
**Research
Paper**

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SUDAN'S DEMOCRATIC TRANSITION ON LIFE SUPPORT

Ensuring democratic governance by
strengthening human rights protection
and combating impunity

REDRESS and the SOAS Centre for Human Rights Law



Contents

Recommendations	3
The uncertain future of Sudan's democratic transition	4
Sudan's unhappy experience with coups	9
Remedying the illegality of Sudan's coup	16
Human rights violations are absolutely disqualifying	23
The way forward	31

Recommendations

- The cyclical nature of Sudan’s post-independence, post-coup politics is closely linked to the absence of respect for the rule of law, human rights protections and justice for past violations, and the unconstitutional nature of the transfer of power which has occurred since 25 October 2021. Addressing these factors has—or should have—real implications for any solution to the current crisis in Sudan. An unequivocal finding to that end is that the military should not play a continued role in any democratic transformation in Sudan.
- Resolving the ongoing political crisis in Sudan requires a concerted, effective use of diplomatic and human rights tools to prevent further violations, combat impunity for past violations and ensure their non-repetition.
- As an immediate priority, all States should apply targeted sanctions against those individuals and entities most responsible for ongoing systematic, widespread human rights violations, all of which undoubtedly fall within the scope of the available human rights sanctions regimes.
- States and other international actors concerned about the future of Sudan must recognise that attaining the goals of accountability, legislative and institutional reforms requires viewing transitional justice objectives as a top-line priority, rather than a bolt-on to economic reforms, however important those are. The *realpolitik* delaying of justice imperatives, whether to facilitate economic reforms or not, is a familiar tactic used by the Sudanese military and security apparatus to reinforce its power. Efforts must be made to assure the Sudanese public that justice has not once again been set aside as negotiations proceed concerning a political transition. This includes a clear commitment that a public account of the military authorities’ responsibility for serious human rights violations is forthcoming.
- Political mediations which are ongoing at the time of writing must be inclusive, transparent, and participatory. To this end, viewpoints solicited through closed consultations should be attributed to stakeholders to the extent possible while ensuring the safety of participations. Mediators should avoid drawing a false equivalency between military and security leaders and civilian counterparts. In light of these considerations, a process involving an element of open public consultation (similar to those currently underway *vis-à-vis* the resistance committees) would be better suited to bolster the public acceptance and legitimacy of the joint UNITAMS-AU-IGAD intervention.
- Taking this approach will allow the Sudanese public to contribute more effectively to ongoing political processes and, in turn, enable mediators to gauge the full range of public preferences in Sudan on how to address fundamental questions about the nature of Sudan’s democratic transition and legal system. Increased transparency may also help to counter the assumed dominance of military and security interests in exerting influence on the political process; at the very least, overall transparency would better display a balance of structural and political interests for public consideration and analysis.

The uncertain future of Sudan's democratic transition

Serious human rights violations committed by military and security forces have brought Sudan's democratic transition to a halt

The end of Omar al-Bashir's three-decade rule in April 2019 after months of peaceful protests ushered in the opportunity for unprecedented human rights and political reforms in Sudan. The transitional government established by an August 2019 political agreement was an important milestone and, despite facing considerable obstacles, Sudan's civilian leadership made important inroads in key areas, including on stabilising Sudan's economy. Though still fragile, Sudan's transition was seen as a model of democratic renewal for other countries in the Horn of Africa and elsewhere.

The military's seizure of power brought Sudan's transition to a screeching halt. In the small hours of 25 October 2021, unidentified Sudanese security forces arrested then-prime minister Abdalla Hamdok at his home, along with several other prominent civilian members of the transitional government.¹ Shortly after noon on the same day, General Abdel Fattah al-Burhan, the head of the Sudan Armed Forces (SAF) and chairman of the Sovereign Council,² appeared on Sudanese television to announce, among other items, the imposition of a nationwide state of emergency and the repeal of some selected articles of the Constitutional Charter for the 2019 Transitional Period as amended in 2020 (hereinafter referred to as the "Constitutional Document") providing for a joint civilian-military government.³

The coup precipitated an ongoing crisis characterised by serious human rights violations that has been condemned worldwide. Security forces rapidly embarked on a campaign of mass

1 Al Jazeera, "Sudan security forces arrest PM Abdalla Hamdok, ministers," 25 October 2021, available at: <https://www.aljazeera.com/news/2021/10/25/sudans-abdalla-hamdok-under-arrest-report>.

2 The Sovereign Council was, pursuant to article 10 of the Constitutional Document, composed of 5 civilian members selected by the Forces of Freedom and Change, 5 military members selected by the Transitional Military Council, and one additional civilian member selected by agreement between the FFC and TMC.

3 Abdel Fattah al-Burhan, YouTube, 25 أكتوبر 2021، <https://www.youtube.com/watch?v=4mWl2JnVjSs>. Al-Burhan also announced the removal of all *walis* (regional governors) and the dissolution of the Empowerment Removal Committee, a body established to seize the assets of Bashir-era regime leaders.

arrests and detentions,⁴ and repeatedly used excessive and lethal force against unarmed protestors, as documented in many statements and reports.⁵

On 21 November 2021, after four weeks in house arrest, Abdalla Hamdok signed a political agreement with al-Burhan, effecting his reinstatement as prime minister. The 14-point agreement provided, inter alia, for the release of political detainees and called for investigations into violence against protestors since the coup.⁶ However, it was widely seen as an attempt to legitimate the coup, and hence rejected by the Forces of Freedom and Change (FFC) and key grassroots constituencies, including the neighborhood resistance committees that have played a leading role in organising peaceful protests.⁷

In discussions with REDRESS at the time of the agreement, Sudanese activists and analysts noted that Hamdok was likely motivated to sign the agreement to avoid further violence, particularly in light of protests that had been announced, including for the same day (21 November 2021) and 23 November 2021. Reports from Sudan showed that grassroots groups had begun organising community blood banks in the days before the protests, preparing for serious injuries at the hands of the security forces.⁸ Indeed, evidencing the ongoing risk to protestors, even as the agreement was being signed, a 16-year-old protestor was shot in the head and killed in Omdurman,⁹ while security forces fired tear gas inside the Khartoum Teaching Hospital and throughout the city.¹⁰

Despite some indications that Hamdok had subsequently regained the ability to constrain the military's activities in the political sphere, including an announced freeze on all political appointments made after the military takeover, he publicly offered his resignation on 2 January

4 See REDRESS, Darfur Bar Association, PLACE, and the Emergency Lawyers Group, "'Taken from Khartoum's Streets': Arbitrary arrests, incommunicado detentions, and enforced disappearances under Sudan's emergency laws," March 2022, available at: <https://redress.org/news/new-joint-briefing-highlights-ongoing-arbitrary-arrests-and-enforced-disappearances-in-sudan/>.

5 See, for e.g., Human Rights Watch, "Sudan: Security Forces Use Lethal Force on Protestors," 23 November 2021, available at: <https://www.hrw.org/news/2021/11/23/sudan-security-forces-use-lethal-force-protesters>; see also Office of the United Nations High Commissioner for Human Rights, "Sudan: UN expert deplores deadly military response to protests," 2 November 2021, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27752&LangID=E>; Office of the United Nations High Commissioner for Human Rights, "Oral update on the situation of human rights in the Sudan," 7 March 2022, available at: <https://www.ohchr.org/en/statements/2022/03/oral-update-situation-human-rights-sudan>.

6 Political (Declaration) Agreement, 21 November 2021, available at: <https://redress.org/wp-content/uploads/2021/11/Political-Agreement-21-Nov-2021.pdf> (unofficial translation by International IDEA).

7 See, for e.g., Reuters, "Sudan opposition group says it does not recognise deal with military," 21 November 2021, available at: <https://www.reuters.com/article/sudan-politics-coalition-idAFC6N2RK029>; see also Sudanese Professionals Association, Twitter, 21 November 2021, available at: <https://twitter.com/AssociationSd/status/1462426710335533058>.

8 Taha Hussein, Twitter, 22 November 2021, available at: https://twitter.com/6a7a_hussein/status/1462797233804521474?s=20.

9 Central Committee of Sudanese Doctors, Twitter, 21 November 2021, available at: https://twitter.com/SD_DOCTORS/status/1462461216698380297.

10 Central Committee of Sudanese Doctors, Twitter, 21 November 2021, available at: https://twitter.com/SD_DOCTORS/status/1462445049053171721. See also Reuters, "Sudanese medics shaken by attacks on hospitals treating anti-coup protestors," 11 January 2022, available at: <https://www.reuters.com/world/africa/sudanese-medics-shaken-by-attacks-hospitals-treating-anti-coup-protesters-2022-01-11/>.

2022.¹¹ Some indicated that Hamdok resigned after it became clear that the military had no intention of keeping its side of the political non-interference bargain.¹² The Sovereign Council's decision to restore the General Intelligence Service's authority to arrest and detain individuals, conduct searches and seizures, and prohibit or regulate the movement of people—announced in the last week of a tumultuous 2021—may have been the decisive factor for Hamdok's decision, though he has not publicly commented on this.¹³ The highly symbolic nature of vesting the General Intelligence Service (GIS) with far-reaching powers cannot be underestimated,¹⁴ considering that its predecessor, the National Intelligence and Security Service (NISS), had been notorious for its recourse to torture and other serious human rights violations.¹⁵

If the notion of consensus were to be taken seriously, it is difficult to envisage any return to the pre-coup political formulation: a joint civilian-military transitional government, albeit ostensibly “civilian-led”.

Hamdok's resignation marked the end of the process of democratic transition which began in August 2019 with the signing of the Constitutional Document. In practical terms, the immediate dilemma of who will appoint his replacement awaits resolution. Per the provisions of the Constitutional Document 2019, the FFC have the power to choose the prime minister in the event the position becomes vacant.¹⁶ However, the FFC remain in a state of disarray. The Transitional Legislative Council (TLC) may have the authority to select a prime minister, though the terms of the Constitutional Document 2019 are less clear on this point, in light of provisions stating that “[i]n the event the position of Prime Minister is vacant before the Transitional Legislative Council, the Prime Minister is appointed in accordance with the initial appointment procedure.”¹⁷ Given that the TLC has not been created, appointment of a prime minister should thus still fall within the remit of the FFC. With no credible civilian leadership remaining in the transitional government, however, the Constitutional Declaration 2019 has de facto ceased to be operational. Any unilateral decision by the military to appoint a civilian figurehead as prime minister would constitute a clear breach of the Constitutional Document, which is based on a delicate power-sharing arrangement whose ultimate objective is the transition to full civilian rule.

11 Abdalla Hamdok, Twitter, 2 January 2022, available at: <https://twitter.com/sudanpmhamdok/status/1477738836088299526?s=21>; see also BBC, “Sudan coup: Prime Minister Abdalla Hamdok resigns after mass protests,” 3 January 2022, available at <https://www.bbc.com/news/world-africa-59855246>.

12 BBC, “Sudan coup: Prime Minister Abdalla Hamdok resigns after mass protests,” 3 January 2022, available at <https://www.bbc.com/news/world-africa-59855246>.

13 Sudan Tribune, “Sudan's GIS gets temporary power to arrest civilians,” 27 December 2021, available at: <https://sudantribune.com/article253483/>.

14 Emergency Decree No. 3 (2021), available at: <https://redress.org/wp-content/uploads/2022/03/Emergency-Decree-No-3-2021.pdf>. The decree, issued under the state of emergency declared by al-Burhan on 25 October 2021, also grants immunity to GIS agents, reversing one of the major achievements of the democratic transition to-date.

15 See, for e.g., REDRESS, *A Way Forward? Anti-torture reforms in Sudan in the post-Bashir era*, December 2019, available at: <https://redress.org/news/a-way-forward-acjps-and-redress-report-provides-a-roadmap-for-eradicating-torture-in-the-post-bashir-era/>; see also Amnesty International, *Sudan: Agents of Fear: The National Security Service in Sudan*, 19 July 2010, available at: <https://www.amnesty.org/en/documents/afr54/010/2010/en/>.

16 Constitutional Document 2019, Article 18(3); see also Article 12(1)(a).

17 Constitutional Document 2019, Art. 18(3).

Looming larger over the vacant prime minister's seat, however, is an existential question for the Constitutional Document and, by extension, Sudan's democratic transition. International actors have not been entirely clear on the next steps. In a 20 January 2022 readout, for example, the US government reiterated its commitment to "the establishment of a civilian-led government based upon consensus."¹⁸ If the notion of consensus were to be taken seriously, it is difficult to envisage any return to the pre-coup political formulation: a joint civilian-military transitional government, albeit ostensibly "civilian-led."

Since the coup, resistance committees¹⁹ across Sudan have set out three demands: "no negotiation, no partnership, and no legitimacy" with the military. These resistance committees, which have mobilised hundreds of thousands of protestors across Sudan²⁰ – organised through localised *tansiqiyyat* (coordination) units – have in recent months begun articulating formal political charters for a second phase of Sudan's democratic transition. Made available by several resistance committees for public comment and debate,²¹ the political charters published so far differ in the details but are clear on one key point: that there should be no continued role for the military to play in Sudan's democratic transition, and that human rights reforms and institutional reform of Sudan's security and military sector, including the RSF, must be centred in any future political processes.

Indeed, as this paper outlines, four factors counsel against the continued involvement of the military in any democratic transformation in Sudan. The first factor is that it is antithetical to the prioritisation of accountability, respect for human rights, and legal reform as the primary means of ending the cycle of political repression, impunity and instability in Sudan. The second is historical, rooted in the Sudanese experience of post-coup consultations and political reconfigurations, including most recently following al-Bashir's ouster. The third is primarily legal: that Sudan's military has abrogated its domestic, regional and international legal obligations (and has thereby forfeited any trust in its willingness and ability to fulfil these obligations). And the fourth is the military's calculated campaign of human rights violations since the coup, intended to suppress objections to its seizure of power, which has marked it as deeply undemocratic and not acting in the wider public's interest.

18 US Embassy Khartoum, Twitter, 20 January 2022, available at: <https://twitter.com/USEmbassyKRT/status/1484152541667549184>.

19 As Muzan Alneel notes, neighbourhood resistance committees are "grassroots organizations with extended origins in Sudan's modern political history going back to the 1990s. They were revived and prompted via a call in a public statement from the Sudanese Professionals Association (SPA), the association that led the protests of 2019-2019," ultimately resulting in former president Omar al-Bashir's ouster from office. See Tahrir Institute for Middle East Policy, "Resistance Committees: The Specters Organizing Sudan's Protests," 26 November 2021, available at: <https://timep.org/explainers/resistance-committees-the-specters-organizing-sudans-protests/>.

20 Resistance committees and "the street" – a commonly-used term for the broad-based coalition of citizen protestors, labour unions, youth and women's groups, student movements, professional associations, academic institutions and other grassroots initiatives – have both propelled Sudan's resistance movement. See, for e.g., Tahrir Institute for Middle East Policy, "Including the Sudanese Street in Political Processes," 20 December 2021, available at: <https://timep.org/commentary/analysis/including-the-sudanese-street-in-political-processes/>; see also CMI, "The role of local resistance committees in Sudan's transitional period," 2021, available at: <https://www.cmi.no/publications/7920-the-role-of-local-resistance-committees-in-sudans-transitional-period>.

21 See, for e.g., Khartoum State Resistance Committees, "Proposal for a Charter to Establish the Authority of the People," available at: <https://redress.org/wp-content/uploads/2022/03/Khartoum-Resistance-Committees-Political-Charter.pdf>; see also, for e.g., Madani Resistance Committee, "Political Declaration," available at: <https://redress.org/wp-content/uploads/2022/03/مذكرة-الإعلان-السياسي-للجان-مقاومة-مدني.pdf>.

This paper analyses these factors in turn, with the first constituting an overarching, cross-cutting theme, before concluding with proposals for what an agenda for human rights protection and strengthening of rule of law and democracy in Sudan should entail. Thus far, international actors have proven unwilling to take the decisive actions required to influence events in Sudan, both by ensuring human rights protection and a return to civilian-led rule. Resolving the ongoing crisis in Sudan requires a concerted, effective use of diplomatic and human rights tools to prevent further violations, combat impunity for past violations and ensure their non-repetition. Such measures are also a critical means for a genuine and lasting transition towards a democratic Sudan, which needs to prioritise addressing deep-rooted legacies of abuse of power and impunity over resort to short-term measures.

Sudan's unhappy experience with coups

If history is any indication, without a strategic change in approach, post-coup political or legal adjustments will benefit Sudan's military

Military coups have marred Sudan's history. Most notably, they brought to an end three fledgling attempts at democratic transition, in 1958, 1969, and 1985.²² Since Sudan gained its independence on 1 January 1956, at least 17 serious coup attempts have been mounted by various elements within the country's military and security apparatus, three of which have ushered into power military regimes.²³

The cyclical nature of Sudan's post-independence, post-coup politics is closely linked to the absence of the rule of law, human rights protection and justice for past violations. As journalist Richard Cockett noted in 2016, "[f]rom the very beginning . . . Sudan lapsed into a familiar cycle: unstable, democratically elected coalitions would become weak, chaotic and unworkable, only to be swept away by military-led coups in league with one of the main political factions, acting in the name of law and order."²⁴ In this pattern, "[t]he new military ruler was accepted at first, but in his turn became overbearing, dictatorial and unpopular," and subsequently "overthrown by a popular uprising that returned the country to democracy again."²⁵ This cycle has repeated itself up to the present day: Omar al-Bashir who came to power by a coup in 1989 was replaced first by a Transitional Military Council in 2019, followed by the joint civilian-military government, and most recently by a de facto military government. In contrast to Cockett's account, the latest regime has had no popular acceptance whatsoever, as it was vigorously opposed from the very day of the coup. Even now, rumors of divisions among Sudan's military and security leaders continue to circulate, raising the spectre of a coup-against-the-coup.²⁶

22 See, for e.g., W.J. Berridge, *Civil Uprisings in Modern Sudan* (Bloomsbury Academic 2015).

23 A complete analysis of the historical and geographic factors which have contributed to Sudan's political fragility is beyond the scope of this paper. There is no doubt, though, that attention must be paid to uneven patterns of development across the country, regional dynamics and international interventions, and ethnic and religious differences which have been amongst the factors contributing to instability and conflict. For an analysis of the link between these factors and human rights, see Lutz Oette, 'Power, Conflict and Human Rights in Sudan' in Lutz Oette and Mohamed Abdelsalam Babiker (eds), *Constitution-Making and Human Rights in the Sudans* (Routledge 2019) 15-40.

24 Richard Cockett, *Sudan: The Failure and Division of an African State* (Yale University Press, 2016) 59.

25 *Ibid.*

26 See, for e.g. Alarby, "Al-Burhan reaches Cairo for his fear of a coup arranged by Hemeti and external parties" 24 February 2022, available at: <https://www.alaraby.co.uk/politics/%D8%A7%D9%84%D8%A8%D8%B1%D9%87%D8%A7%D9%86-%D9%8A%D8%A8%D9%84%D8%BA-%D8%A7%D9%84%D9%82%D8%A7%D9%87%D8%B1%D8%A9-%D8%AE%D8%B4%D9%8A%D8%AA%D9%87-%D9%85%D9%86-%D8%A7%D9%86%D9%82%D9%84%D8%A7%D8%A8-%D8%A8%D8%AA%D8%B1%D8%AA%D9%8A%D8%A8-%D9%85%D9%86-%D8%AD%D9%85%D9%8A%D8%AF%D8%AA%D9%8A-%D9%88%D8%A3%D8%B7%D8%B1%D8%A7%D9%81-%D8%AE%D8%A7%D8%B1%D8%AC%D9%8A%D8%A9>. See also Kholood Khair, "A Coup Cannot Serve Two Masters," Arab Center Washington DC, 22 February 2022, available at: <https://arabcenterdc.org/resource/a-coup-cannot-serve-two-masters/>.

The army has sought to exploit, and seize upon the perceived weakness of Sudan's political parties and civil society. As the next section of this paper will examine in greater detail, army leader al-Burhan has consistently maintained that the October 2021 coup was carried out in defence of democratic goals and was necessary to protect Sudan's transition. Having apparently studied the lessons of its predecessors, the military staged the October coup immediately following protests organised by a splinter FFC group,²⁷ which called itself the "Forces for Freedom and Change-the Founding Platform,"²⁸ led by two former rebels-turned-members of the transitional government, Gibril Ibrahim and Minni Minnawi and in coordination with Malik Aggar, the head of the Sudanese Revolutionary Front and the Sudan People's Liberation Movement (SPLM)-North leader. Protestors called for an end to the civilian government and its replacement with a technocratic government, while chanting "down with the hunger government," and inviting al-Burhan to lead the transition.²⁹ There has been much debate on the actual motives that prompted the coup and its timing. Many observers attribute it to the looming possible handover of power to the civilian leaders of the Sovereign Council, which by some counts was due to take place in November 2021.³⁰ Such handover would have shifted the power balance and constituted a threat to the political and economic interests of the military. It was also viewed as reinvigorating calls for accountability for past violations, including the 3 June 2019 massacres in which the military has been implicated.³¹

A central lesson emerges clearly from Sudan's past: that efforts to implement essential human rights and rule-of-law reforms have not succeeded or have been co-opted by military leaders with their own agendas. Some of these reforms are necessary to provide justice and reparation for victims of serious human rights violations and international crimes. Others are needed to dismantle Sudan's anti-democratic patronage network, which has enriched military, National Congress Party, and other Islamist leaders, and constitutes one of the causes for their grip

27 The Sudan Revolutionary Front (SRF) – a coalition of Sudanese opposition groups founded in 2011 and including both SLM-MM and JEM—formally joined the joint civilian-military transitional government in January 2021 after signing the Juba Peace Agreement on 3 October 2020. The Juba Peace Agreement (JPA) consists in part of a number of bilateral agreements between the transitional government and different rebel groups; the SLM-MM signed the JPA under the name "The Armed Struggle Movements-Darfur Path), consisting mainly of the JEM, SLM-MM, Sudan Liberation Movement-Transitional Council, the Sudanese Alliance Movement, the Sudan Liberation Forces Alliance, and the Sudan Liberation Movement. At the time, many analysts expected that the SRF would help tip the balance of power towards the civilian component of the transitional government. As it turned out, though SRF-constituent groups shared with the civilian FFC a common interest in deposing Omar al-Bashir, after his removal from power in April 2019, the interests of the rebel movements and FFC diverged significantly. The military likely played a role in actively working to exploit, and encourage, tensions between the FFC and SRF groups, and within the SRF itself in the months leading up to the coup.

28 Dabanga, "Charter for the Unity of the Forces for Freedom and Change signed in Sudan Capital," 18 October 2021, available at: <https://www.dabangasudan.org/en/all-news/article/charter-for-the-unity-of-the-forces-for-freedom-and-change-signed-in-sudan-capital>.

29 See, for e.g., Reuters, "Sudan protest calls for military coup as political crisis deepens," 17 October 2021, available at: <https://www.reuters.com/world/africa/pro-military-protests-sudan-political-crisis-deepens-2021-10-16/>.

30 The date for the handover of the Sovereign Council to civilian leadership, originally set for 17 May 2021 in the Constitutional Document 2019, was cast into doubt after the signing of the Juba Peace Agreement, which was silent on the issue of the handover of power. Some argued that the date was November 2021. Others, including former minister of justice Nasredeen Abdulbari, argued for July 2022. See, for e.g., Nasredeen Abdulbari, "A Transitional Period Constitutional Question in Sudan," 16 February 2022, Just Security, available at: <https://www.justsecurity.org/80164/a-transitional-period-constitutional-question-in-sudan/>.

31 See Physicians for Human Rights, '*Chaos and Fire: An Analysis of Sudan's June 3, 2019 Khartoum Massacre*, 5 March 2020, available at: <https://phr.org/our-work/resources/chaos-and-fire-an-analysis-of-sudans-june-3-2019-khartoum-massacre/>.

on power.³² Additional longstanding items on Sudan’s agenda include security sector reform and constitutional and legal reform.³³ All of these can be understood as part of “transitional justice,” which “comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses,” and may include “judicial and non-judicial mechanisms . . . and individual prosecutions, reparations, truth-seeking, institutional reform, vetting, and dismissals, or a combination thereof.”³⁴

A central lesson emerges clearly from Sudan’s past: that efforts to implement essential human rights and rule-of-law reforms have not succeeded or have been co-opted by military leaders with their own agendas.

Making real, lasting progress on each of these fronts is needed to “coup-proof” Sudan. Doing so in partnership with the military and security forces responsible for serious human rights violations is not possible; the military has demonstrated no respect for democratic values and processes and has not taken any steps to address its track record of violations of human rights and international humanitarian law. On the contrary, its latest actions have further worsened this record. Sudan has previously grappled with the concept and implementation of transitional justice. Even under former president Omar al-Bashir—and before, including under President Jaafar Nimeiri—initiatives have been undertaken to address and prevent the violations of the past.³⁵ On paper, previous peace agreements, including the Comprehensive Peace Agreement (2005), Darfur Peace Agreement (DPA, 2006) and the Doha Document for Peace in Darfur (2011) engaged, albeit inadequately, with various aspects of transitional justice, including some measure of accountability, compensation, and reform.³⁶

In practice, as continued violations made apparent, these efforts fell short of delivering meaningful outcomes for victims or ending the military’s grip over power. For example, the 2006 DPA broadly acknowledged the need for reparation, including by stating that “[r]

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- 32 See, for e.g., The Sentry, *Sudan’s Deep State: How Insiders Violently Privatized Sudan’s Wealth, and How to Respond*, 25 April 2017, available at: https://enoughproject.org/wp-content/uploads/2017/05/SudansDeepState_Final_Enough.pdf (noting in 2017 that “[p]resident Omar al-Bashir, National Congress Party (NCP) loyalists, and other political and military elites have manipulated Sudan’s economy and diverted state assets for personal gain for more than two decades”).
- 33 REDRESS’s Project on Criminal Law Reform in Sudan has identified many of the constitutional and legal reforms needed to enhance access to justice and to ensure accountability for serious human rights violations. See the PCLRS website, available at: <http://www.pclrs.com/>.
- 34 See UN Secretary-General, “The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary-General,” UN Doc. S/2004/616 (23 August 2004) para 8, available at: <https://digitallibrary.un.org/record/527647?ln=en> (noting that the “notion of ‘transitional justice’ . . . comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with different levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof”). *Ibid.* at para 8.
- 35 See Abdelsalam Hassan Abdelsalam and Amin M Medani, ‘Criminal Law Reform in African and Muslim Countries with Particular Reference to Sudan’ in Lutz Oette (ed.), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (Ashgate 2011) 33-65.
- 36 See particularly Suliman Baldo and Lisa Magarell, *Reparation and the Darfur Peace Process: Ensuring Victims’ Rights* (International Centre for Transitional Justice 2007).

ehabilitation and reconstruction of Darfur is a priority; to that end, steps shall be taken to compensate the people of Darfur and address grievances for lives lost, assets destroyed or stolen, and suffering caused.”³⁷ To this end, the DPA envisaged the creation of several bodies whose role would be to resolve land ownership and other disputes,³⁸ and a Compensation Fund was to be created, to which the then-government pledged \$30 million USD (later raised to \$100 million). Despite these promises, however, no reparations were delivered under either the DPA, which quickly collapsed, or the later Doha Document for Peace in Darfur, which was similarly flawed.³⁹

Similarly, past law reform efforts have either gone unimplemented or have resulted in only limited changes. As the late Amin Medani, a distinguished human rights lawyer who served as a cabinet minister after Nimeiri’s overthrow until Sadiq al-Mahdi’s election, wrote in 2014, “it must be admitted that Sudan’s political experience since independence . . . does not show the political stability, nor the political will necessary for the institution of constitutionalism and, consequently, the necessary environment for institutionalising respect for and promotion of human rights.”⁴⁰ Medani continued, noting that “[s]ince independence in 1956, Sudan has been governed by three pluralistic (so-called democratic) and three autocratic military regimes, the former governing the country for 12 years, and the latter for the remaining 37 [at the time of writing]. Between them, they have adopted eight Constitutions, the last being the 2005 Interim National Constitution (INC).”⁴¹ In the eight years since Medani made this observation, Sudan has adopted its ninth constitution, the interim Constitutional Document 2019.⁴²

Throughout this period, Sudan’s leaders, including under military regimes, have made some overtures towards human rights protections. Under al-Bashir, for example, the INC, pursuant to the Comprehensive Peace Agreement, included a Bill of Rights, which was later largely incorporated into the Constitutional Document 2019. However, these limited constitutional rights were neither translated into statutory law nor the subject of vigorous protection in the

37 Darfur Peace Agreement (2006) para 101.

38 These included Property Claims Committees, which were to be created to resolve individual claims concerning ownership of land and assets; a Compensation Commission to provide reparation for other harms, including “physical or mental injury, emotional suffering or human and economic losses, in connection with the conflict” (DPA, para 200); a Compensation Fund that would allow the Compensation Commission to make interim awards within three months of the DPA’s entry into force (paid within 60 days), to be followed by full hearings on claims; and a Darfur Rehabilitation and Resettlement Commission, to be supported by a Darfur Reconstruction and Development Fund.

39 As the Enough Project noted in August 2012, “[f]rom its inception, the [Doha Document for Peace in Darfur] was deeply flawed. It fails to address the most important security and political issues identified by Darfuris [and . . .] it also allows Khartoum to continue its divide-and-conquer strategy of dealing with each of the country’s conflict zones in isolation.” See Enough Project, “Failing Darfur,” August 2012, available at: <https://enoughproject.org/files/DDPDimplementation.pdf>.

40 Amin M. Medani, “The Constitutional Bill of Rights in the Sudan: Towards Substantive Guarantees and Effective Realisation of Rights,” in REDRESS, Faculty of Law, University of Khartoum, and Sudanese Human Rights Monitor, *The Constitutional Protection of Human Rights in Sudan: Challenges and Future Perspectives* (January 2014) 7, available at: <http://www.pclrs.com/downloads/140127final-sudan-uok-report.pdf>.

41 *Ibid.*

42 On the history of Sudan’s constitutions, see Ali Suleiman Fadlalla and Mohamed Abdelsalam Babiker, ‘In search of constitution and constitutionalism in Sudan: the quest for legitimacy and the protection of rights’ in Lutz Oette and Mohamed Abdelsalam Babiker (eds), *Constitution-Making and Human Rights in the Sudans* (Routledge 2019) 41-62.

jurisprudence of Sudan’s Constitutional Court.⁴³ Similarly, even reforms made to key pieces of legislation have not been accompanied with institutional reforms, leaving another gap between law and practice.

Perhaps more so than in any other period since Sudan’s independence, the transitional government under Prime Minister Hamdok made headway in tackling some of these thorny issues. For example, in November 2019, the transitional government announced the repeal of the national Public Order Law, which had long been used to disproportionately target women for a range of “morality” offences and restricted women’s participation in the public sphere.⁴⁴ In July 2020, a second set of major legislative reforms lifted the immunities for GIS agents and abolished some forms of corporal punishment. They also criminalised female genital mutilation and amended the prohibition of the use of torture in relation to judicial proceedings, among other violations.⁴⁵ In another historic step, the transitional government ratified in August 2021 the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and acceded to the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).⁴⁶

Achieved by dint of determination from civilian leaders within the transitional government, these reforms were an important step towards enhanced human rights protection, at least on paper. Nonetheless, as REDRESS and the People’s Legal Aid Centre (PLACE) noted in April 2021, well before the coup, the transitional bodies charged with implementing and enacting these reforms were not fully established or operationalised.⁴⁷ Some reforms simply went unheeded by the military and security forces. For example, the disbanded Public Order Police continued to operate in a renamed “Community Security Division,”⁴⁸ and security forces repeatedly failed to respond to requests by the Public Prosecution to waive immunities or refused to cooperate in providing evidence in cases concerning abuses by their respective personnel.⁴⁹ As a result, almost no cases concerning serious human rights violations by military or security forces moved forward under the transitional government, including in relation to the 3 June 2019 sit-in massacre.

43 REDRESS, CLRS and Sudanese Human Rights Monitor, *Arrested Development: Sudan’s Constitutional Court, Access to Justice and the Effective Protection of Human Rights* (August 2012), available at: <https://redress.org/wp-content/uploads/2018/01/Aug-12-Arrested-Development-Sudan.pdf>.

44 REDRESS and SIHA, *Criminalisation of Women: A Need for Fundamental Reform*, November 2017, available at: <https://redress.org/wp-content/uploads/2017/12/report-Final.pdf>.

45 See REDRESS, *Sudan’s recent law reforms: explained* (30 July 2020), available at: <https://redress.org/news/sudans-recent-law-reforms-explained/>.

46 See REDRESS, “In Historic Move, Sudan Ratifies Key International Treaty on Torture, Joining 171 Other States,” 12 August 2021, available at: <https://redress.org/news/in-historic-move-sudan-ratifies-key-international-treaty-on-torture-joining-171-other-states/>. Sudan ratified other key international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1986.

47 See REDRESS and PLACE, *Sudan: Human Rights Two Years After Al-Bashir’s Removal*, April 2021, available at: <https://redress.org/news/sudan-two-years-post-bashir-progress-made-but-more-to-be-done/>.

48 See, for e.g., SIHA, “Sudan Public Order Law is Still Intact,” August 2021, available at: <https://sihanet.org/sudan-public-order-law-is-still-intact-female-artists-assaulted-by-police-in-khartoum-north-sharg-al-nile-area/>.

49 REDRESS, *Domestic Accountability Efforts in Sudan*, May 2021, available at: <https://redress.org/wp-content/uploads/2021/05/Sudan-Domestic-Accountability-Efforts-Policy-Briefing.pdf>.

Even more tellingly, accountability and reform objectives agreed upon in the Constitutional Document which had real, structural implications for various components of Sudan’s security apparatus—or for specific individuals—were not fulfilled under the joint civilian-military transitional government. The ratification of the Rome Statute stalled on the desk of the Sovereign Council,⁵⁰ for example, and the long-teased transfer of al-Bashir and others in Sudanese custody to the International Criminal Court (ICC) has not materialized. Al-Burhan, Mohamed Hamdan Dagalo (known as “Hemedti,” the head of the Rapid Support Forces), and others may well fear the possibility of an ICC inquiry into their own activities in Darfur. No progress was made on other major accountability initiatives, including the Special Court on the Crimes of Darfur, and there was no movement towards establishing the programmes necessary for delivery of the collective and individual reparations contemplated in the Juba Peace Agreement.⁵¹ The transitional government’s lack of commitment in establishing the promised Transitional Legislative Council, Constitutional Court, and High Judicial Council all but ensured that such reforms and initiatives would not be effected.

Accountability and reform objectives agreed upon in the Constitutional Document which had real, structural implications for various components of Sudan’s security apparatus—or for specific individuals—were not fulfilled under the joint civilian-military transitional government.

Similarly, discussions about major overhauls to the structure of the military, including the complete integration of the RSF into the SAF, have not borne fruit. Left to reform itself, Sudan’s security sector succeeded throughout the two-year transitional period preceding the coup in keeping the balance of power firmly on its side.

As experts from The Sentry, an investigative and policy organisation, noted shortly after the coup, “[w]hile destabilizing for Sudan’s politics and economy, the coup does not represent a fundamental shift in the power dynamics in Khartoum. Instead, it brings the security services’ warped inceptive structures into public view. Confronting these dynamics head-on is essential for addressing Sudan’s political crisis and revitalizing the transition to civilian rule.”⁵² Several organisations have laid out a path for comprehensive security sector reform in Sudan as a prerequisite for a stable, democratic Sudan that is based on respect for the rule of law, human rights and civilian oversight.⁵³

50 Dabanga, “Sudan Cabinet unanimous on bill to join Rome Statute of ICC,” 3 August 2021, available at: <https://www.dabangasudan.org/en/all-news/article/sudan-cabinet-unanimous-on-bill-to-join-rome-statute-of-icc>.

51 See REDRESS, “Juba Peace Agreement: Excerpted Sections, Transitional Justice and Accountability,” available at: <https://redress.org/wp-content/uploads/2021/01/2021.1.14-Juba-Peace-Agreement-Unofficial-English-Translation.pdf>.

52 The Sentry, “A Strategy for Revitalizing Sudan’s Democratic Transition,” November 2021, available at: https://cdn.thesentry.org/wp-content/uploads/2021/11/StrategyRevitalizingSudan%E2%80%99sDemocraticTransition_TheSentry_Nov2021.pdf.

53 *Ibid.* See also International Crisis Group, “Safeguarding Sudan’s revolution,” 21 October 2019, available at: <https://www.crisisgroup.org/africa/horn-africa/sudan/281-safeguarding-sudans-revolution>.

While divisions among political parties no doubt remain a challenge, particularly within the FFC and the Sudanese Revolutionary Front,⁵⁴ the resistance committees are energetic, increasingly coordinated, and comparatively more representative than Sudan's Khartoum-centric (and male-dominated) political parties. They should be viewed as credible emerging political actors. International actors should focus attention on building some degree of consensus on transitional justice priorities at this level, rather than pushing for a return to an uneasy power-sharing agreement that is incapable—both presently and historically—of delivering critical reforms.

Renegotiation—if not replacement altogether—of the Constitutional Document 2019 (and the Juba Peace Agreement), which sets out the governing framework for Sudan's transitional period, is now the immediate priority. However, international fatigue, and a constellation of other crises—including on Sudan's borders in Ethiopia—increase the risk that Sudanese actors will be pushed into accepting an unsatisfactory compromise offer or become further disillusioned, with the acute, attendant risk of an escalation of the crisis. As discussed, the former outcome will once again introduce the moral hazard of encouraging Sudanese military actors to adopt unconstitutional tactics in the future. Accordingly, the following section examines the tensions between the short-term resolution of Sudan's constitutional crisis and long-term support for constitutional and legitimate transitional justice processes which ensure the protection of human rights.

54 The Sudanese Revolutionary Front (SRF) is a coalition of Sudanese opposition groups which formally joined the transitional government in January 2021 after signing the Juba Peace Agreement on 3 October 2020. See footnote 27.

Remedying the illegality of Sudan's coup

A return to constitutional order in Sudan requires a rethinking of the fundamentals

In the days following the military's seizure of power on 25 October 2021, the legality of the military's actions was widely discussed,⁵⁵ including whether the arrest of then-prime minister Abdalla Hamdok and repeal of the articles of the Constitutional Document 2019 establishing a joint military-civilian transitional government constituted a "coup." The question was pertinent for two reasons. First, al-Burhan, the commander of the SAF, claimed that the military takeover was carried out in defense of the Constitutional Document, and was in fact in conformity with the overall transitional goals set out in the document—in other words, neither a coup nor unconstitutional. As the section below discusses, al-Burhan was wrong on both counts.

Second, certain policy responses by international actors would only be triggered automatically if the events of 25 October 2021 qualified as a coup. For example, as the US Congressional Research Service noted in a briefing issued on the following day, US foreign assistance restrictions apply when "a country's military has overthrown, or played a decisive role in overthrowing the government," and when the "deposed leader was 'duly elected.'"⁵⁶ The briefing asked whether the "overthrow of non-'duly elected' leaders be punished as well? Should policymakers be granted the ability to lift the provision if the military transfers control to a civilian-led transitional government, even if that government is not elected?"⁵⁷

As stated publicly by al-Burhan, from the perspective of the military the events of 25 October 2021 and subsequent political developments were taken to preserve Sudan's stability. In support of his position, he invoked the failure of Hamdok's government to form a Transitional Legislative Council and other outstanding government organs, and political infighting among various factions of the FFC. Speaking at a news conference following the military takeover,

55 See, for e.g., Al Jazeera, "Sudan coup: Which constitutional articles have been suspended?", 26 October 2021, available at: <https://www.aljazeera.com/news/2021/10/26/sudan-coup-which-constitutional-articles-suspended>. See also Sudanese Professionals Association, Twitter, 26 October 2021, available at: <https://twitter.com/AssociationSd/status/1453066690149982219?s=20&t=ILFakxyNOWXKU5uxx-55PA>; Council of the EU, "Press Release: Declaration by the High Representative on behalf of the EU on Sudan," 26 October 2021, available at: <https://www.consilium.europa.eu/en/press/press-releases/2021/10/26/declaration-by-the-high-representative-on-behalf-of-the-eu-on-sudan/>; UN Secretary-General, "Statement attributable to the Spokesperson for the Secretary-General on Sudan," 25 October 2021, available at: <https://www.un.org/sg/en/node/260286>.

56 Congressional Research Service, "Coup-Related Restrictions in U.S. Foreign Aid Appropriations," 26 October 2021, available at: <https://sgp.fas.org/crs/row/IF11267.pdf>.

57 *Ibid.*

al-Burhan said that “the dangers we witnessed last week could have led the country into civil war;”⁵⁸ presumably in a reference to public demonstrations which had occurred in early-to-mid October 2021; adding that “we only wanted to correct the course to a transition . . . we had promised the people of Sudan and the entire world. We will protect this transition.”⁵⁹

Whatever the merits of some of these arguments on their face—the pace of democratic reforms had slowed considerably, for the reasons discussed in the section above⁶⁰—the military’s actions lacked any legal basis whatsoever, either under Sudan’s Constitutional Document 2019 or relevant regional and international law.

Sudan’s Constitutional Document

Sudan’s Constitutional Document was agreed to in August 2019. It followed a July 2019 political agreement between the governing Transitional Military Council (led by al-Burhan) that was established after Omar al-Bashir’s overthrow in April 2019 and the FFC.⁶¹ Chief among its provisions were those providing for a joint military-civilian government, comprised of a “Sovereign Council” intended to function as a quasi-head of state and a Council of Ministers, which would exercise executive functions.⁶²

Others have assessed on a point-by-point basis the legal effect of al-Burhan’s 25 October 2021 announcement repealing specific provisions of the Constitutional Document.⁶³ For the purposes of this analysis, the essential takeaway is that al-Burhan, even in his capacity as the head of the Sovereign Council, lacked the constitutional basis to unilaterally amend or repeal the Constitutional Document, under its own terms. Article 78 of the Constitutional Document provides that “[t]his Charter cannot be amended or repealed other than through a two thirds majority of the members of the Transitional Legislative Council.” In the absence of the TLC, its constitutional powers are “invested in the members of the Sovereign Council and the [Council of Ministers], who exercise them in a joint meeting, and who take decisions by consensus

58 Al-Arabiya News, “Sudan’s Burhan says army ousted government to avoid civil war,” 27 October 2021, available at: <https://english.alarabiya.net/News/north-africa/2021/10/27/Sudan-s-Burhan-says-army-ousted-government-to-avoid-civil-war>.

59 *Ibid.*

60 As analysts noted in a USIP publication just after the coup, “disagreements over power wielded by civilian and military components of Sudan’s government led to this moment. On the surface, the planned leadership transfer of Sudan’s ruling Sovereign Council . . . to civilian control likely increased resistance within the military to cede power, as did calls for accountability and comprehensive security sector reform. However, the splintering of civilian political coalitions, increased overtures to the military from signatories to the 2020 Juba Peace Agreement (JPA) and tensions within the security sector all contributed to a volatile political situation ripe for such an action. The military seems to have seen a need to protect its interests, and more importantly, an opportunity to do so.” United States Institute of Peace, *Dissecting Sudan’s Coup*, 27 October 2021, available at: <https://www.usip.org/publications/2021/10/dissecting-sudans-coup>.

61 The Juba Peace Agreement (2020) amended the Constitutional Document by bringing other groups, under the umbrella of the SRF, into the government and power-sharing arrangement.

62 Constitutional Document 2019, Articles 11-12; Articles 15-16. *See also* Article 24.3, providing for the formation of a Transitional Legislative Council.

63 *See, for e.g.*, Sami Abdelhalim Saeed, “Sudan’s Constitutional Crisis: Dissecting the Coup Declaration,” *Just Security*, 3 November 2021, available at: <https://www.justsecurity.org/78848/sudans-constitutional-crisis-dissecting-the-coup-declaration/>.

or by a two-thirds majority of members.”⁶⁴ Fundamentally a power-sharing agreement, the Constitutional Document does not contemplate the exercise of legislative authority by a single figure, even the head of the Sovereign Council. Similarly, the Constitutional Document sets out clearly the conditions for the declaration of a state of emergency⁶⁵ and appointment of government ministers.⁶⁶ In particular, the declaration of a state of emergency is a prerogative power vested in the prime minister, to be exercised with the approval of the Transitional Legislative Council. Those conditions were not met in the period immediately following the arrest of Hamdok. As a matter of law, therefore, al-Burhan’s actions since 25 October 2021—and particularly the suspension of portions of the Constitutional Document, declaration of a state of emergency, and subsequent appointment of caretaker government ministers—were both unconstitutional and have no legal validity.

A return to constitutionalism

The unconstitutional nature of the transfer of power which has occurred since 25 October 2021 has—or should have—real implications for any solution to the current crisis in Sudan.

Treaties to which Sudan is a party,⁶⁷ including the African Charter on Democracy, Elections, and Governance (ADC), are clear on several points in this respect. Adopted in 2007, the ADC was designed to set out a normative framework for the African Union’s policies and responses to unconstitutional changes of government, the definition of which includes “any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.”⁶⁸

Where such an unconstitutional change of government occurs, as in Sudan, Article 25 of the ADC equips the AU Peace and Security Council (PSC) with several possible policy responses. In addition to requiring the suspension of a State Party “from the exercise of its right to participate

⁶⁴ Constitutional Document 2019, Article 25(3).

⁶⁵ Constitutional Document 2019, Article 40. The Constitutional Document provides that the “Sovereign Council may, pursuant to a request from the Cabinet, declare a state of emergency” (Art. 40.1); any such declaration of a state of emergency “shall be presented to the Transitional Legislative Council within 15 days from the date of its issuance” (Art. 40.2). The Constitutional Document is clear on another point: “the declaration of a state of emergency is extinguished if the Legislative Council does not ratify it, and all the measures taken thereunder are extinguished, without retroactive force” (Art. 40.3).

⁶⁶ Constitutional Document 2019, Article 15.

⁶⁷ Among other treaties, Sudan is a State Party to the International Covenant on Civil and Political Rights (ICCPR) (ratified 18 March 1986), the International Covenant on Economic, Social and Cultural Rights (ICESCR) (ratified 18 March 1986), the African Charter on Human and Peoples’ Rights (ratified 18 February 1986), and the African Charter on Democracy, Elections and Governance (19 June 2013).

⁶⁸ The ADC defines an “unconstitutional change of government” as follows: (i) any putsch or coup d’état against a democratically elected Government; (ii) any intervention by mercenaries to replace a democratically elected Government; (iii) any replacement of a democratically elected government by armed dissidents or rebel; (iv) any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; or (v) any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government. See African Charter on Democracy, Elections and Governance, Article 23. These transitional government was not democratically elected. However, as the discussion above makes clear, the transfer of power which occurred on 25 October 2021 was unconstitutional. See AHG/Decl.5 (XXXVI), Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (“the Lomé Declaration”) (2002).

in the activities of the [African] Union,”⁶⁹ the ADC stipulates that the “perpetrators of [an] unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State.”⁷⁰ The ADC also contemplates the prosecution of “perpetrators of unconstitutional change of government . . . before the competent court of the Union.”⁷¹

The AU’s policy preference for a return to constitutional order is clear. In practice, in the African context, this return to constitutional order has taken two forms. In some situations, the PSC has called for the reinstatement of the overthrown government, such as after coups in Niger⁷² or Mauritania.⁷³ In other cases, where a return to constitutional order would require the replacement of the *de facto* authorities with a new interim power-sharing regime, the AU has demanded speedy elections, typically within six months.⁷⁴

The ADC is unambiguous on another point: that perpetrators of unconstitutional changes of government should have no political future in the State in question.⁷⁵ Applied to the Sudanese context, this would mean that al-Burhan and his key allies in the security apparatus should not be permitted to design elections in 2023, as is now under discussion, or to serve in any capacity in a reconfigured transitional government. Of course, precluding al-Burhan and a select few military and security officials from assuming leadership roles in any future transitional government is itself not enough to prevent another coup in the future. Others are waiting in the wings to take their places.

Against this background, how should the African Union—and more importantly, key international partners, such as the European Union, United Nations, and US—proceed? The ADC is legally binding. However, while the AU has developed a stronger normative framework for responding to unconstitutional changes in government than the UN, its processes are in some situations vulnerable to political pressure by member states. Consequently, the UN has in several instances played a lead role in responses to these types of crises, albeit with

69 African Charter on Democracy, Elections, and Governance, Article 25(1). Sudan was suspended from the African Union on 26 October 2021. See African Union, “Communiqué of the 1041st meeting of the Peace and Security Council of the African Union held on 26 October 2021 on the Situation in Sudan,” 26 October 2021, available at: <https://www.peaceau.org/en/article/communique-of-the-1041th-meeting-of-the-peace-and-security-council-of-the-african-union-held-on-26-october-2021-on-the-situation-in-sudan>.

70 African Charter on Democracy, Elections, and Governance, Article 25(4).

71 African Charter on Democracy, Elections, and Governance, Article 25(5).

72 See Peace and Security Council, “Communiqué of the 126th Meeting of the Peace and Security Council,” 19 February 2010, available at: <https://www.peaceau.org/uploads/communique-niger-eng.pdf>.

73 See Peace and Security Council, “Communiqué of the 151st Meeting of the Peace and Security Council,” AU Doc. PSC/MIN/Comm.2(CLI), 22 September 2008, available at: <https://www.peaceau.org/uploads/mauritaniacommeng.pdf>.

74 For example, in Niger, the PSC called for a transitional period not exceeding six months and ending through elections, leaving it largely to the *de facto* authorities to decide on the specific modalities of a return to constitutional order. See Peace and Security Council, “Communiqué of the 126th Meeting of the Peace and Security Council,” 19 February 2010, available at: <https://www.peaceau.org/uploads/communique-niger-eng.pdf>.

75 African Charter on Democracy, Elections, and Governance, Article 25(4).

mixed success.⁷⁶ Consistent with this pattern, following the coup, UN's Integrated Transition Assistance Mission in Sudan (UNITAMS) initiated political consultations, though with only a limited degree of consensus or coherence.⁷⁷ However, facing criticism across the political spectrum—and perhaps in light of the AU PSC's strong role in convincing the military to sign on to the original power-sharing agreement, after the 3 June 2019 sit-in massacre—UNITAMS has since joined forces with both the AU and the International Governmental Authority on Development (IGAD), leaving a multiplicity of actors in the role of “mediator.”⁷⁸

Whatever steps are taken next, any remedy to the illegality of Sudan's coup and a return to constitutional order must be designed with the end goal of a fully democratic state in which security forces are not involved in non-security matters. Any security sector reform must be guided by an understanding of human rights and people as rights-holders, and that military and security actors are duty-bearers, insofar as they must respect, protect, and fulfil human rights obligations.⁷⁹ As regional and international actors, including the African Union and Friends of Sudan group, are increasingly engaged in mediation efforts, they must be clear-eyed on the fact that a return to constitutional order in Sudan cannot simply mean permitting Sudan's military to behave once again as a self-interested actor, entrenching its policy preferences into any “reformed” Constitutional Document (and any subsequent human rights or “transitional justice” initiatives).

Others have outlined three ways in which this “constitutional entrenchment” can occur: procedural, substantive, and institutional.⁸⁰ Procedurally, the military may design a process which inevitably produces favourable outcomes for itself; substantively, a military can carve out broad powers for itself under a new constitution.⁸¹ And institutionally, militaries can

76 See, for e.g., International Peace Institute, *UN Mediation and the Politics of Transition after Constitutional Crises*, February 2012, available at: <https://www.ipinst.org/wp-content/uploads/2012/02/IPI-Epub-UN-MEDIATION.pdf> (analysing the UN's lead role in mediations after unconstitutional changes in government in Kenya, Mauritania, Guinea, Madagascar, and Kyrgyzstan). For a critique of the UN Security Council's responses to coups, see also International Crisis Group, “Why the UN Security Council Stumbles in Responding to Coups,” 24 January 2022, available at: <https://www.crisisgroup.org/global/why-un-security-council-stumbles-responding-coups>.

77 For example, other regional actors have initiated their own limited mediation initiatives, though ostensibly in support of the UNITAMS effort. See, for e.g., Al-Monitor, “Egypt seeks mediation in Sudan,” 22 February 2022, available at: <https://www.al-monitor.com/originals/2022/02/egypt-seeks-mediation-sudan>; see also Sudan Tribune, “IGAD to mediate talks to end Sudan's transition crisis,” 31 January 2022, available at: <https://sudantribune.com/article254752/>; Sudan Tribune, “Burhan renews his support for UNITAMS initiative to end Sudanese crisis,” 4 March 2022, available at: <https://sudantribune.com/article255961/> (noting that “[a]l-Burhan welcomed the mediation of the African Union but said that the UNITAMS's role should be limited to facilitating the Sudanese-led dialogue”).

78 See UNITAMS, “UNITAMS SRSG Mr. Volker Perthes Remarks to the Security Council,” 28 March 2022, available at: <https://unitams.unmissions.org/en/unitams-srsg-mr-volker-perthes-remarks-security-council> (noting that “I am pleased to announce to this Council that the United Nations, the African Union and IGAD have agreed to join efforts in supporting Sudan through the next phase of this political process, drawing on our comparative advantages and respective strengths. Our common intention is to facilitate an inclusive, Sudanese-owned, and Sudanese-led political process, with the full and meaningful participation of women, focusing on a limited number of urgent priorities required to address the current crisis, and restore constitutional order”).

79 See, for e.g., United Nations Security Sector Reform, “Security Sector Reform: Integrated Technical Guidance Notes,” 2012, available at: https://peacekeeping.un.org/sites/default/files/un_integrated_technical_guidance_notes_on_ssr_1.pdf; see also UN General Assembly, “Securing States and societies: strengthening the United Nations comprehensive support to security sector reforms,” UN Doc A/67/970-S/2013/480 (13 August 2013); African Union Commission, “African Union Policy Framework on Security Sector Reform,” available at: <http://www.peaceau.org/uploads/au-policy-framework-on-security-sector-reform-ae-ssr.pdf>.

80 Ozan O. Varol, “The Democratic Coup d'État,” *Harvard International Law Journal*, Vol. 53 (2012) 295.

81 *Ibid.* at 296.

establish “[c]ounter-majoritarian institutions . . . that continue to enforce the military’s policy preferences even after the military relinquishes power to democratically elected leaders.”⁸² Through this process, one which occurs behind closed doors with relatively little public visibility, and in light of the military’s coercive power, leaders have significant opportunity to maximise the military’s interests.

The 3 June 2019 sit-in dispersal in Khartoum provides an interesting example of such practice. Sudan’s ruling body at the time, the Transitional Military Council, oversaw a violent crackdown on protestors which left somewhere between 120 and 240 people killed, hundreds others injured or missing, and others subjected to sexual- and gender-based violence.⁸³ The TMC, per its spokesperson, admitted that “they made a plan and implemented it.”⁸⁴ Nonetheless, the members of the TMC, which included al-Burhan and Hemedti, remained in leadership roles under the power-sharing agreement set out in the Constitutional Document 2019, as negotiated under the supervision of the African Union.

A return to constitutionalism in Sudan requires a rethinking of the fundamentals, starting with the rejection of a civil-military partnership model as the most viable path forward for Sudan’s democratic transition. Any reforms to the Constitutional Document (or Juba Peace Agreement), and creation of auxiliary political organs or effective commissions, must be made with this in mind.

With the benefit of hindsight, the Constitutional Document 2019, and the Juba Peace Agreement which amended it, were the product of political processes that exhibit each of the above characteristics. Any consultations and mediations moving forward must not repeat the same mistakes. In August 2019, the military signed on to a power-sharing agreement with civilian counterparts, but there has been no effective power-sharing in practice. Sudan’s protestors have made it apparent that they will not accept a second iteration of such an agreement, and they are right to be worried.⁸⁵

82 *Ibid.* at 296.

83 Physicians for Human Rights, ‘Chaos and Fire’: An Analysis of Sudan’s June 3 2019 Khartoum Massacre, 5 March 2020, available at: <https://phr.org/our-work/resources/chaos-and-fire-an-analysis-of-sudans-june-3-2019-khartoum-massacre/>.

84 Al Jazeera, “Sudan military admits it ordered brutal crackdown on protestors,” 14 June 2019, available at: <https://www.aljazeera.com/news/2019/6/14/sudan-military-admits-it-ordered-brutal-crackdown-on-protesters>.

85 Reporting from Reuters in early April 2022 suggested that “[f]actions aligned with Sudan’s military have drawn up a deal to form a transitional government that would cement the army’s control and bypass pro-democracy groups it shared power with before an October coup, according to a document seen by Reuters and three sources familiar with the agreement. [. . .] It includes some steps that the military had already indicated it would take, such as the appointment of a technocratic cabinet and parliament to govern until elections expected next year, and the nomination of judicial bodies and an election commission. [. . .] It also elevates the military as Sudan’s paramount authority, diverging sharply from the power-sharing enshrined after Bashir’s overthrow in a Constitutional Declaration that remained a reference point even after the coup.” See Reuters, “EXCLUSIVE – Draft Sudan deal seeks to cement military’s grip,” 7 April 2022, available at: <https://www.reuters.com/world/africa/exclusive-draft-sudan-deal-seeks-cement-militarys-grip-2022-04-06/>. See also Bloomberg, “Sudan is Warned Proposed Post-Coup Deal Rules Out Return of Aid,” 7 April 2022, available at: <https://www.bloomberg.com/news/articles/2022-04-07/sudan-is-warned-proposed-post-coup-deal-rules-out-return-of-aid?sref=EiBYBXC4>.

A return to constitutionalism in Sudan requires a rethinking of the fundamentals, starting with the rejection of a civil-military partnership model as the most viable path forward for Sudan's democratic transition. Any reforms to the Constitutional Document (or Juba Peace Agreement), and creation of auxiliary political organs or effective commissions, must be made with this in mind. For a start, this includes precluding the reconfiguring of a military-led Sovereign Council with veto power, which as we have seen has permitted the military to exercise outsized influence over policymaking, such as on key accountability and transitional justice issues (eg, the transfer of Omar al-Bashir to the ICC or the establishment of fully operative Law Reform and Transitional Justice Commissions). Similarly, the military must not be authorised, vis-à-vis a Sovereign Council or other body, to appoint or approve members of a future Constitutional Court as well as members of the High Judicial Council. And, as others have noted, Sudan's military cannot be left to hold or control "free and fair elections," though the Constitutional Document in its current form grants the military the authority to appoint the national election commission.⁸⁶

International and regional actors may believe that they have strong incentives to push for a mediated end to Sudan's political crisis through the implementation of surface-level reforms to the Constitutional Document. But, for the reasons just described, this return to constitutional "order" will not result in long-term stability. It would instead perpetuate the cycles of instability and human rights violations that the revolution and transitional agreement were designed to overcome for good. There would be no prospect of a serious engagement with multiple human rights and transitional justice challenges which is a prerequisite for a democratic and peaceful Sudan.

86 See Amal Hamdan, "Sudan's military are calling for elections in 2023: Here is why that's a bad idea," January 2022, available at: <https://www.cmi.no/publications/8119-sudans-military-are-calling-for-elections-in-2023-here-is-why-thats-a-bad-idea>.

Human rights violations are absolutely disqualifying

Perpetrators of serious human rights violations cannot be viewed as equal partners in any future transitional justice process

Prior to the coup, the military had some measure of democratic legitimacy as a governing partner under both the Constitutional Document 2019 and the Juba Peace Agreement (though both documents were the product of negotiations conducted by individuals who did not themselves enjoy electoral legitimacy). As discussed above, however, that legitimacy has evaporated, and cannot be re-conferred through a flawed mediation process. The human rights violations conducted by Sudan's military and security forces are further delegitimizing, not least because continued violence and other violations appear calculated to force civilian leaders into making unsatisfactory compromises or political concessions.

In the early weeks of the coup, arriving at a complete picture of ongoing human rights violations was virtually impossible, given a near-complete telecommunications blackout.⁸⁷ Now, though international actors seem to have been successful in persuading the military to keep the Internet on, harassment of journalists and activists continues to make the gathering and collation of information challenging.⁸⁸ Nonetheless, a wide range of credible civil society groups, reputable media sources, and the OHCHR⁸⁹ have identified Sudan's military and security forces

87 On 25 October 2021, Sudan's military implemented an Internet shutdown which stretched on for nearly a month. Two Sudanese courts issued decisions under consumer protection legislation in the second week of November 2021 (9 and 11 November 2021), ordering Sudan's main telecommunications providers to restore service to customers. However, on 11 November 2021, the military announced via Sudan's Telecommunications and Post Regulatory Authority that its order to stop Internet access "overrides any decisions from other parties." Further limiting the spread of accurate information, joint forces including the SAF raided the offices of several prominent publications, including The Democrat and the Sudan's official state news agency, SUNA. (Internet services were largely restored by 18 November 2021, and restrictions on social media lifted by 24 November 2021.) See Netblocks, Twitter, 11 November 2021, available at: <https://twitter.com/netblocks/status/1458903864695042053>; see also Facebook, SUNA, 28 October 2021, available at: https://m.facebook.com/story.php?story_fbid=1549456648740452&id=243633812656082&sfnsn=mo; Netblocks, "Internet disrupted in Sudan amid reports of coup attempt," 25 October 2021, available at: <https://netblocks.org/reports/internet-disrupted-in-sudan-amid-reports-of-coup-attempt-Q8ov93yn>.

88 See, for e.g., Dabanga, "Sudan coup media curbs – journalists lament mass violations," 27 February 2022, available at: <https://www.dabangasudan.org/en/all-news/article/sudan-coup-media-curbs-journalists-lament-mass-violations>; see also Dabanga, "Intense attacks on the social media accounts of Sudanese activists," 25 February 2022, available at: <https://www.dabangasudan.org/en/all-news/article/intense-attack-on-the-social-media-accounts-of-activists-and-resistance-committees>; VOA, "Sudan's Media Under Fire Over Coup Coverage," 6 April 2022, available at: <https://www.voanews.com/a/sudan-media-under-fire-over-coup-coverage/6518284.html>.

89 See, for e.g., OHCHR, "Oral update on the situation of human rights in the Sudan," 7 March 2022, available at: <https://www.ohchr.org/en/statements/2022/03/oral-update-situation-human-rights-sudan>; see also United Nations Sudan, "UN human rights expert Adama Dieng concludes his official visit to Sudan (20-24 February 2022)," 24 February 2022, available at: <https://sudan.un.org/en/173200-un-human-rights-expert-adama-dieng-concludes-his-official-visit-sudan-20-24-february-2022>.

as responsible for repeated instances of serious human rights violations, including the use of excessive lethal force against protestors and human defenders, arbitrary detentions and enforced disappearance, and torture and other forms of ill-treatment.⁹⁰ These violations—many of which constitute sanctionable activities under the US, UK, and EU human rights sanctions regimes⁹¹—are reminiscent of the pre-revolution period under al-Bashir, and risk being committed with impunity, as there can be no expectation that any perpetrators will be held accountable.

Further, ongoing violations, as the following section will examine in greater detail, contravene several human rights treaties to which Sudan is a party, including the two most recently joined by the transitional government: the UNCAT and the ICPPED. Some violations committed since the coup could also rise to the level of international crimes for which there should be no immunity, including enforced disappearance, murder, torture, and rape and other forms of sexual violence as crimes against humanity. All of these violations require a complete, transparent and independent investigation by external or non-governmental institutions without delay.

Violations of the right to life and right to be free from torture

The use of excessive and lethal force against protestors by Sudanese security forces⁹² has, rightly, drawn international condemnation and concerted attention (though, by the same token, fewer killings of protestors should not be interpreted by international observers as the primary indicator of either improvement or stasis in the human rights situation). At the time of writing, 100 people had been killed during protests,⁹³ and hundreds of others injured (exact count unknown, though one Sudanese organisation has placed the number at 4,500).⁹⁴ Many of

90 See, for e.g., Human Rights Watch, “Sudan: Security Forces Use Lethal Force on Protestors,” 23 November 2021, available at: <https://www.hrw.org/news/2021/11/23/sudan-security-forces-use-lethal-force-protesters>; see also UN Secretary-General, “Situation in the Sudan and the activities of the United Nations Integrated Transition Assistance Mission in the Sudan: Report of the Secretary-General,” UN Doc. S/2022/172, 2 March 2022, available at: https://unitams.unmissions.org/sites/default/files/sg_report_on_unitams_s-2022-172.pdf.

91 For more information on the UK Global Human Rights Sanctions, see UK Government, “UK sanctions relating to global human rights,” available at: <https://www.gov.uk/government/collections/uk-global-human-rights-sanctions>; see also U.S. Department of the Treasury, “Global Magnitsky Sanctions,” available at: <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/global-magnitsky-sanctions>; Council of the European Union, “EU adopts a global human rights sanctions regime,” available at: <https://www.consilium.europa.eu/en/press/press-releases/2020/12/07/eu-adopts-a-global-human-rights-sanctions-regime/>.

92 The use of excessive, including lethal, force against protestors since the coup is not a new phenomenon in Sudan. On the contrary, these violations are consistent with a pattern of historic abuses in Sudan. For example, under former president Omar al-Bashir, thousands of people were killed or injured in protests. In 2013, a series of popular protests were conducted in Wad Madani, Khartoum, Omdurman, and other cities across Sudan after al-Bashir announced an end to fuel subsidies. More than 170 people, including children, were reported killed by government forces. The government’s response to these protests, and many other demonstrations, was characterized by the use of tear gas canisters at close range and targeting of protestors’ heads and chests with live ammunition. See Human Rights Watch, *We Stood, They Opened Fire*, 21 April 2014, available at: <https://www.hrw.org/report/2014/04/21/we-stood-they-opened-fire/killings-and-arrests-sudans-security-forces-during>. Similarly, under the Transitional Military Council (TMC) which was established after al-Bashir’s ouster from office, a sit-in protest outside of the army headquarters in Khartoum was violently dispersed on 3 June 2019. See Physicians for Human Rights, *‘Chaos and Fire’: An Analysis of Sudan’s June 3 2019 Khartoum Massacre*, 5 March 2020, available at: <https://phr.org/our-work/resources/chaos-and-fire-an-analysis-of-sudans-june-3-2019-khartoum-massacre/>.

93 Central Committee of Sudanese Doctors, Twitter, 6 June 2022, available at: https://twitter.com/SD_DOCTORS/status/1533897108322918404?s=20&t=EdfysG_A_XKoHw3i6hyM0Q.

94 Hadhreen, Facebook, 4 June 2022, available at: <https://www.facebook.com/Hadhreen/posts/1138252893403471>.

these deaths likely constitute extrajudicial killings,⁹⁵ which are a violation of the right to life as protected by a number of international treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights.⁹⁶

Sudanese 'joint' security forces have systematically deployed a range of weapons against unarmed protestors, including chemical irritants such as "skunk water" and tear gas, as well as automatic weapons, anti-aircraft weapons and armour-piercing bullets. These weapons have been deployed at close range, causing hundreds of severe injuries, including amputations, blindness, respiratory illness, and death. Such acts, which were carried out by government authorities,⁹⁷ appear to have been intended to inflict severe pain and suffering for the purposes of intimidation, coercion and punishment and constitute serious violations of the right not to be subject to torture or cruel, inhuman or degrading treatment or punishment as defined by the UNCAT.⁹⁸

As the UN Special Rapporteur on Torture has stated, "[a]ny unnecessary, excessive or otherwise arbitrary use of force by law enforcement officials⁹⁹ is incompatible with the absolute prohibition of cruel, inhuman or degrading treatment."¹⁰⁰ Further, the use of any weapon "in order to intentionally and purposefully inflict pain or suffering on a powerless person, always amounts to an aggravated form of cruel, inhuman or degrading treatment or punishment or even torture."¹⁰¹ The Special Rapporteur on Torture has also noted that some weapons inherently involve "a high risk of torture and other cruel, inhuman or degrading treatment or punishment,"¹⁰² including "fully automatic weapons and high-caliber and high-energy expanding bullets," and "less lethal weapons, such as certain types of kinetic impact

95 Extrajudicial, summary, or arbitrary executions are understood as referring to the deliberate killing of individuals outside of any legal framework. *See, for e.g.*, Article 6, ICCPR; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, UN Economic and Social Council Res. 1989/65. *See also* Human Rights Committee, "General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life," UN Doc CCPR/C/GC/36 (30 October 2018) (noting that "Article 6 recognizes and protects the right to life of all human beings. It is the supreme right from which no derogation is permitted even in situations of armed conflict and other public emergencies which threatens the life of the nation").

96 *See, for e.g.*, Article 6, ICCPR; Article 4, African Charter on Human and Peoples' Rights.

97 SAF soldiers, the police, RSF, and Central Reserve Police (a militarised police unit also known as "Abu Tira") have figured prominently in the violent crackdown on protests. Human Rights Watch, "Sudanese Forces Should Stop Abuses Against Protestors," 29 October 2021, available at: <https://www.hrw.org/news/2021/10/29/sudanese-forces-should-stop-abuses-against-protesters>.

98 According to Art 1 of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. 39/46 (10 Dec. 1984) ("[t]he term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity").

99 The UN Special Rapporteur on torture noted that "the terms "State agent" and "law enforcement official" will be used interchangeably to denote any person exercising, de jure or de facto, public authority on behalf of the State, whether of military or civilian status and whether appointed, elected, employed or contracted, including private security personnel." Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, "Extra-custodial use of force and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment," A/72/178 (20 July 2017).

100 UN OHCHR, "Arbitrary police violence can amount to torture, even in public spaces, UN expert warns," 13 October 2017, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22235&LangID=E>.

101 *Ibid.*

102 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, "Extra-custodial use of force and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment," A/72/178 (20 July 2017), paras. 152 – 157.

projectiles, electrical discharge weapons, chemical irritants, water cannons and disorientation devices.”¹⁰³ Indeed, the use of these weapons in Sudan is contrary to the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the UN’s Guidance on Less-Lethal Weapons in Law Enforcement of 2020.¹⁰⁴

Attacks on healthcare workers and journalists¹⁰⁵ may also rise to the level of torture.¹⁰⁶ At the time of the coup, human rights organisations, including REDRESS, warned that security forces could also be expected to target medical facilities and healthcare workers. We noted that “[d]uring the 3 June 2019 sit-in dispersal security forces attacked makeshift clinics and Khartoum-area hospitals, including by preventing access to care for injured protestors and severely restricting the flow of medical supplies and health workers. Similar attacks may be anticipated on Saturday [30 October 2021].”¹⁰⁷

Bearing out these warnings, security forces have consistently targeted medical facilities and medical professionals in the days following 25 October 2021, including by preventing the work of the National Blood Bank, closing roads leading to critical hospitals, raiding emergency departments and searching doctors, and arresting wounded individuals while they sought medical treatment.¹⁰⁸ As Reuters reported on 11 January 2022, “[a]ssaults on medical facilities have centred on hospitals which lie along main protest routes and routinely treat injured protestors.”¹⁰⁹ These actions, which have put patients and health workers at grave risk, constituted egregious breaches of the right to health and, in several instances, particularly in respect of individual assaults, amounted to ill-treatment if not torture.¹¹⁰

103 *Ibid.*

104 See United Nations Human Rights, “Guidance on Less-Lethal Weapons in Law Enforcement,” 2020, available at: https://www.ohchr.org/Documents/HRBodies/CCPR/LLW_Guidance.pdf.

105 Even following the lifting of restrictions on the Internet and social media on 24 November 2021, security and intelligence forces have continued to conduct a series of raids and attacks against journalists and media offices. For example, the Sudanese Journalists Network said in a 30 December 2021 statement that security forces “raided the offices of regional and international news organisations, including Al Arabiya, Skynews, and El Sharq.” See Middle East Eye, “Sudan protestors and security forces resort to new tactics,” 1 January 2022, available at: <https://www.middleeasteye.net/news/sudan-protesters-security-forces-resort-new-tactics>.

106 See UN Human Rights Committee, “General Comment No. 34 (Article 19: Freedoms of opinion and expression,” UN Doc. CCPR/C/GC/34 (12 September 2011), para 23.

107 REDRESS, “Military Coup in Sudan: Call for Action Ahead of 30 October Protests,” 29 October 2021, available at: <https://redress.org/news/military-coup-in-sudan-call-for-action-ahead-of-30-october-protests/>.

108 Central Committee of Sudanese Doctors, Twitter, 22 November 2021, available at: https://twitter.com/SD_DOCTORS/status/1462674635724627970?s=20.

109 Reuters, “Sudanese medics shaken by attacks on hospitals treating anti-coup protestors,” 11 January 2022, available at: <https://www.reuters.com/world/africa/sudanese-medics-shaken-by-attacks-hospitals-treating-anti-coup-protesters-2022-01-11/>.

110 In addition to Sudan’s other international and domestic legal obligations to refrain from torture and other forms of ill-treatment, Sudan is also required to protect health workers’ independence. Attacks on or interference in the functioning of medical facilities and transports are strictly prohibited under international law, and medical facilities must be protected from violence, attacks, or other interference with their provision of essential functions. Governments may not target or punish those who seek to uphold their internationally recognised responsibilities to provide medical care, and must otherwise interfere with the enjoyment of the right to health. See, for e.g., International Committee of the Red Cross, “Respecting and Protecting Health Care in Armed Conflict and in Situations Not Covered by International Humanitarian Law and Non-International Armed Conflict,” 31 March 2012, available at: <https://www.icrc.org/en/document/respecting-and-protecting-health-care-armed-conflicts-and-situations-not-covered>. Intentional attacks on medical staff causing severe harm or suffering, or attacks on medical facilities intended to prevent injured protestors from accessing medical care – intentionally furthering their suffering and putting their right to life and integrity at stake – would also likely constitute torture.

Other serious crimes have also been committed in the context of protests, including sexual- and other gender-based violence. Perhaps most notably, several days after the protests held on 19 December 2021, the UN OHCHR in Sudan announced that it had received 13 allegations of rape and gang rape by security forces, as well as reports of women being sexually harassed by security forces as they attempted to flee the protests.¹¹¹ At the time, the UN Special Representative of the Secretary-General on Sexual Violence in Conflict noted that, “while some of the survivors of sexual violence have filed judicial complaints and have sought immediate medical assistance . . . others have opted not to report and/or seek medical and other assistance, owing to social stigma, fear of persecution and reprisals.”¹¹² Other protestors have reported having their heads forcibly shaved,¹¹³ which under al-Bashir was a “a common way for security forces to humiliate young activists and prisoners in Sudan,” particularly young men.¹¹⁴

It is well-established under international law that rape and other forms of sexual violence can constitute torture or ill-treatment.¹¹⁵ International courts have consistently held that rape and other forms of sexual violence committed by state officials constitute torture,¹¹⁶ and the UN Special Rapporteur on Torture has found that “rape constitutes torture when it is carried out by, at the instigation of, or with the consent or acquiescence of public officials.”¹¹⁷ Other

111 Reuters, “UN reports 13 rape allegations during Sudan protests,” 21 December 2021, available at: <https://www.reuters.com/world/africa/un-reports-13-rape-allegations-during-sudan-protests-2021-12-21/>. The Darfur Bar Association subsequently said that it had received 30 complaints of sexual harassment, including 16 complaints of rape, following the 19 December 2021 protests. Three of the rape complaints were reportedly filed by young men. Dabanga, “Darfur Bar Association: 16 rapes during Dec 25 Sudan demos,” 29 December 2021, available at: <https://www.dabangasudan.org/en/all-news/article/darfur-bar-association-16-people-raped-during-dec-25-sudan-demos>.

112 Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, Press Release, 23 December 2021, available at: <https://www.un.org/sexualviolenceinconflict/press-release/un-special-representative-pramila-patten-expresses-grave-concern-over-alleged-acts-of-sexual-violence-against-women-and-girls-during-the-19-december-2021-demonstrations-in-sudan-and-calls-for-restrain/>. See also Darfur24, “A girl recounts the details of her gang rape by men in police uniform in Khartoum,” 15 March 2022, available at: <https://www.darfur24.com/en/2022/03/15/a-girl-recounts-the-details-of-her-gang-rape-by-men-in-police-uniform-in-khartoum/>; Dabanga, “(3) حالات اغتصاب عقب مواكب 14 مارس” 17 March 2022, available at: <https://www.dabangasudan.org/ar/all-news/article/3-%D8%AD%D8%A7%D9%84%D8%A7%D8%AA-%D8%A7%D8%BA%D8%AA%D8%B5%D8%A7%D8%A8-%D8%B9%D9%82%D8%A8-%D9%85%D9%88%D8%A7%D9%83%D8%A8-14-%D9%85%D8%A7%D8%B1%D8%B3>; Adama Dieng, Twitter, 15 March 2022, available at: https://twitter.com/AdviserAdaDieng/status/1503792933530652679?s=20&t=7JcR_M0ryPHqhXOoMvL33A (“[s]hocked by allegations that a young woman, bus passenger, was gang raped by Central Reserve Police officers”).

113 During a protest on 26 October 2021, a protestor told The Guardian that security forces “asked me to say ‘military’ [a reference to the chants of the word ‘civilian’ by demonstrators who oppose the coup] but I didn’t say a word . . . [s]o eight of them surrounded me and kept beating me with sticks, and one of them stood on my head before shaving off my hair.” The Guardian, “‘Patients hid under beds’: Sudan doctors refuse to hand injured protestors to soldiers,” 26 October 2021, available at: <https://www.theguardian.com/world/2021/oct/26/patients-hid-under-beds-many-protesters-injured-after-sudan-coup>.

114 Human Rights Watch, *‘They Were Shouting ‘Kill Them’: Sudan’s Violent Crackdown on Protestors in Khartoum*, November 2019, available at: <https://www.hrw.org/report/2019/11/18/they-were-shouting-kill-them/sudan-violent-crackdown-protesters-khartoum>.

115 See, for e.g., REDRESS, *REDRESS for Rape: Using international jurisprudence on rape as a form of torture or other ill-treatment*, October 2013, available at: <https://redress.org/publication/redress-for-rape-using-international-jurisprudence-on-rape-as-a-form-of-torture-or-other-ill-treatment/>.

116 See, for e.g., ICTY, *Prosecutor v Jean-Paul Akayesu* (1998) ICTR-96-4-T, Trial Chamber Judgment of 2 September 1998; ECHR, *Aydın v Turkey*, Application no. 23178/94, Judgement of 25 September 1997, para 86; IACHR, *Case of Women Victims of Sexual Torture in Atenco v. Mexico*, (Preliminary objection, merits, reparations and costs) Judgment of November 28, 2018, Ser C No 371, paras 177-204.

117 See, for e.g., the 1986 report of the Special Rapporteur on Torture, UN Doc. E/ CN.4/1986/15, §119; or his 1992 statement to the Commission on Human Rights explicitly stating that rape constitutes torture, Summary Record of the 21st meeting of the Commission on Human Rights, UN Doc. E/CN.4/1992/SR.21, §35. See also Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57 (5 January 2016).

gender-based violence, such as discrimination or humiliation on the basis of gender, can also constitute the crime of torture or ill-treatment.¹¹⁸

Arbitrary detentions and enforced disappearance

The ICCPR and the African Charter on Human and Peoples' Rights, among other international and regional treaties, guarantee the freedom of liberty of the person.¹¹⁹ The UN Human Rights Committee has stated that "deprivation of liberty must not be arbitrary, and must be carried out with respect for the rule of law."¹²⁰ In particular, the Human Rights Committee has held that "arrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the [ICCPR] is arbitrary, including . . . freedom of assembly (art. 21) [and] freedom of association (art. 22)."¹²¹ Further, "[a]rrest or detention on discriminatory grounds . . . is also in principle arbitrary."¹²²

Since the coup, more than 1,000 individuals¹²³ have been arrested and detained on the basis of their participation in peaceful protests, or as a result of their membership in local resistance committees or professional associations. In some cases, but not all, individuals have been charged under Sudan's Criminal Code 1991; in other cases, individuals have been detained without charge, and many individuals have been held incommunicado for hours, days, or weeks.¹²⁴ Such activities constitute arbitrary detentions and could amount in some cases to enforced disappearance.

The precise roles of the different security and intelligence services are difficult to determine, but the ongoing campaign of arrests follows familiar Bashir-era patterns, suggesting the heavy

118 See, for e.g., Human Rights Council, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment," UN Doc A/HRC/31/57 (5 January 2016); see also UN Committee against Torture, "General Comment No. 2," UN Doc CAT/C/GC2 (24 January 2008); ECtHR, *M.C. v. Bulgaria*, Application no. 39272/98 (4 December 2003); see also ECtHR, *Aydin v. Turkey*, Application no. 23178/94, Judgment of 25 September 1997; Committee on the Elimination of Discrimination against Women, "General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19," UN Doc CEDAW/C/GC/35 (26 July 2017); UN OHCHR, "Istanbul Protocol," 2004, available at: <https://www.ohchr.org/sites/default/files/documents/publications/training8rev1en.pdf>.

119 Human Rights Committee, "General Comment No. 35: Article 9 (Liberty and Security of Person), CCPR/C/GC/35 (16 December 2014); see also Article 9, ICCPR; Article 6, African Charter on Human and Peoples' Rights.

120 Human Rights Committee, "General Comment No. 35: Article 9 (Liberty and Security of Person), CCPR/C/GC/35 (16 December 2014).

121 *Ibid.*

122 *Ibid.*

123 In early March 2022, the Joint Human Rights Office in Khartoum reported that more than 1,000 people were arrested between 25 October 2021 and 3 March 2022, including nearly 150 children. However, the real figures are likely higher, because varying periods of detention, an absence of centralized recordkeeping (in addition to the widespread practice of state denial of detentions), and a fear of reprisals frustrate efforts to arrive at a complete picture of the problem. At the time of writing, arrests and detentions are ongoing. See OHCHR, "Oral update on the situation of human rights in the Sudan: 49th Session of the Human Rights Council, Statement by United Nations High Commissioner for Human Rights, Michelle Bachelet," 7 March 2022, available at: <https://www.ohchr.org/en/statements/2022/03/oral-update-situation-human-rights-sudan?LangID=E&NewsID=28215>.

124 See REDRESS, Darfur Bar Association, PLACE, and the Emergency Lawyers Group, *'Taken from Khartoum's Streets': Arbitrary arrests, incommunicado detentions, and enforced disappearances under Sudan's emergency laws*, March 2022, available at: <https://redress.org/wp-content/uploads/2022/03/Emergency-Measures-in-Sudan-EN.pdf>.

involvement of the GIS which, as indicated earlier, now operates under restored powers to search, arrest, confiscate and detain following a decree issued by the Sovereign Council.¹²⁵ In addition, the Central Investigation Department (CID), a police branch specialising in investigating major crimes and sometimes known as the Federal Investigation Police, have also been implicated in conducting arbitrary and incommunicado detentions.¹²⁶

Many activists have been arrested from their homes or taken from the streets, as in the case of Amiera Osman, a prominent women’s rights activist who was arrested in a midnight raid by more than 30 plainclothes individuals. As REDRESS noted in an urgent appeal directed at the UN Special Rapporteur on torture and UN bodies charged with investigating cases of enforced disappearance,¹²⁷ Amiera Osman was denied medication needed to treat injuries sustained in a car accident several years prior and held incommunicado for over two weeks before being released and charged with the possession of illegal weapons and ammunition. Amiera Osman’s detention, and that of many others,¹²⁸ should be considered an enforced disappearance within the meaning of the ICCPED.¹²⁹

In other cases, individuals arrested in Khartoum by unidentified joint forces have reportedly been transported to a detention centre which was once part of the then-NISS headquarters, identified by its proximity to the Shendi Bus Station.¹³⁰ Under the al-Bashir regime, this facility was notorious for its “fridges,” which have been described as a “series of chilled holding cells in which the cold is used as an instrument of torture – an instrument that leaves no marks on the

125 At the time of the military takeover on 25 October 2021, GIS lacked the authority under Sudanese law to conduct any arrests or detentions, following legal reforms introduced in July 2019, which removed arrest and detention powers from the security agency.

126 Human Rights Watch, “Sudan: Hundreds of Protestors Detained, Mistreated,” 28 April 2022, available at: <https://www.hrw.org/news/2022/04/28/sudan-hundreds-protesters-detained-mistreated>.

127 REDRESS, “UN Experts Urged to Intervene on Behalf of Prominent Sudanese Activist Disappeared in Raid,” 27 January 2022, available at: <https://redress.org/news/un-experts-urged-to-intervene-on-behalf-of-prominent-sudanese-activist-disappeared-in-raid/>.

128 *For e.g.*, a second woman, a known member of the Khartoum area resistance committees, was arrested from her place of work by GIS personnel in late January 2022 after stepping outside to meet a colleague, after receiving a phone call indicating her assistance was needed. A statement by her colleagues suggests that the call was from the GIS. Her family received information from informal sources that she was detained in Omdurman Women’s Prison but received no official confirmation of her whereabouts. Like many others, she was released on 21 February, coinciding with the UN independent expert’s visit to Sudan. No criminal complaint was opened against her, and she was not interrogated while detained. See REDRESS, Darfur Bar Association, PLACE, and the Emergency Lawyers Group, *‘Taken from Khartoum’s Streets’: Arbitrary arrests, incommunicado detentions, and enforced disappearances under Sudan’s emergency laws*, March 2022, available at: <https://redress.org/wp-content/uploads/2022/03/Emergency-Measures-in-Sudan-EN.pdf>.

129 See International Convention for the Protection of All Persons from Enforced Disappearance, Article 2, defining enforced disappearance as being characterised by three cumulative elements: (1) the deprivation of liberty against the will of the person; (2) the involvement of government officials, either directly or by tolerance or acquiescence; and (3) the refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the person.

130 For example, Maher Abujoukh, a manager of Sudan TV (Sudan’s national, government-owned television network), told a Sudanese paper that he was arrested on 26 October 2021 at 3:30 am by four heavily armed soldiers, who transported him to the intelligence services facility. Abujoukh reportedly spent two weeks in solitary confinement, leaving his cell twice – once to be moved to a different cell, and the second time to have his head shaved. After this initial two-week period, Abujoukh was permitted to leave his cell, meeting other detainees, including Khalid Omer Yousif, journalist Fayez el Selik, Taha Osman Isahaq (one of the three individuals detained outside of the UNITAMS headquarters after a meeting with UNITAMS head Volker Perthes), and others. See Dabanga, “Detained journalist released – some media remains gagged in Sudan,” 1 December 2021, available at: <https://www.dabangasudan.org/en/all-news/article/detained-journalist-released-some-media-remains-gagged-in-sudan>.

body.”¹³¹ Some individuals have also been detained in two CID facilities in Khartoum and Bahri, where families and lawyers are regularly denied access to detainees.¹³²

As the Troika (UK, US, and Norway), Canada, Switzerland and the EU noted in a joint statement in February 2022, these arrests—and the other human rights violations just surveyed—cut against the military’s “stated commitment to participate constructively in a facilitated process to resolve Sudan’s political crisis to return to a democratic transition.”¹³³ It appears that international actors are increasingly alive to the reality that the military has merely paid lip service to this commitment (and to those made by ratification of key international human rights treaties)—yet they have been slow to implement the full possible range of measures to return Sudan towards civilian governance. Military authorities have as a consequence acted without any course corrections. Indeed, days after the February 2022 joint statement just mentioned, a former civilian member of the Sovereign Council was arrested while driving home and taken to an unknown location.¹³⁴

The final section of this paper offers several short- and long-term strategies for charting a way forward.

131 See BBC World Service, “Sudan’s Secret Hit Squads Used to Attack Protests,” 13 February 2019, available at: <https://twitter.com/LHreports/status/1095650563633700864?s=20>. REDRESS understands, based on confidential conversations, that these ‘fridges’ are still being used but has not been in a position to corroborate these reports.

132 Human Rights Watch, “Sudan: Hundreds of Protestors Detained, Mistreated,” 28 April 2022, available at: <https://www.hrw.org/news/2022/04/28/sudan-hundreds-protesters-detained-mistreated>.

133 Press Release, “Sudan: Troika and partners statement: February 2022,” 10 February 2022, available at: <https://www.gov.uk/government/news/sudan-troika-and-partners-statement-february-2022>.

134 Al Jazeera, “Sudan arrests former ruling council member again,” 14 February 2022, available at: <https://www.aljazeera.com/news/2022/2/14/sudan-arrests-former-ruling-council-member>.

The way forward

International and regional actors must prioritise accountability and law reform as an essential precondition for building democracy in Sudan

There are no easy solutions to Sudan's present political and human rights crisis, though it is apparent that preventing Sudan's military from playing a role in domestic politics must be the ultimate objective. Getting there requires strong steps from regional and global multilateral institutions and Sudan's international allies. This entails learning the lessons of Sudan's failed past transitional periods, primarily in recognising that the military cannot be accepted as a lead actor or genuine partner in reform processes, either on the protection of human rights or in the economic and national security spheres. Ensuring broad participation in any ongoing political negotiations, and both ending impunity for human rights violations and preventing their recurrence should be a top priority, as an essential starting point for the process of building both democracy and the rule of law in Sudan.

In the short-term, international actors should apply targeted sanctions

As an immediate priority, the United States, United Kingdom, and European Union should **apply targeted sanctions** against those individuals and entities most responsible for ongoing systematic, widespread human rights violations, all of which undoubtedly fall within the scope of the available human rights sanctions regimes. The human rights violations described in this paper are of a systematic, repeated nature and form part of a broader policy that is by all indications set at the highest levels of the Sudanese military and government, and domestic accountability for the abuses described in this submission is vanishingly unlikely. In light of this reality, targeted sanctions are an appropriate response from the international community. Sanctions should be aimed at both individual military leaders and the business entities and collaborators who facilitate their lucrative enterprises inside and outside of Sudan, maintaining the military and security sector's stranglehold on the Sudanese economy and funding the extensive Bashir-era patronage network.

REDRESS has since the coup submitted evidence to the US and UK Governments recommending that 11 Sudanese individuals and four entities be designated for sanctions.¹³⁵ The submission named senior leaders who command significant political followings, financial assets, and

¹³⁵ REDRESS, "No Time for Delay: Targeted Sanctions Needed against Sudan's Coup Leaders," 02 February 2022, available at: <https://redress.org/news/no-time-for-delay-targeted-sanctions-needed-against-sudans-coup-leaders/>.

major swathes of Sudan’s armed actors, on the basis that they have demonstrated themselves highly capable of actively impacting events in Sudan and are individually responsible for the gross and serious human rights violations described above. There are no doubt many others who ought to be subjected to sanctions for the same reasons.

On the evening of 12 February, in his first televised interview since the coup, al-Burhan said that “[s]anctions and the threat of them are of no use,” while simultaneously rejecting the possibility of comprehensive security sector reforms during any transitional period.¹³⁶ Al-Burhan appears to have concluded that the appetite for recourse to sanctions remains low. The US, UK, and EU should prove him wrong by comprehensively implementing both travel bans and asset freezes, as well as other sanctions, as appropriate, that have been utilised against States breaking international law.¹³⁷ Sanctions imposed by the US against the Central Reserve Police in late March 2022¹³⁸ were a good first step, and are understood to have rattled members of the police and security forces, but more should follow, including against the military- and RSF-owned business entities and their procurement agents. The latter should include particularly those who supply Sudan’s armed actors with weapons being deployed against protestors and the major corporations which make the military resilient in the face of the withholding of international assistance. That many of these assets are likely to be held in hard-to-reach places, such as the United Arab Emirates and Malaysia, does not mean sanctions are not fit for purpose as a deterrent measure.

Detractors of targeted sanctions may argue that their application in the current context will close off possible space for negotiations or stoke further conflict. However, the risk that sanctions levied against Sudan’s military leaders or business enterprises will worsen the situation is low. And, as this paper has outlined, the prospects for dialogue with the military are in any case limited. Instead, further delay in the use of available human rights tools such as targeted sanctions by international actors creates the opportunity for Sudan’s military leaders to deploy divide-and-conquer tactics¹³⁹ to splinter opposition groups and secure regional buy-in for an unsatisfactory political solution brokered in Cairo or the Gulf.

It is important that targeted sanctions must be applied as part of a broader strategy, including to ensure that any punitive measures levied minimise the harms to average Sudanese people, and that they are linked to tangible, publicised benchmarks for authorities to meet that could lead to both their application or lifting as appropriate. For example, any future transitional period should create political space, outside of a possible power-sharing government, that

136 Sudan News Agency, “رئيس مجلس السادة في برنامج الحوار البناء الوطني السودان #سونا”, available at: <https://www.youtube.com/watch?v=N5g9bMgHzB4&t=2s>.

137 As the response to Russia’s February 2022 invasion of Ukraine has made clear, international actors are capable of quickly imposing a range of targeted and network sanctions in an effort to drive behavioural change. Analysts described sanctions imposed as “the most comprehensive set of multilateral economic sanctions ever applied to a major global economy,” and include sanctions against Russian government individuals, oligarchs, citizens, banks and corporations. See Brookings Institute, “Mapping financial countermeasures against Russian aggression: Introducing the Brookings Sanctions Tracker,” 14 March 2022, available at: <https://www.brookings.edu/blog/up-front/2022/03/14/mapping-the-economic-countermeasures-against-russian-aggression-introducing-the-brookings-sanctions-tracker/>.

138 U.S. Department of the Treasury, “Treasury Sanctions Sudanese Central Reserve Police for Serious Human Rights Abuse,” 21 March 2022, available at: <https://home.treasury.gov/news/press-releases/jy0668>.

139 U.S. Department of the Treasury, “Treasury Sanctions Sudanese Central Reserve Police for Serious Human Rights Abuse,” 21 March 2022, available at: <https://home.treasury.gov/news/press-releases/jy0668>.

is conducive to the emergence of new leaders and weakens the military's stranglehold on power.¹⁴⁰ Any efforts to resist expanded political participation by Sudan's military and political elites should be met with new or continued sanctions.

It should also be recognised that Sudan's military is used to surviving sanctions—albeit not the targeted, individualised sanctions just recommended—and that some countries may step in to counterbalance financial pressures. Diplomatic capital should be used to ensure that such counterbalancing does not happen to the greatest extent possible. Despite these potential limitations, imposing sanctions will demonstrate that major powers are serious about supporting the democratic aspirations of the Sudanese people, and that no tolerance for human rights violations is followed by effective action.

In the medium- and long-term, international actors must provide support for accountability, constitutional and institutional reforms

Sanctions are not a substitute for accountability, nor will they result in and of themselves in Sudan's democratisation. Attaining the goals of accountability, legislative and institutional reforms will require viewing transitional justice objectives as a top-line priority, rather than a bolt-on to economic reforms, however important those are. While there is room for debate as to the sequencing of transitional justice processes, it is clear—for the reasons outlined before—that the hands-off approach taken under the previous transitional government did not work. The *realpolitik* delaying of justice issues, whether to facilitate economic reforms or not, is a familiar tactic used by the Sudanese military and security apparatus to reinforce its power. Now, efforts must be made to assure the Sudanese public that justice has not once again been set aside as negotiations proceed concerning a political transition, and that some public account of the military authorities' responsibility for violations is forthcoming. These issues must be foregrounded and prioritised in the design of any political solution.

The *realpolitik* delaying of justice issues, whether to facilitate economic reforms or not, is a familiar tactic used by the Sudanese military and security apparatus to reinforce its power.

As a starting point, political mediations which are ongoing at the time of writing, particularly those undertaken through the joint UNITAMS-AU-IGAD intervention, must be inclusive, transparent and participatory. Viewpoints solicited through consultations should be attributed to stakeholders to the extent possible while still ensuring the safety of participants, and mediators should avoid drawing a false equivalency between military and security leaders

¹⁴⁰ See Centre for Humanitarian Dialogue, "Power sharing, transitional governments and the role of mediation," 2008, available at: https://files.ethz.ch/isn/90801/Power_Sharing_06_08.pdf ("[w]hen elites with interests in wartime structures retain power, they resist the processes of demilitarising and democratising politics. New political leaders need to emerge gradually, with interests not linked to wartime legacies so they can deliver different messages and build political constituencies based on different interest structures").

and civilian counterparts. Taking this approach will allow the Sudanese public to better assess ongoing political processes and, in turn, enable mediators to gauge the full range of public preferences in Sudan on how to address fundamental questions about the nature of Sudan's democratic transition and legal system.

The summary report which emerged from the first round of UNITAMS consultations displays some but not all of these characteristics.¹⁴¹ While the report indicates that a third of participants were women—a positive sign that efforts were made to avoid replicating the issues of unequal gender representation in the preceding transitional period—it does not attribute positions to any particular stakeholders, making it difficult to critically assess the outcomes of the consultative process (and, indeed, their likelihood of implementation, given the relative imbalance of power between stakeholders). As a result, the UNITAMS report—and consequently the consultations more broadly—to some degree lacks input and procedural legitimacy, and risks reinforcing the perception among the Sudanese public that the set of consulted stakeholders is one-sided or heavily skewed towards the military and security apparatus.

As indicated above, a better process would involve an element of open public consultation (similar to those currently underway vis-à-vis the resistance committees) and attribution of positions to particular groups, which may bolster the public acceptance and legitimacy of the UNITAMS intervention. Such a process would also involve the credible national initiatives which currently carry considerable weight with the Sudanese people, such as those being undertaken by resistance committees across the country. Increased transparency may also help to counter the assumed dominance of military and security interests in exerting influence on the political process; at the very least, overall transparency would better display a balance of structural and political interests for public consideration and analysis. International actors, including those directly involved in mediation, should avoid imposing deadlines related to their own timetables and interests, preventing adequate consultation.

The expected outcome of political consultations will be, in some form or another, a constitutional document or framework intended to form the basis for Sudan's democratic transition. In line with the political charters put forth by diverse resistance committees across Sudan, this document should develop a substantive, time-bound vision for the rule of law, human rights protection and accountability, and bodies tasked with law reform. As the Khartoum State Resistance Committees stated, emphasis should be placed on the “principle that the issue of transitional and criminal justice is the only guarantor for a full-fledged political transition”¹⁴² A commitment to substantial law reform by any future governing coalition should be made a prerequisite for meaningful political transition—and any credible elections in the future, particularly to the extent that they are supported by international and regional partners.

141 UNITAMS, *Summary Paper: Consultations on a Political Process for Sudan: an inclusive intra-Sudanese process on the way forward for democracy and peace*, February 2022, available at: <https://t.co/3dbq5cwoeu>.

142 Khartoum State Resistance Committees, “Proposal for a Charter to Establish the Authority of the People,” available at: <https://redress.org/wp-content/uploads/2022/03/Khartoum-Resistance-Committees-Political-Charter.pdf>.

In this regard, it is important that issues of amnesty and impunity are part of the mediation agenda. The UN has articulated a set of guidelines for mediators, among which is a reminder that mediators “cannot endorse peace agreements that provide for amnesties for genocide, crimes against humanity, war crimes or gross violations of human rights.”¹⁴³ These guidelines should be heeded, and taken together with the ADC’s requirements that perpetrators of unconstitutional changes of government should have no political future in the State in question.¹⁴⁴

Encouragingly, agreement on some of these issues emerged from the initial UNITAMS consultation, including the need for accountability at all levels for past crimes in Sudan, “overwhelming consensus that any future Sovereign Council should only supervise the tasks of the transitional period without direct interference in the work of the executive,”¹⁴⁵ and on the need for “a renewed commitment to implementation of the promised mechanisms for transitional justice, beyond the regular justice sector.”¹⁴⁶ The summary report does not drill down into specifics about what a “renewed” transitional justice process should look like, nor does it offer concrete policy proposals in terms of security sector reform beyond the need for a single integrated non-partisan army. Future consultations may do so; in the meantime, this report offers the following key areas for further, priority attention.

i. Comprehensive legal reform

The first priority should be ensuring that Sudan’s national legislation is in conformity with international human rights law and international criminal law, including through reforms to Sudan’s Criminal Law 1991, Criminal Procedure Act 1991, and associated rules of criminal procedure. These reforms should include those needed to combat sexual- and other gender-based violence, torture, enforced disappearance, and other grave violations. In the context of this broad legal reform process, urgent steps are also needed to remove all immunities and amnesties provided for security forces and other personnel, in addition to the other legal barriers that prevent the effective prosecution of serious human rights violations (such as statutes of limitations and immunities provisions in the various laws governing Sudan’s security forces).

This legal reform process should also include broad consultations with those who have suffered human rights violations or who have otherwise been subjected to the law, with the aim of understanding how various actors have used Sudan’s laws and the role of legal professionals in drafting laws that lend themselves to abuse, and their impact on victims and the population at large. The pre-coup transitional government had not succeeded in establishing a legal reform commission as promised under the Constitutional Document 2019. An independent body,

143 United Nations Guidance for Effective Mediation, available at: [http://repository.un.org/bitstream/handle/11176/400960/8%20November%202019%20\(Mediation%20and%20Negotiation\)%20GuidanceEffectiveMediation_UNDPA2012\(english\).pdf?sequence=47](http://repository.un.org/bitstream/handle/11176/400960/8%20November%202019%20(Mediation%20and%20Negotiation)%20GuidanceEffectiveMediation_UNDPA2012(english).pdf?sequence=47).

144 African Charter on Democracy, Elections, and Governance, Article 25(4).

145 There is considerable debate within Sudan as to whether a Sovereign Council in any form is needed.

146 UNITAMS, *Summary Paper: Consultations on a Political Process for Sudan: an inclusive intra-Sudanese process on the way forward for democracy and peace*, February 2022, available at: <https://t.co/3dbq5cwoeu>.

whether a commission or a National Human Rights Institute, should be tasked with formulating a strategy for legal reform in close consultation with relevant Sudanese stakeholders and international experts.

ii. Institutional reform and capacity building

Second, the effectiveness of law reforms in ensuring human rights protection and justice is contingent on parallel institutional reforms. Institutional reforms and changes to policy and practice are also needed for any constitutional reforms, whether to the Constitutional Document 2019 or to a newly-negotiated document, to translate to genuine human rights protections and to guarantee the non-repetition of violations. International human rights standards, including those provided in the ICCPR, UNCAT, ICPPED, and other treaties to which Sudan is a party, provide an instructive framework in this regard.

For example, accountability for decades of human rights violations and serious crimes in Sudan is essential, but Sudan's justice sector is, by design, incapable of delivering credible prosecutions. A lack of political will and the absence of an independent judicial system have contributed to the entrenchment of total impunity, particularly for those most responsible for serious crimes,¹⁴⁷ who have historically sat atop Sudan's governmental bodies. Systematic issues, many of which are a by-product of Bashir-era neglect and disinvestment (eg, understaffing and underresourcing), must be promptly addressed—again, without the involvement of the military.

Accordingly, a major priority is the reform of the Sudanese judiciary and Public Prosecution to ensure their operational independence. A July 2020 law creating a commission for reform of judicial and legal bodies remains in force, though the commission was never staffed; if properly operationalised, this body could be a useful tool for undertaking the necessary institutional reforms, and particularly the vetting and training of judges, public prosecutors, and others.

It is also critical to establish the High Judicial Council¹⁴⁸ and an effective Constitutional Court with full powers of judicial review on constitutional matters as well as a direct review function

147 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. See African Union, *Report of the African Union: High Level Panel on Darfur (AUPD)*, 29 October 2009, PSC/AHG/2(CCVII), para 217, available at: <https://www.refworld.org/docid/4ccfde402.html>

148 Bodies responsible for the oversight of the judiciary have historically been heavily dominated by the executive branch, such as the National Judicial Service Commission. See for e.g., African Centre for Justice and Peace Studies, *The Judiciary in Sudan: Its Role in the Protection of Human Rights During the Comprehensive Peace Agreement Interim Period (2005 – 2011)*, April 2012, available at: <http://www.acjps.org/wp-content/uploads/2012/04/The-Judiciary-in-Sudan.pdf>.

vis-à-vis the Supreme Court.¹⁴⁹ Sudan's lower courts should also be empowered to refer constitutional questions to the Constitutional Court, promoting a culture of constitutionalism and human rights within the broader judiciary, and allowing individuals to raise simple constitutional issues without exhausting all available domestic remedies within the regular court system—historically a costly, and time-consuming, endeavour.¹⁵⁰ As REDRESS has previously noted with Sudanese partners, allowing lower courts to deal with constitutional issues before going to the Constitutional Court may strengthen the judiciary's accountability functions by rendering individual judges less vulnerable to political repercussions.¹⁵¹

For these reforms to “take hold,” and to give meaning to any fundamental freedoms and rights protected in the Constitutional Document 2019 or any possible successor document, judges must be genuinely independent, and willing on an individual basis to challenge laws and practice. In the past, the High Judicial Council ostensibly charged with oversight of the Sudanese judiciary was not mandated to do more than adopt the budget of the judiciary and make recommendations to the executive. This is not sufficient. To exercise effective oversight of the judiciary, a High Judicial Council or its equivalent must be mandated to establish adequate appointment and review procedures (though this is not to say that a full clearing-of-house is necessarily required across the Sudanese judiciary).

At the same time, it is equally important to build the capacity of Sudanese prosecutors at all levels. This entails the upskilling of relevant personnel in respect of human rights law and Sudanese legal standards, conducting effective investigations, and fair trial protections. Other priorities concern the protection of victims' rights, including through the provision of legal aid and the right to participate in all stages of legal proceedings.

Any efforts to amend or rewrite the Constitutional Document must ensure that the responsibility for carrying out these critical reforms is delegated to civilian leaders who are fully empowered to take binding action, and who are representative of the Sudanese public (including on the basis of gender); it will be important to avoid the trap of the “commission,” where Sudan's past reform efforts have faltered. For example, even outside of the most recent transitional period, other past judicial reform efforts have failed in part because previous commissions, such as the National Judicial Service Commission (established after the 2005 signing of the

149 Under past constitutional documents, such as the Interim National Constitution 2005, the Constitutional Court was vested with control functions as the highest court in constitutional matters, and exclusive jurisdiction to adjudicate cases concerning: (1) the protection of human rights and fundamental freedoms; (2) resolution of disputes between the different levels of government; and (3) complaints against any act of the Presidency or the National Council of Ministers if the act involves a violation of the decentralized system of government. See Interim National Constitution (2005), Article 122, Articles 61(a) and 78(a), available at: <https://redress.org/wp-content/uploads/2021/09/2005-Sudan-Interim-National-Constitution-English.pdf>. By comparison, the Constitutional Document 2019 provided relatively little detail on the Constitutional Court's mandate and jurisdiction, stating that the “Constitutional Court is an independent court, and is separate from the judicial authority. It is competent to oversee the constitutionality of laws and measures, to protect rights and freedoms, and to adjudicate constitutional disputes.” See Constitutional Document 2019, Article 31.

150 Review of the Constitutional Court's possible structure and functions may be useful in this respect, in an effort to streamline appeals processes. For example, before al-Bashir's presidency, a Constitutional Chamber in the Supreme Court was empowered to exercise constitutional review functions.

151 See REDRESS, CLRS, and the Sudanese Human Rights Monitor, “Arrested Development: Sudan's Constitutional Court, Access to Justice and the Effective Protection of Human Rights,” August 2012, available at: http://www.pclrs.com/downloads/Resources/1208arrested_development_sudan.pdf.

Comprehensive Peace Agreement), were not mandated to do more than adopt the judiciary’s budget, as indicated above. The same applies to the commission for the reform of the justice sector (established in April 2020 but never operationalised), which was based on a flawed law that did not give it a broad enough mandate.

Where commissions are created as necessary, they must be independent, adequately resourced and authorised to take and enforce meaningful decisions, including as related to the removal of judges or prosecutors who lack impartiality. Other steps that should be taken include circumscribing the role of any executive body—whether a president or council—including its law-making powers and limiting available emergency powers.

iii. Security sector reform

Any reforms to Sudan’s legal framework and justice sector will not be effective without meaningful security sector reform, in addition to the legal reforms indicated above (such as the lifting of immunities for all security, intelligence, and law enforcement personnel).¹⁵² The large number of armed actors involved in official or quasi-official law enforcement and national security actions—including the SAF, RSF, police, GIS, and JPA signatories—increase the complexity of any SSR process. For example, though JPA signatory groups are not involved in ongoing law enforcement actions, they are currently slated for inclusion in any future security arrangements and a Disarmament, Demobilization and Reintegration (DDR) process; some may be integrated into Sudan’s regular forces, if and when Sudan creates a single unified national army. Consequently, it is important that international actors support Sudan in devising a strategy for security sector reform that goes beyond enforcing adequate international standards on use of force and usage of firearms.

The UN Secretary-General has previously enumerated a set of factors which effective and accountable security sectors have in common.¹⁵³ In relevant part, these include (a) a legal and/or constitutional framework providing for the legitimate and accountable use of force in accordance with international human rights standards; (b) mechanisms for oversight, including systems for financial management and review; (c) mechanisms for establishing “transparent modalities for coordination and cooperation among different actors, based on their respective constitutional/legal roles and responsibilities”; and (d) a culture of service, promoting among other items respect for human rights within security bodies.

Sudan must make substantial progress in each of these areas, beginning with a broad consultation and involvement of civil society, national and local authorities, and grassroots groups, including traditional leaders, women’s groups and others. New legislation should clearly set out the mission and mandate of each of Sudan’s security actors, in line with international

¹⁵² See also REDRESS, CLRS, and the Sudanese Organisation for Research and Development, *Security for all: Reforming Sudan’s National Security Services*, September 2009, available at: <http://www.pclrs.com/downloads/Resources/Resources/Security%20for%20all%20Final.pdf>.

¹⁵³ See Report of the Secretary-General on ‘Securing peace and development: the role of the United Nations in supporting security sector reform,’ UN Doc. A/62/59-S/2008/39 (23 January 2008).

human rights standards and without the extant ambiguity that defines “security” as any “threat to the security of Sudan,” leaving organisations such as the GIS with broad discretion. The functions and powers of each security body should also be clearly defined and circumscribed, distinguishing between the tasks of Sudan’s intelligence and law enforcement agencies, leaving no possibility for the exercise of “special” or “emergency” powers by any agency.¹⁵⁴

iv. Truthseeking and accountability

Finally, international actors should support initiatives intended to arrive at a common narrative about past and present violations. Just before the coup, the UN Human Rights Council failed to renew a resolution extending technical assistance and capacity building on human rights issues that included a regular human rights monitoring and reporting aspect to the Council. At the time, civil society organisations sounded a note of caution, highlighting that the fragility of Sudan’s democratic transition merited ongoing HRC attention—a warning which proved prescient.¹⁵⁵ The UN HRC has since the coup appointed an independent expert to monitor the human rights situation in Sudan.¹⁵⁶ Though not quite a fact-finding mission or commission of inquiry, the independent expert’s mandate presents an opportunity to clarify the circumstances surrounding serious human rights violations. States should ensure his office is properly resourced and granted access to key witnesses and information. Publicly discussing human rights violations and the responsible parties will be an important means towards reducing the military’s sense of impunity.

The forthcoming June 2022 session of the HRC provides an opportunity to explore the appropriateness of additional measures, such as the heightened need for a commission of inquiry given the number of violations which have occurred since the November 2021 appointment of the independent expert.

On the domestic front, prior to the coup, the transitional government had made some progress in establishing a transitional justice commission, getting as far as passing a law authorising its creation.¹⁵⁷ The commission had not been fully operationalised at the time of the coup. Nonetheless, some efforts had been made to conduct limited consultations with relevant stakeholders in the lead-up to the bill’s passage. Moving forward—at the appropriate time—Sudanese authorities should be encouraged to ensure that any future consultations on

154 For example, as REDRESS and Sudanese partners have examined in detail, the extension of emergency powers of arrest and detention to the GIS has resulted in hundreds of arbitrary (illegal) detentions since the coup. See REDRESS, Darfur Bar Association, PLACE, and the Emergency Lawyers Group, *‘Taken from Khartoum’s Streets’: Arbitrary arrests, incommunicado detentions, and enforced disappearances under Sudan’s emergency laws*, March 2022, available at: <https://redress.org/wp-content/uploads/2022/03/Emergency-Measures-in-Sudan-EN.pdf>.

155 See Joint Letter, “The Human Rights Council should extend its support to, and scrutiny of, Sudan,” 10 September 2021, available at: <https://redress.org/wp-content/uploads/2021/09/HRC48-Civil-society-letter-regarding-SUDAN.pdf>.

156 UN Human Rights Council, Twitter, 13 November 2021, available at: https://twitter.com/UN_HRC/status/1459513259783032834.

157 See Transitional Justice Commission Bill, available at: <https://redress.org/wp-content/uploads/2021/03/Transitional-Justice-Commission-Bill-2020-English.pdf>.

topics concerning transitional justice are broad-based, inclusive, and effective.¹⁵⁸ International actors can support an integrated, rights-based transitional justice process by insisting on representation and making the re-starting of funding contingent on concrete action in this respect. Truthseeking and accountability should be foregrounded in this process.

In fairness, the pre-coup transitional government had also initiated several key investigative efforts, a necessary pre-cursor to any prosecutions. Most notably, this included the launch of an investigative committee into the serious human rights violations and international crimes committed on 3 June 2019. Separately, Sudan's attorney general confirmed to REDRESS in May 2021 that nearly 20 cases concerning (a) violations since 1989, (b) extrajudicial killings and repression of protests, and (c) violations since December 2018 (the start of the revolution) were underway.¹⁵⁹ In an important milestone, in late March 2021, the Public Prosecution announced the first charges of crimes against humanity under Sudan's criminal code (as amended in 2009 to include international crimes, though not in conformity with international law).

Some of these cases moved to the judicial sentencing phase, including in the case of Ahmed al-Khair, a public schoolteacher who was tortured and killed by NISS agents, 28 of whom were convicted and sentenced.¹⁶⁰ In the al-Khair case, commendable efforts were made to ensure some measure of public participation in the proceedings, which were conducted in open court and broadcasted on Sudanese media.

These were positive steps forward, but as this paper has laid out, many violations have occurred since the coup alone, all of which will require investigation and remedy. Sudan's justice sector is simply not capable now of handling these cases. Even the few initiatives just discussed under the pre-coup transitional government faced significant challenges, ranging from a lack of political will (not to mention outright interference) to limited technical capacity. Most pertinently, the Public Prosecution and courts in Sudan are chronically understaffed and underfunded, while prosecutors, judges and lawyers lack experience in conducting large-scale, complex investigations into international crimes.¹⁶¹

The international community should heed the lessons learned from the pre-coup period, and invest significantly more resources into the provision of technical capacity-building to legal professionals across the sector. Among other topics, such training should include a focus on the use and analysis of open-source evidence, witness protection and fair trial protections (eg, the exclusionary rule for torture and ensuring that witnesses are not subject to reprisals), and standards for the investigation and prosecution of international crimes. Now, not later, is

158 See REDRESS and SOAS Centre for Human Rights, *Domestic Accountability Efforts in Sudan*, May 2021, available at: <https://redress.org/wp-content/uploads/2021/05/Sudan-Domestic-Accountability-Efforts-Policy-Briefing.pdf>.

159 Ibid.

160 See BBC, "Sudan sentences 29 to death for teacher's killing in custody," 30 December 2019, available at: <https://www.bbc.co.uk/news/world-africa-50945224/>. It should be noted that the implementation of the death penalty in these and other cases may contravene the prohibition of torture and Sudan's other international obligations.

161 See REDRESS and SOAS Centre for Human Rights, *Domestic Accountability Efforts in Sudan*, May 2021, available at: <https://redress.org/wp-content/uploads/2021/05/Sudan-Domestic-Accountability-Efforts-Policy-Briefing.pdf>.

the time to begin such capacity-building, with a view towards supporting broad accountability efforts aimed at prosecuting perpetrators at all levels.

Conclusion: The need for immediate, concerted action to ensure democratic governance and lasting human rights protection in Sudan

The discussion about human rights reforms and accountability may seem premature, given the fluid and tense political situation. Yet precisely the opposite is true. A lack of accountability has long had a chilling effect on political participation in Sudan, and until concrete steps are taken to reduce impunity, it will be difficult for the country to restore trust in any fledgling democratic system.

International and regional actors must work collaboratively to implement and build public support for the full gamut of constitutional and human rights reforms described above, including by reiterating that these are necessary for the resumption of international assistance, debt relief, and the lifting of any targeted sanctions which are imposed. Transitional justice need not contradict mediation efforts and should not be put on hold any longer. On the contrary, as this paper has highlighted, issues of accountability, impunity, and legal and institutional reform must be resolved to tip the balance of power towards any civilian leaders. Any possible democracy in Sudan will remain contingent and hostage to the threat of violent overthrow as long as the militarisation of politics in Sudan persists, which has all too often created, and continues to dictate, the environment for ongoing human rights violations.

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