



# DOMESTIC ACCOUNTABILITY EFFORTS IN SUDAN

Policy Briefing

MAY 2021

## SUMMARY

1. Following months of protests, Sudan's president Omar al-Bashir was removed from office in April 2019 and replaced by a transitional government. Among other elements, the [agreement](#) which established the transitional government imposes upon Sudan's leaders a constitutional obligation to investigate and prosecute all abuses committed under the al-Bashir regime and during the revolution which led to al-Bashir's overthrow—including gross human rights violations such as torture, extrajudicial killings, and enforced disappearances.
2. Any such efforts are long overdue: under the al-Bashir regime, numerous legislative and institutional failings permitted widespread violations to occur without fear of prosecution or other forms of accountability. A lack of accountability for past crimes has fostered a climate of impunity in Sudan, emboldening continued abuses and playing a destabilising role in Sudan's fragile political transition. A holistic transitional justice process in Sudan must therefore ensure accountability for past violations while closing the legal and institutional gaps which facilitate ongoing abuses. Criminal justice, whether domestic or international, cannot on its own fully satisfy victims of these violations. A range of other, complementary justice measures should therefore be considered and implemented.
3. Sudan's transitional government has taken some important steps towards securing justice for past human rights violations and international crimes in Sudan. Increased cooperation with the International Criminal Court (ICC) evidences a commitment by the transitional government to implementing aspects of the Juba Peace Agreement, and willingness to meet Sudan's international legal obligations. On the domestic front, Sudan's Public Prosecution has established several investigative committees, including committees for the investigation of [missing persons](#) and the events of [3 June 2019](#), and has announced efforts to investigate past abuses in key cases.
4. These are all notable initiatives, which must now be properly implemented. Yet, more is needed. This includes additional progress on the planned justice institutions under the Juba Peace Agreement and Constitutional Charter 2019, and the elimination of remaining legal and institutional obstacles to accountability. To date, the perpetrators of serious human rights violations and international crimes in Sudan have, by and large, not been held accountable, even as human rights violations continue throughout Sudan.
5. Some of the key obstacles to accountability can be overcome through urgent legal reforms. As an immediate priority, such reforms should include the abolishment of any existing immunities provisions which make the prosecution of any members of the security and intelligence forces for human rights violations virtually impossible. Longer-term, organisations and donors seeking to promote domestic justice initiatives must work to build political will for accountability across all bodies of the transitional government, while at the same time addressing the various challenges related to a lack of capacity and the independence of the Sudanese judiciary.
6. These efforts must be sustained and coordinated, and inclusive of Sudanese civil society organisations, domestic judicial and political actors, and international bodies where relevant, such as the ICC. A fragmented approach to domestic justice efforts in Sudan diffuses responsibility for meaningful prosecutions, and may result in “selective justice,” such as prosecutions of only low-ranking perpetrators and not those most responsible for violations.

## RECOMMENDATIONS

7. **To Sudan's transitional government:**

- a) In the context of a broader legal reform process, take urgent steps to remove all immunities and amnesties provided for security forces and other personnel, and any other legal barriers that prevent the effective prosecution of serious human rights violations, including statutes of limitations.
- b) Amend the Criminal Act 1991 and Armed Forces Act 2007 to ensure that the definitions of international crimes, particularly crimes against humanity and war crimes, are consistent with international law, and incorporate command/superior responsibility as modes of liability.
- c) Expedite efforts to establish and operationalise a legal and/or judicial reform commission that is empowered to take binding and supervisory action to ensure the independence and impartiality of the judiciary.
- d) Build capacity for the effective investigation, prosecution and trials of systematic crimes and grave violations of human rights, including through case selection and prioritization to focus when advisable on those bearing the greatest responsibility for past abuses.
- e) Ensure genuine representation of women, members of other marginalised groups, and subject matter experts on topics such as sexual violence in all justice initiatives, including any specialised investigative committees.
- f) Emphasise and reinforce victims' participation in all relevant proceedings and implement the right to effective remedy and to reparation through practical and legal measures.

8. **To the international community of States, international organisations, donors, and international civil society:**

- a) Provide substantial material support, including funding and technical capacity building, to Sudan's justice sector, placing an emphasis on forensic investigations, human rights case-building, and commitment to international human rights standards.
- b) Provide targeted support for the creation of planned justice institutions, including a Special Court for Crimes in Darfur, as well as Sudan's transitional legislative council and constitutional court.
- c) Provide targeted technical support for any ongoing or planned judicial reform efforts, with a view towards ensuring the independence and impartiality of the judiciary.
- d) Call on the transitional government to ensure that all law enforcement agencies, including the security forces, General Intelligence Service (GIS), and armed forces, disclose available evidence related to all grave human rights cases, including ongoing proceedings.
- e) Encourage the ratification of key human rights treaties, including UNCAT, ICPPED and CEDAW, as well as the ratification of the OPCAT, without reservations incompatible with the object and purpose of the treaties; and provide technical assistance when needed to facilitate implementation (including through the process of depositing the required instruments of ratification).

- f) Focus on supporting the Sudanese government in taking concrete practical steps to enable domestic accountability efforts, including critical legislative reforms such as the removal of immunities for perpetrators of human rights abuses within the security sector and amendments to Sudan's criminal code.
- g) Support efforts and initiatives that enable the direct participation of victims and affected communities in the design and implementation of accountability and transitional justice measures.

## BACKGROUND



*Photo credit: Petterik Wiggers/Panos Pictures. A group of female protestors break their Ramadan fast during a mass sit-in outside the Ministry of Defence (2019).*

9. Former Sudanese president Omar al-Bashir's three decades in office were characterised by the widespread use of torture, enforced disappearances, extra-judicial killings, and other serious human rights violations committed as a means to silence critics and maintain control. Common forms of torture and other ill-treatment included sexual violence, electrocution, beatings and mock executions, and protestors across Sudan were often met with excessive—including lethal—force. Many of these violations amounted to international crimes, including crimes against humanity, war crimes, and genocide.
10. Past efforts to prosecute these and other human rights violations in Sudan, including the atrocity crimes committed in Darfur, South Kordofan, and other states, have not been successful. In part, accountability efforts have been hampered by Sudan's [inadequate and discriminatory criminal code](#), which does not properly criminalise many violations, including torture. As this briefing will discuss in greater detail below, other legislative shortcomings, including immunities provisions, have historically ensured that members of Sudan's defence and security forces could not be held accountable.
11. A lack of political will and the absence of an independent judicial system further contributed to entrenching total impunity, particularly for those most responsible for serious crimes. Even high-profile justice initiatives, such as the Special Court on the Events in Darfur (created in 2005), have not resulted in adequate criminal accountability. For example, the Special Court on Darfur did not handle any international crimes; the [only charges](#) related to a large-scale attack on civilians in Darfur, which may have constituted a crime against humanity or war crime, led to convictions for theft.
12. The failure to bring perpetrators at any level to justice has further eroded victims' trust in Sudan's legal system, while the prevailing impunity has permitted the continuation

of serious crimes in Darfur and elsewhere in Sudan, including under the current transitional government. For example, in the months following al-Bashir's removal, government forces, including the Rapid Support Forces (RSF) carried out violent attacks against protestors, which resembled those conducted under al-Bashir. In particular, on [3 June 2019](#), government forces attacked those participating in a sit-in outside of the army headquarters in Khartoum. Several hundred people were killed or severely injured, and dozens of protestors were sexually assaulted or disappeared; some protestors remain unaccounted for. More recently, demonstrators gathering outside of the army headquarters on 11 May 2021 to commemorate the events of 3 June 2019 [were met with live fire and tear gas](#), resulting in the death of at least two protestors and dozens of other injuries. Armed conflict in Darfur in the early months of 2021 is also an echo from Sudan's past.

#### UPDATE: CURRENT EFFORTS

13. Though detractors argue that little progress has been made in this respect, Sudan's transitional government has repeatedly affirmed its commitment to ensuring accountability for past violations to meeting Sudan's international legal obligations. Among other indicators of progress, in the months and years since then-President al-Bashir was removed from office, the transitional government has committed to the creation of a number of justice institutions. These include a planned second iteration of a Special Court on Crimes in Darfur, while [an investigative committee](#) for the 3 June events has been created, as well as committees for the investigation of [missing persons](#), for crimes against humanity, and sexual violence. Other committees continue to be established on an *ad hoc* basis; in April 2021, for example, the Public Prosecution [announced](#) the creation of a committee to investigate the 2018 killing of protestors in al-Gedaref.
14. Sudan's attorney general<sup>1</sup> has confirmed that his office's efforts are focused on (a) violations since 1989; (b) extrajudicial killings and repression of protests; and (c) violations since December 2018, the start of the Sudanese revolution. Investigations of violations in these areas have led to the initiation of several high-profile prosecutions (among the nearly twenty cases that are reportedly underway). These include prosecutions concerning the torture and death of a [doctor](#) in 1990, the killing of unarmed [protestors](#) in 2005 at Port Sudan, the violent breakup of protests against the planned [Kajbar dam](#), and the 1990 [Ramadan incident](#), in which at least 28 army officers were executed without trial following the coup which brought al-Bashir to power.
15. Efforts have been taken to ensure some measure of public participation in at least some of these prosecutions. In the case of [Ahmed al-Khair](#), a public schoolteacher who was tortured and killed by Sudanese security forces and members of the National Intelligence and Security Services (NISS) in February 2019, all proceedings were conducted in an open court and broadcasted through Sudanese media. 29 individuals were convicted and sentenced in al-Khair's case, in the first convictions of their kind – though it should be noted that the implementation of the death penalty in these cases may contravene the prohibition of torture and Sudan's other international obligations. In another milestone, the Public Prosecution announced in late March 2021 the first charges of crimes against humanity under Sudan's criminal code (which was amended

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<sup>1</sup> Attorney General Taj-el-sir el-Hibir (cited in this briefing) has since resigned, and his position has been temporarily filled.

in 2009 to include international crimes, albeit not in complete conformity with international law, as discussed below).

16. The committees established under the Public Prosecution, which are fully authorised to refer cases for prosecution, are separately pursuing a wide range of cases. The Committee for Investigations of Extrajudicial Killings, Violations of Human Rights and Acts that Constitute Crimes under the Criminal Code of 1991 is among the most visible—and the most broadly mandated—of these ad hoc committees. Tasked with investigating any crimes or human rights abuses which occurred between 30 June 1989 (when al-Bashir assumed power) and 11 April 2019 (the date of al-Bashir’s removal from office), the Committee on Extrajudicial Killings handles complaints directly from victims as well as referrals from the Public Prosecution. Other committees established under the Public Prosecution are similarly competent to handle cases, including the 3 June 2019 investigative committee.
17. Members of the Committee on Extrajudicial Killings and the 3 June 2019 committee have separately confirmed that many witnesses and victims have been interviewed in the course of their ongoing investigations, including alleged perpetrators. The head of the 3 June 2019 committee has, for example, stated that testimonies and evidence from [over 3,000 witnesses](#) have been received by his committee; among those interviewed are members of the transitional government—including Lt. Gen. Abdel Fattah al-Burhan and Mohamed Hamdan Daglo (“Hemedti”)—who were summoned before the 3 June committee for questioning in December 2020, and again in April and May 2021. Other committees, such as the committee for the claims of the December 2018 revolution martyrs in Omdurman, have issued [public calls](#) for information, pictures or other testimonial evidence to support their investigations.

#### **ISSUE AREAS: PRIORITIES FOR REFORM AND ATTENTION**

18. The efforts just described are commendable, and it should be recognised that any justice initiatives take time to develop and yield results, particularly given the scope of violations committed in Sudan. Emerging from three decades under the al-Bashir regime, Sudan’s transitional government is tasked with creating and amending laws and institutions, providing professional and adequately trained justice sector staff, and delivering accountability—all at the same time. This is not an easy task and is one complicated by several key legal and institutional obstacles, as highlighted by the experiences of the Public Prosecution and investigative committees to date. The following section outlines these obstacles and suggests steps needed to close the accountability gap.

#### **Evidentiary challenges**

19. A lack of documentation, and limited access to witnesses, including victims, is a primary challenge. For example, though its jurisdiction extends to 2019, most of the roughly 50 claims now before the Committee on Extrajudicial Killings concern crimes committed by members of the security forces between November 1989 and 1995. In the thirty years since the underlying events, most, if not all, documentation has disappeared; consequently, direct testimony from witnesses constitutes the majority of evidence collected. This is a time-consuming, expensive, and difficult endeavour in a context where witnesses are hard to identify and locate, and where they may have safety or security concerns regarding testifying in criminal proceedings.

20. Other forensic challenges are equally pressing. In some cases, mass graves have yet to be identified, while the exhumation of known mass graves—some of which date back 20 years—requires significant forensic documentation and capacity. Sudan’s attorney general has issued orders to conduct autopsies and develop DNA profiles for all bodies discovered, according to the standards set out by the International Commission on Missing Persons.
21. Beyond these technical issues, difficulty in accessing information continues to hinder the ability of investigators to move forward with prosecutions. In many cases, perpetrators of serious crimes and human rights abuses in Sudan were members of the security or armed forces, police, or intelligence services. Though these law enforcement and security agencies are obligated to disclose evidence when requested, securing evidence from the relevant bodies has proven [challenging in practice](#), as noted by Sudan’s attorney general.

**Recommendation:** *Call on the transitional government to ensure that all law enforcement agencies, including the security forces, GIS, and armed forces, disclose available evidence related to all grave human rights cases, including ongoing proceedings.*

#### **Lack of capacity**

22. As indicated above, many of the investigations and prosecutions necessitated by the serious crimes committed in Sudan under al-Bashir and since the revolution require significant technical capacity. However, systematic issues—many of which are a by-product of Bashir-era neglect and disinvestment—continue to affect the ability of Sudanese justice sector actors to implement the full range of needed accountability measures.
23. First, both the Public Prosecution and courts in Sudan are severely understaffed. Roughly three-quarters of all justice sector positions are unfilled. A shortage of qualified legal professionals throughout the justice sector hampers efforts to tackle the requisite accountability initiatives comprehensively and strategically. Similarly, it should also be noted that the Public Prosecution’s limited enforcement capabilities constrain its ability to ensure that individuals charged with crimes are actually arrested and prosecuted.
24. Further, prosecutors, lawyers and judges lack experience in conducting large-scale investigations and prosecuting serious human rights violations and international crimes. Legal professionals across the board need training and technical support to strengthen national capacity to investigate these cases and trace complex patterns of crime to the necessary legal standard. Any such trainings should include, among other topics, information on witness protection and other fair trial protections (e.g., ensuring that witnesses are not subject to reprisals), standards for the investigation and prosecution of international crimes, and issues related to gender- and victim-sensitivity and harm reduction.
25. Any capacity building efforts must be also attentive to issues of representation, and inclusive of women, members of other marginalised groups, and experts on issues such as sexual violence. Some of the committees that have already been created lack such representation, including the 3 June investigative committee, though women were targets of significant violence on 3 June 2019. This should be remedied; ensuring genuinely independent, impartial and thorough investigation requires adequate representation at all levels, including within the judiciary and Public Prosecution.

**Recommendation:** *Provide substantial material support, including funding and technical capacity building, to Sudan's justice sector, placing an emphasis on forensic investigations, human rights case-building, and international human rights standards.*

26. Separately, it is essential to ensure the independence of the judiciary. Once operational, a planned legal reform commission will be tasked with the reformulation of the justice system—including the judiciary, Ministry of Justice and Public Prosecution, and Sudan's bar association. Past judicial reform efforts have not succeeded in Sudan, in part because previous commissions, such as the National Judicial Service Commission (established after the 2005 signing of the Comprehensive Peace Agreement), were not mandated to do more than adopting the judiciary's budget. Any new iteration of a legal and judicial reform commission must be authorised to take and enforce meaningful decisions, including as related to the removal of corrupt judges or those who lack impartiality.

**Recommendation:** *Provide targeted technical support for any ongoing or planned judicial reform efforts, with a view towards ensuring the independence and impartiality of the judiciary.*

### **Legal shortcomings**

#### *Immunities*

27. Historically, members of the Sudanese Armed Forces (SAF), police, and the General Intelligence Service (GIS) have been afforded broad immunities through the Armed Forces Act 2007, the Police Act 2008, and the National Security Act 2010. These immunities are incompatible with the duty to investigate and prosecute serious human rights violations and the right to an effective remedy because they effectively bar victims of torture and other human rights violations from claiming compensation and/or other forms of reparation.
28. In July 2020, Sudan's transitional government removed Article 52 of the NSA 2010, abolishing some of the immunities enjoyed by members of NISS (now known as the General Intelligence Service, or GIS). Still, immunity remains one of the biggest obstacles to justice in Sudan. In particular, the Armed Forces Act 2007 and Police Act 2008 retain provisions granting individuals immunity from prosecution unless approval is granted by higher-level officials through internal processes. Consequently, though investigations into human rights violations such as torture are carried out by the Attorney General, only the director of the respective security force may authorise the lifting of immunity in response to a request from the Public Prosecution.
29. In recent cases, the security and regular forces have not responded to requests by the Public Prosecution to waive immunities, making the investigation and prosecution of any cases of torture, ill-treatment and other human rights violations functionally impossible. Further, despite the July 2020 amendments to the National Security Act, GIS agents continue to enjoy broad immunities. To date, though Sudan's attorney general has stated that this issue has been raised before both the Sovereign Council and the Council of Ministers, no meaningful progress has been made towards the lifting of immunities in most cases.

30. To address this obstacle to justice, Sudan's transitional government should remove immunities altogether; short of that, the authority to lift immunities should be removed from the security forces and other law enforcement agencies, and the transitional government should instead implement a process for judicial authorisation and review of any decision on immunities. The NSA, Armed Forces Act, Police Act, and laws governing the conduct of the RSF should also be amended accordingly. Any other obstacles to investigations or prosecutions of crimes, such as the [November 2020 amnesty decree](#) or statute of limitations provisions, should similarly be scrutinised and amended as necessary to comply with Sudan's international human rights obligations.

**Recommendation:** *In the context of a broader legal reform process, take urgent steps to lift all immunities for security forces and other personnel, and any other legal barriers providing protection from prosecution.*

#### *Sudan's criminal code and retroactivity*

31. In addition to the immunities provisions discussed above, Sudanese criminal law is not in full conformity with the applicable international legal standards. Meaningful prosecution of international crimes will require overcoming these shortcomings as well as the other substantive and procedural legal obstacles.
32. Though genocide, war crimes, and crimes against humanity were added to the Criminal Act 1991 [in a 2009 amendment](#), as codified their definitions do not cover all internationally recognised elements of the respective crimes. For example, though Article 186 of the Criminal Act 1991 as amended includes a substantial list of gender-based crimes, the definition of rape as a crime against humanity does not include all acts of penetration. Similarly, "genocide" as defined in the Criminal Act sets an even higher threshold for the prosecution of the crime of genocide under Sudanese national criminal law than under international law—making prosecution of the crime of genocide exceedingly difficult.
33. Further, Sudan's criminal law does not include several essential international criminal law principles, including provisions establishing criminal liability on the grounds of command or superior responsibility. These are well-established modes of criminal liability in international criminal law that impose obligations on commanders and superiors to prevent crimes—and does not allow them to avoid responsibility for serious crimes committed by their subordinates. In the same way, Sudanese law does not recognise an explicit right to reparation or effective remedy for victims of international crimes or other serious human rights or humanitarian law violations, and does not fully criminalise torture in line with international standards, despite some July 2020 [legal amendments](#) which strengthened protections against torture.
34. Any amendments to Sudan's criminal code are of particular importance in ensuring accountability for future violations. As Sudan's attorney general has stated, however, the principle of non-retroactivity, as enshrined in the Criminal Procedure Act 1991, may preclude certain crimes from being prosecuted. For example, many of the gravest violations committed in Sudan (such as crimes committed in Darfur in the early 2000s) occurred before international crimes were incorporated into Sudan's criminal code; the Public Prosecution has therefore taken the position that any such offences committed before 2009 cannot be prosecuted as crimes against humanity, genocide, or war crimes.
35. This is notwithstanding the exception recognised in Article 15(2) of the International Covenant on Civil and Political Rights to which Sudan is a party, according to which the

principle of non-retroactivity shall not “prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

**Recommendation:** *Amend the Criminal Act 1991 and Armed Forces Act 2007 to ensure that the definitions of international crimes, particularly crimes against humanity and war crimes, are consistent with international law, and add command/superior responsibility as modes of liability.*

#### **Fragmented approach to justice**

36. Finally, the fragmentation of accountability efforts in Sudan is an overarching concern. Given the wide-ranging nature of historic and ongoing violations in Sudan—including torture, targeting of civilians in arenas of armed conflict, and sexual- and gender-based violence—it is important that any accountability efforts are comprehensive and coordinated. A fragmented approach to justice increases the risk of duplication of efforts and reduces capacity for delivery of key activities, such as complex investigations of systemic crimes. For example, competing or overlapping priorities, mandates, or jurisdictions between different actors within the accountability sphere can make coordination difficult, and can strain already-limited resources. Equally, the diffusion of responsibility across a variety of domestic bodies, including *ad hoc* investigative committees, may result in a piecemeal approach to accountability that fails to address the needs of victims or is viewed publicly as achieving only “selective justice” along political lines.
37. For this reason, it is important to ensure both overall coherence within the Public Prosecution and in terms of broader accountability. As a first step, it is essential to understand the full range of actors working on justice initiatives in Sudan, and the specific challenges they face—above and beyond those outlined in this briefing. From this starting point, Sudan’s transitional government, with the support of international donors and civil society organisations, can develop and implement a programme of work aimed at (a) **preventing** ongoing abuses; (b) **protecting** past victims and marginalised groups; and (c) **prosecuting** perpetrators at all levels. Taking a holistic approach that balances prevention, protection and prosecution is best suited to deliver a form of progressive accountability which both develops the capacity and legitimacy of Sudan’s institutions—preventing future violations—while delivering criminal accountability in the most serious cases.

Front cover photo credit: Mahmoud Hjaj/Anadolu Agency via Getty Images. A relative gestures as families take part in a sit-in on Nile Street in the Sudanese capital Khartoum, to pay tribute to killed anti-regime demonstrators (3 January 2021).

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