DPA) provides for the establishment of the Transitional Darfur Regional Authority (TDRA). The DPA grants the TDRA authority over the implementation of the DPA in Darfur and general control over the region pending the outcome of the Darfur referendum in 2010.¹ The DPA provides that the TDRA is responsible for reviewing federal government action in Darfur, facilitating communication with the federal government, and establishing security arrangements.²

CORE ELEMENTS

Beginning the Transition Period

Generally, a peace agreement will specify when the transition period and creation of a transitional government will begin. Options include commencing the transition period (1) upon signing of the agreement; (2) on a specific date or after

¹ Darfur Peace Agreement art. 6, para.48, 56, May 5, 2006, *available at* http://www.unmis.org/english/2006Docs/DPA_ABUJA-5-05-06-withSignatures.pdf (last accessed Sept. 28, 2007).

² Darfur Peace Agreement art. 6, para. 53; art. 29, para. 390.

some period following signing of the agreement; or (3) only when certain conditions occur (such as the cessation of hostilities). If the agreement establishes a precondition to the commencement of the transition period, the agreement may specify who shall decide when the triggering condition exists. A “pre-transitional” authority that manages the implementation of the transition, foreign or international organization, or a supervisory institution consisting of both domestic and foreign members may make the decision as to when the state meets the precondition for commencement of the transition period.³

Ending the Transition Period

An agreement may also specify when the transition period will end. States usually provide that a transitional period will end after the satisfaction of some objective condition evidencing the successful transition to a permanent governance structure. These conditions may include holding elections or the adopting a permanent constitution. To prevent a transitional arrangement from becoming a permanent arrangement, an agreement may require that these conditions occur within a specified timeframe.

Most agreements do not specify an end date for the transitional government. Parties may consider, however, including a “penalty-default” in the agreement that would create a permanent arrangement if the transitional government does not create one by a specified time. For example, the Arusha Peace and Reconciliation Agreement for Burundi provided that if the transitional government does not amend or adopt a constitution within twenty-three months of the beginning of the transition period, the supervisory institution overseeing the transition would promulgate a constitution.⁴

Powers

Peace agreements usually provide for the powers of the transitional government. In states that create power-sharing arrangements by creating a federal system of government, parties may delineate which functions belong to the

³ See discussion of Supervisory Mechanisms below.

⁴ Arusha Peace And Reconciliation Agreement For Burundi, Aug. 28, 2000, protocol II, chap. II, art. 15, para. 7 Aug. 28, 2000, *available at* http://www.usip.org/library/pa/burundi/pa_burundi_08282000_pr2ch2.html (last accessed Sept. 24, 2007).

transitional provincial government, and which will remain with the central government.

Structure

A peace agreement may specify which governing institutions will exercise political authority during the transition period. Some agreements provide for the full range of traditional democratic institutions, including a unicameral or bicameral legislature, a head of state, a cabinet, and a constitutional court, in which case the agreement should also allocate all powers and responsibilities among the different institutions.

Selection Method for Members

An agreement may specify the composition and selection method for a transitional government. The challenge associated with doing so, however, is that it may affect the distribution of political power during the transition period. Some agreements, therefore, create a separate institution to select members of transitional government. In Afghanistan, for example, a “Special Independent Commission” selected the members of the provisional Loya Jirga under the guidelines of the agreement.⁵ Another alternative is to name specific individuals to each office, a method used in agreements in both Liberia.⁶ A third alternative is for the agreement to predetermine the political or ethnic composition of the transitional government in order to ensure representation for all groups.⁷ For example, if the agreement delegates the power of appointing members to a governing institution, it might also specify the political or ethnic composition of that institution as a way of limiting the selection body’s discretion.⁸

⁵ Agreement On Provisional Arrangements In Afghanistan Pending The Re-Establishment Of Permanent Government Institutions, art. IV Dec. 5, 2001, *available at* <http://www.washingtonpost.com/wp-srv/world/texts/bonnagreement.html> (last accessed Sept. 23, 2007).

⁶ Abuja Agreement to Supplement the Cotonou and Akosombo Agreements as subsequently clarified by the Accra Agreement, Aug. 19, 1995, part II, sec. A., Aug. 19, 1995.

⁷ For example, an agreement in East Timor limits the number of East Timorese on the Transition Council. Agreement between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor, art. 59(a) May 5, 1999, art. 59(a), *available at* <http://www.un.org/peace/etimor99/civic/aut14-e.htm> (last accessed Sept. 23, 2007). The East Timor Agreement limits the number of East Timorese on the Transition Council.

⁸ Agreement On Provisional Arrangements In Afghanistan Pending The Re-Establishment Of Permanent Government Institutions, art. IV, Dec. 5, 2001.

Procedures

Many agreements contain rules of procedure for transitional governments that include more than one member. For instance, the agreement might require approval by a supermajority before the government can act on certain sensitive matters. In Burundi, the parties agreed to require two-thirds or more of the institution's members to vote for an item before taking action.⁹ In Liberia, on the other hand, the parties did not establish procedures, or delegate to the transitional government the power to determine its own procedures.¹⁰

Specific Tasks

Peace agreements often require the transitional government to carry out specific tasks during the transition period. These usually include organizing elections and/or drafting and adopting a constitution. These tasks might also include: (1) performing a census to prepare for elections;¹¹ (2) establishing or reforming certain institutions (such as a human rights commission or a central bank);¹² (3) appointing local and administrative officials;¹³ (4) obtaining international aid;¹⁴ (5) repatriating refugees;¹⁵ and (6) creating mechanisms for national reconciliation.¹⁶ An agreement may also explicitly require the transitional government to carry out requisite actions for a transition to a permanent settlement to occur or that are too urgent to wait until the end of the transition.

⁹ Arusha Peace And Reconciliation Agreement For Burundi, Aug. 28, 2000, ch. II, art. 15, para. 10, Aug. 28, 2000.

¹⁰ Akosombo Agreement, §A.3, Sept. 12, 1994 (Liberia), *available at* http://www.usip.org/library/pa/liberia/liberia_09121994.html (last accessed Sept. 23, 2007).

¹¹ Interim Agreement for Peace and Self-Government in Kosovo, Feb. 23, 1999, ch. 5, art. IV, para. 3, Feb. 23, 1999, *available at* http://www.usip.org/library/pa/kosovo/kosovo_rambouillet.html (last accessed Sept. 23, 2007).

¹² Agreement On Provisional Arrangements In Afghanistan Pending The Re-Establishment Of Permanent Government Institutions, art. III(C), (Dec. 5, 2001).

¹³ Agreement On Provisional Arrangements In Afghanistan Pending The Re-Establishment Of Permanent Government Institutions, art. III (.C), (, December 5, 2001).

¹⁴ Arusha Peace And Reconciliation Agreement For Burundi, Aug. 28, 2000, protocol II, chap. II, art. 22, para.12 Aug. 28, 2000.

¹⁵ Arusha Peace And Reconciliation Agreement For Burundi, Aug. 28, 2000, protocol II chap. II, art. 18, para. 3 Aug. 28, 2000.

¹⁶ Arusha Peace And Reconciliation Agreement For Burundi, Aug. 28, 2000, protocol II, chap. II, art. 18, para. 2 Aug. 28, 2000.

Legal and Administrative Continuity

A peace agreement will often specify what law will govern matters not addressed in the agreement, and what existing government agencies will continue to function until new government institutions replace them. As applied by Burundi and Kosovo, the agreements provide that all laws and administrative mechanisms existing prior to the agreements remain in effect unless the agreements explicitly repeals them or the transitional or permanent government affirmatively changes them.¹⁷

Supervisory Mechanisms

Parties to peace agreements often create a separate and independent institution to supervise the transitional government and monitor the implementation of the permanent political settlement. As applied in Burundi and Kosovo, this institution can include foreign members, which may help to ensure neutrality.¹⁸

Role of the International Community

Some peace agreements specify what role the international community will play in the transitional government. In Burundi, the Arusha Peace and Reconciliation Agreement generally that members of the international community should advise the transitional government.¹⁹ Alternatively, the Croatian Erdut Agreement gave international players specific roles in the transitional government, and asked them to establish the transitional administration itself.²⁰ The extent of international involvement in the transition usually depends on the level of trust between the parties and on the technical capacity of local officials.

¹⁷ Arusha Peace And Reconciliation Agreement For Burundi, Aug. 28, 2000, Protocol 2, ch. II, art. 16, Aug. 28, 2000; Interim Agreement for Peace and Self-Government in Kosovo, Feb. 23, 1999, ch. 5, art. IV, paras. 4-6, Feb. 23, 1999.

¹⁸ Arusha Peace And Reconciliation Agreement For Burundi, Aug. 28, 2000, Protocol V, art. 3, Aug. 28, 2000; Interim Agreement for Peace and Self-Government in Kosovo, Feb. 23, 1999, ch. 5, art. IV, paras. 4-6, Feb. 23, 1999.

¹⁹ Arusha Peace And Reconciliation Agreement For Burundi, Aug. 28, 2000, Protocol V, art. 7, Aug. 28, 2000.

²⁰ The Erdut Agreement, para. 2, Nov. 12, 1995 (Croatia), *available at* <http://www.reliefweb.int/rw/RWB.NSF/db900SID/MHII-68JC6Z?OpenDocument> (last accessed Sept. 23, 2007).

DARFUR PEACE AGREEMENT

At the national level, the Darfur Peace Agreement (DPA) refers to the Interim National Constitution for the governance of the Sudan. At the regional level in Darfur, the DPA provides that the government of Sudan create a Transitional Darfur Regional Authority (TDRA) upon the signing of the agreement.²¹ The TDRA will remain in power until the outcome of a referendum on the permanent status of Darfur, to occur no later than July 2010.²² If the referendum mandates the creation of a Region of Darfur, the TDRA will create a Constitutional Commission for the formation of the new governmental entity.

The TDRA is composed of the Senior Assistant to the President of Sudan, the Governors of the three Darfur provinces, the heads of a number of Commissions under the DPA, and any other persons agreed to by the parties.²³ The TDRA will have the power to create its own procedures and establish its own budget.²⁴

Beyond the general responsibility for implementing the agreement, the DPA grants the TDRA authority to review recommendations for legislative and executive actions, facilitate communication, reconstruction, and rehabilitation, and communicate with the government of Sudan to promote peace and reconciliation.²⁵ The DPA also provides that the TDRA may undertake any other tasks “as may be agreed upon by the TDRA to promote the objectives of [the DPA].”²⁶

Another important function of the TDRA is the establishment of security arrangements for Darfur.²⁷ Specifically, the DPA tasks the TDRA with the establishment of a Darfur Security Arrangements Implementation Commission (DSAIC), which will act as a subsidiary of the TDRA.²⁸ The DPA provides that DSAIC will make recommendations regarding security and policing to the

²¹ Darfur Peace Agreement, art. 6, para. 48.

²² Darfur Peace Agreement, art. 6, para. 56.

²³ Darfur Peace Agreement, art. 6, para. 50.

²⁴ Darfur Peace Agreement, art. 6, para. 52.

²⁵ Darfur Peace Agreement, art. 6, para. 53.

²⁶ Darfur Peace Agreement, art. 6, para. 53(f).

²⁷ Darfur Peace Agreement, art. 29, para. 390.

²⁸ Darfur Peace Agreement, art. 29, para. 390.

TDRA.²⁹ The DPA requires the Government of Sudan, Sudan Liberation Movement/Army, and the Justice and Equality Movement to implement those security recommendations that the TDRA approves.³⁰ DSAIC recommendations regarding policing will go to the TDRA and regional governments for action.³¹

SAMPLE LANGUAGE

Article XXX

Transition Period

- (1) Immediately following the signing of this Agreement the [Government of Sudan or International Organization or Other Parties] shall establish a [Transitional Authority].³²
- (2) If a majority of votes cast by all Darfurians in the referendum determines that a Region of Darfur should be formed, the [Transitional Authority] shall form a Constitutional Commission to determine the competencies of the Regional Government of Darfur. The Commission shall present for adoption its proposed Constitution to the Assemblies of the three states of Darfur sitting in joint session within [X length of time] of the referendum. The President of the Republic of the Sudan shall then take steps to implement the Constitution as adopted by the Assemblies and any other steps required to establish the region.
- (3) In the event of a majority of votes being cast against the proposal to establish a Region, the structure of three states in Darfur shall be retained and the [Transitional Authority] shall be dissolved, in which case, the elected governments of the three states of Darfur shall assume any remaining function of the [Transitional Authority], in their respective states.³³

OR

- (1) The transition period shall commence from the time that the conditions necessary for installing the transitional Government in accordance with the

²⁹ Darfur Peace Agreement, art. 29, paras 448, 451.

³⁰ Darfur Peace Agreement, art. 29, para. 449.

³¹ Darfur Peace Agreement, art. 29, para. 452.

³² This language is drawn from the Darfur Peace Agreement, para. 48.

³³ This language is drawn from Darfur Peace Agreement, art. 6 paras. 59-60.

applicable instruments have been met, which shall be as soon as possible after three months, and in any event not later than [X length of time], from the date of signature of the Agreement.

- (2) The [Transitional Regional Authority] alone shall determine this date, and may bring it forward if it decides that the necessary conditions exist. Until the transition period commences, all parties shall meet their obligations under the Agreement to establish or co-operate in establishing the agreed legal and institutional framework.
- (3) The [Transitional Regional Authority], established as set forth in [Article XXX], shall be the mechanism for guaranteeing compliance with the Agreement.
- (4) The transition period shall culminate after national elections. The presidential election shall take place after the first democratic election of the legislature. Both elections shall take place within [X amount of time] of the commencement of the transition period.³⁴

OR

There shall be a transitional period of [X months] which may be extended at most to another period of the same duration if so requested by one of the parties.³⁵

Article XXX **Powers of the Transitional Government**

The [Transitional Authority], in which the Darfurians shall be effectively represented, shall serve as the principal instrument for the implementation of this Agreement and for enhancing coordination and cooperation among the three States of Darfur. The [Transitional Authority] shall be a symbol of reconciliation and unity of the people of Darfur and their effort to build a future based on peace and good neighborliness.³⁶

OR

³⁴ This language is drawn from BURUNDI, Arusha Peace And Reconciliation Agreement For Burundi, art.13, Aug. 28, 2000, art.13.

³⁵ This language is drawn from The Erdut Agreement, November 12, 1995 (Croatia, 1995).

³⁶ This language is drawn from Darfur Peace Agreement, art. 6, para. 49.

Upon the official transfer of power, the Transitional Government shall be the repository of the [Region's] sovereignty. The Transitional Government shall be entrusted with the day-to-day conduct of the affairs of [Darfur], and shall have the right to issue decrees for the peace, order, and good government of [Darfur].³⁷

Article XXX

Structure of the Transitional Government

- (1) The [Transitional Authority] shall consist of the following:
 - (a) [insert participating parties here]
 - (b) Others that may be agreed by the Parties.³⁸

OR

There shall be a broadly representative Transitional Council, composed of at least [X number] of Darfurians and [X number] of [other Sudanese group or central government officials]. The Transitional Council shall exercise all legislative and executive powers of the State during the transition period.³⁹

OR

- (1) There shall be a Transitional Legislature made up of a Regional Assembly and a Senate, a Transitional Executive, a Judiciary, and other transitional institutions.
- (2) The constitutional provisions governing the powers, duties and functioning of the transitional Executive, the transitional Legislature and the Judiciary, as well as the rights and duties of citizens and of political parties and associations, shall be as set forth hereunder.

³⁷ This language is drawn from the Agreement On Provisional Arrangements In Afghanistan Pending The Re-Establishment Of Permanent Government Institutions, art. 3, Dec. 5, 2001, art. 3.

³⁸ This language is drawn from Darfur Peace Agreement, art. 6, para. 50.

³⁹ This language is drawn from the Agreement between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor, art. 59, May 5, 1999, art. 59.

- (3) The precise identity of the members of the transitional Executive shall be decided by the transitional Governor and Vice-Governor after consultations with the heads of the parties participating in the transitional Regional Assembly.
- (4) The transitional Governor and Vice-Governor shall determine the initial function of each Minister when allocating the ministries to parties. The transitional Governor and Vice-Governor shall ensure that the minister in charge of [insert function] belongs to a different party from the minister responsible for [the police or other function].
- (5) There shall be a Regional Court possessing the jurisdiction and functions set forth in this Agreement. The Court shall be made up of [X number of] members.⁴⁰

ARTICLE XXX

Procedure for the Transitional Government

- (1) Meetings shall be presided over by the Senior Assistant to the President [or other person as the Parties may agree], and in her/his absence, the Governors of the three Darfur [or other persons as the Parties may agree] states shall preside over the meetings in rotation.
- (2) The [Transitional Authority] shall establish its own rules of procedure, engage such staff it deems necessary to carry out its work and establish a budget for that purpose.
- (3) The [Government of Sudan shall] provide an adequate budget to finance its activities and may establish a special fund to accommodate international donor funds for its programs.⁴¹

OR

- (1) All decisions shall be made based on a simple majority.

⁴⁰ This language is drawn from the Arusha Peace And Reconciliation Agreement For Burundi, art. 15, Aug. 28, 2000, art. 15.

⁴¹ This language is drawn from Darfur Peace Agreement, art. 6, paras. 51-52.

- (2) The [insert name of institution] shall also devise and implement appropriate rules of procedure in respect of its operations, to be signed by all members upon their induction into office.⁴²

Article XXX

Specific Tasks for the Transitional Government

- (1) The Transitional Authority shall exercise the following functions:
 - (a) [specify tasks/functions]
 - (b) Other functions as may be agreed upon by the TDRA to promote the objectives of this Agreement.⁴³

Article XXX

Supervisory Mechanism

- (1) An independent Assessment and Evaluation Commission shall be established during the [insert timeframe] to monitor the implementation of the Agreement.
- (2) The composition of the Assessment and Evaluation Commission shall consist of equal representation from the Parties to this Agreement, and not more than [X number of] representatives, respectively, from each of the following categories:
 - (a) [insert names of participating parties and third party states]
- (3) The Parties shall work with the Commission during the Interim Period with a view to improving the institutions and arrangements created under the Agreement.⁴⁴

⁴² This language is drawn from the Akosombo Agreement, art. 12, (Liberia, Sept. 12, 1994) art. 12.).

⁴³ This language is drawn from Darfur Peace Agreement, art. 6, para. 53.

⁴⁴ This language is drawn from the Machakos Agreement (Sudan, 2002), para 2.4.