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The Dialectic of Governance and Justice: Conceptualising and Implementing the Rule of Law in Sudan

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Foreword

It is with a profound sense of urgency and a steadfast commitment to the future of Sudan that Fikra for Studies and Development presents this seminal report, "The Dialectic of Governance and Justice: Conceptualising and Implementing the Rule of Law in Sudan." At a time when our nation is navigating an intensely challenging period in its history, marked by an ongoing armed conflict that has drastically weakened judicial authority and exacerbated a pre-existing deterioration of the rule of law, the insights and analyses contained within these pages could not be more critical. The very fabric of the Sudanese state and the dignity of its people depend on our collective ability to envision and enact a future where law is not merely an instrument of power, but the bedrock of a just, peaceful, and equitable society.

The title of this report was chosen with deliberate care. "***The Dialectic of Governance and Justice***" encapsulates the inherent, often complex, and sometimes fraught interplay between the practical imperatives of establishing functional, stable governance and the profound, non-negotiable demand for true justice. For Sudan, moving forward from decades of turmoil and recent conflict, this dialectic is not an abstract academic concern; it is the central challenge that must be navigated if we are to rebuild our nation on a sustainable foundation. This report confronts this challenge head-on, eschewing simplistic solutions in favor of a nuanced, critical, and comparative exploration of what the rule of law can and must mean for Sudan today and tomorrow.

The theoretical framework adopted by this report is both rigorous and adaptive. It acknowledges the multifaceted nature of the rule of law, a concept that, despite its frequent invocation, remains intricate and contested across various ideologies and actors. The report delves into diverse conceptualizations, from "end-based" perspectives that view the rule of law as a means to achieve specific outcomes like equality and predictable justice, to "institutional" approaches that define it by the presence of particular state structures. However, it also critically examines the limitations of such models, particularly the risk of an institutional approach becoming a superficial, "paint-by-numbers" exercise blind to material results and potentially harmful in diverse societies like Sudan.

This approach appreciates the rule of law as "inescapably a matter of substantive political morality", blending core legal principles as objectives with a recognition of institutions (including international criminal law) as vital tools, all while remaining acutely aware of its political products and the potential for law itself to be a vehicle for power dynamics, as Foucauldian analyses might suggest.

This theoretical depth is not an end in itself. Its true value lies in its application to the specific, pressing realities of Sudan. The report painstakingly examines our nation's prior experiences with implementing transitional justice and the significant, though often fraught, efforts to revitalize political and economic institutions following the 2018/2019 revolution, particularly through the lens of the 2019 Constitutional Declaration. It acknowledges the legal reforms undertaken and the considerable drawbacks they faced,

providing a candid assessment of why previous initiatives, despite their aspirations, fell short. The challenges are immense, ranging from political fragmentation and the persistence of armed conflicts to entrenched corruption and the deep-seated weaknesses within our judicial institutions.

Furthermore, the report grapples with the complex interface between the rule of law and transitional justice, understanding that any post-conflict reconstruction must address past abuses within a framework that upholds justice and human rights. It explores how international criminal law can be applied to foster accountability for crimes committed before and during the war, serving as a crucial component of a broader rule of law project. Crucially, this research underscores the importance of approaching Sudan's unique legal matrix—a rich tapestry of civil, sharia, customary, and common law traditions —not as an obstacle, but as a complex reality that must be engaged with sensitively and constructively to build an indigenous and sustainable rule of law.

The publication of this report during the current devastating conflict is a conscious decision. It is precisely when the rule of law seems most absent that the intellectual and practical work of envisioning its restoration becomes most vital. This report offers more than an academic analysis; it presents an initial blueprint and recommendations for strengthening the rule of law in Sudan, promoting transitional justice, and reforming criminal justice. Its recommendations are directed towards a wide array of stakeholders—the Sudanese state, civil society organizations, and international

bodies—with the aim of promoting a sustainable Sudanese rule of law project that can allow freedom, peace and justice to be realized, not just in the short-term, but for generations to come.

This comprehensive and timely work is the product of the dedicated and insightful efforts of Fikra for Studies and Development's legal research team: ***Rawan Elsadig, Wehaj Kamal, and Mohamed Hesham***. Their collective expertise, meticulous research, and profound intellectual engagement with the complexities of Sudan's legal and political landscape have been instrumental in shaping this report. The depth of analysis, the critical perspectives offered, and the nuanced understanding of the interplay between governance and justice are a testament to their valuable contribution. They have navigated a vast array of theoretical concepts and challenging empirical data to produce a report that we believe offers significant contributions to the discourse on the rule of law in Sudan.

At Fikra for Studies and Development, we believe that a future where the government is bound by law, where all citizens are equal before it, and where justice is predictable and accessible is attainable for Sudan. This report aims to initiate and contribute to that essential, ongoing dialogue. We offer it in the hope that it will spur critical reflection, inform policy, and empower all those working towards a Sudan where the sanctity of the law galvanizes a just and enduring peace.

Amgad Fareid Eltayeb

Executive Director of Fikra for Studies and Development

Preface

In virtually every context, the absence of a robust independent rule of law is an underlying cause of conflict and societal division. The perception of widening inequality and legal institutions which serve the interests of certain groups in power inevitably leads to a breakdown in public confidence and the use of force to maintain power. The current crisis in Sudan is no exception. Since Sudan's inception, and for several decades, subsequent regimes have failed to establish a system that upholds the rule of law and basic human rights in practice.

Since the outbreak of conflict in Sudan between the Sudanese Armed Forces and the Rapid Support Forces, the global community has witnessed widespread atrocities and systematic human rights violations against Sudanese civilians, including war crimes, crimes against humanity, and genocide, where vulnerable groups have been deliberately targeted with the intent to destroy them in whole or in part. Additionally, the perpetrators have intentionally targeted state institutions and civilian infrastructure, virtually replacing an already inadequate justice system with continuous war.

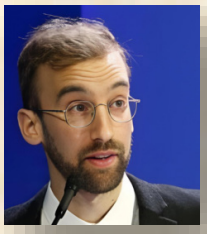
April 2023 marked a turning moment in the annals of accountability for atrocities committed in Sudan. The imperative to begin the process of creating comprehensive and effective justice mechanisms has never been more urgent. There is a collective responsibility to end the cycles of violence and longstanding impunity in Sudan. This report delves

into the multifaceted role of establishing resilient justice and accountability frameworks, which will shape the emergence of Sudan's democratic governance and foster internal reconciliation. At the heart of this exploration lies the examination of the pivotal role played by the rule of law and transitional justice in fulfilling the aspirations of the Sudanese people for freedom, peace, and justice that encapsulated the December 2018 uprising.

The prolonged violations, characterized by a pervasive culture of impunity, the absence of genuine political will, and the ineffectiveness of international mechanisms to adequately address atrocities in Sudan, have significantly exacerbated the situation. The catastrophic impact of the accountability gap is clear. As we observe, perpetrators of atrocities themselves document and glorify their abuses. They celebrate these atrocities with their families, friends, and broader public through social media platforms, including burying victims alive, rape, torture, and slaughter. There is overwhelming evidence to initiate legal proceedings, indict the perpetrators, and secure their conviction. As this landmark report amply demonstrates, there are adequate domestic, regional, and international accountability options available to secure concrete justice and accountability for the people of Sudan. The primary challenge lies in the absence of a political commitment to effectively stop and redress the atrocities. Justice and accountability are often subordinated to political compromises, resulting in their sidelining.

In the face of unprecedented crises and conflict confronting Sudan, this report proposes comprehensive and viable frameworks to address these issues. The authors have meticulously reviewed the extant literature on the rule of law and transitional justice to produce practicable pathways forward for Sudan, which must begin today. We hope this paper will be duly considered by all stakeholders, including the people of Sudan, regional actors, and relevant international institutions.

Real accountability can break the cycles of violence and military rule in Sudan and establish a foundation for an effective, resilient, and inclusive process that prioritizes a victim-centered approach to transitional justice.



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I. Introduction

In a post-conflict legal landscape, an injured rule of law is amongst the first issues to be remedied - for Sudan, looking to the future and envisioning legal reconstruction (or transitional justice as it may be termed) requires a solid understanding and approach to revitalising the rule of law. Not only has the ongoing armed conflict at the time of publishing been characterised by the drastic weakening of judicial authority, but circumstances leading up to the outbreak of war in April 2023 involved a deterioration of the rule of law resulting from tense political dynamics. It is with this complicated foundation that sustainable frameworks for the rule of law must be erected, not only to develop the governance of the Sudanese nation-state but also to address past injustices. This paper, whilst sensitive to the political dimensions of the rule of law, examines and analyses the pressing legal matters regarding the rule of law in post-conflict Sudan. The nation's prior experience in implementing transitional justice has been a monumental push towards shaping the post-revolution goals of Sudanese legal, political, and civil society actors, to foster freedom, peace, and justice. Through critical and comparative approaches, this research utilises insights on past experiences nationally (as well as regionally, and internationally) and posits an initial blueprint for strengthening the rule of law in Sudan and promoting transitional justice and criminal justice.

In this research, the second chapter establishes a pedological perspective of the development of the rule of law, providing ideas and

backgrounds for conceptualising the rule of law in a specifically Sudanese legal context, as well as exploring the relationship between the rule of law, transitional justice, and state-building. Following that, by way of assessing the 2019 Constitutional Declaration, the third chapter examines the ways in which the Sudanese political and economic institutions had been revitalised via the increased rule of law efforts following the 2018/2019 revolution. Additionally, legal reforms that took place during the transitional government, and the drawbacks they had faced, are discussed. The fourth chapter proceeds with a comparative analysis of the application of international criminal law, as relevant to the armed conflict, to allow for transitional justice to take place as part of a broader rule of law project to be established in the governing of crimes committed during the war. Finally, the paper offers policy recommendations to various stakeholders, including the Sudanese state, civil society organisations, and international bodies, with the aim of promoting a sustainable Sudanese rule of law project that will allow for peace and justice to flourish in the short-term, and galvanise the sanctity of the law in the long-term.

II. Frameworks and Backgrounds for Conceptualising the Rule of Law and Sudanese Law

The Rule of Law as a Legal Concept, Definitions and Purposes: The Law and Beyond

Given its dual legal and political nature, ontological questions and contentions surrounding the rule of law persist – its invocation by lawyers, politicians, political activists, and international governmental organisations, amongst other actors, is indicative of its highly intricate conceptualisation and role in various ideologies.

There has been a tendency to dichotomise understandings of the rule of law into those preferred by legal practitioners and those preferred by institutions – analyses, such as Rachel Kleinfeld's, place more legal-minded definitions in the category of 'end-based'. For Kleinfeld, this conceptualisation of the rule of law views it as a means to achieve the following ends: a government bound by law, equality before the law, law and order, predictable and efficient justice, and the absence of state violation of human rights, with each aim becoming more contested.[1] Consequently, it is plausible that some legal truisms regarding the rule of law are more attractive to nation-states, as law and order may seem to be to a political entity grabbing power in the aftermath of armed conflict, than others, like state respect for human

[1] Belton, R. K. (2005, January). Competing Definitions of the Rule of Law: Implications for Practitioners. Carneige Endowment for International Peace, pp. 7-15.

rights. Alternatively, an institutional approach develops a metric that serves as the very definition of the rule of law [2] – that is to say, to identify the rule of law is to identify the presence of particularly designed institutions. In this sense, institutions denote a judicial branch of the state, human rights laws, training programmes for law enforcement, and monitoring bodies. However, this approach, often found in international organisations with high degrees of institutionalisation, runs the risk of turning any rule of law promotion efforts into a paint-by-numbers method that is blind to material results. For example, highly competent law enforcement can have adequate training on and distillation of human rights laws, but in an ethnically diverse nation such as Sudan, reifying ethnic differentiation and creating cleavages by employing predominantly one group could increase the risk of ethnic violence[3] whilst simultaneously ticking the institutional boxes of the rule of law on paper. Additionally, whilst institutional competency is undoubtedly necessary to strengthen the rule of law, focusing on organisational requirements may forgo a more comprehensive ideals-based approach intended to spur horizontal institutional development in favour of unilaterally enhancing specific institutions, whilst others remain underdeveloped and unserviceable.

[2] Ibid, p.16.

[3] Lieberman, E. S.; Singh, P. (2012, October). The Institutional Origins of Ethnic Violence. Comparative Politics, 45(1), pp. 1–24.

Definitionally, Joseph Raz's assertion that the meaning of the rule of law is in the name - "people should obey the law and be ruled by it" – but that both "political and legal theory" make a "narrower" construction - that "the government shall be ruled by the law and subject to it"[4] - addresses the purposive reading of the rule of law by legal practitioners, whilst also extending it into the political sphere. Jurisprudentially, there are also similar, though slightly differing, conceptions of the rule of law, each with its implications for legal practitioners and the administration of justice within the nation-state. For instance, Raz's, Lon L. Fuller's, and John Finnis' substantive definitions of 'rule of law' have many points of convergence such as the stability of rules, their clarity, non-contradiction, and promulgation, but differ in their laying importance to court accessibility and court review powers in the definitional stage.[5]

Internationally, the rule of law is crucial in consolidating the reach of the international legal paradigm. There is almost a commonsensical nature to the international rule of law, as nation-states have subjected themselves to much of international law and its porous boundary with international relations. The acceptability and necessity of the rule of law in the international sphere are evidenced, for example, by then UN Secretary-General Kofi Annan's delineation of the commitment to the

[4] Raz, J. (1979). The Authority of Law: Essays on Law and Morality. Oxford University Press, p. 212.

[5] Møller, J.; Skaaning, S-E. (2014). The Rule of Law: Definitions, Measures, Patterns and Causes. Palgrave Macmillan, p. 15.

Responsibility to Protect (R2P) as a matter of rule of law, separate from a proposed use of force criteria when approaching the UN Security Council (UNSC)[6] – normatively, legal initiatives aiming to expand the rule of law are favourably adopted by the international legal framework. Moreover, the work of the Office of the United Nations High Commissioner for Human Rights (OHCHR) expressly involves strengthening the rule of law concerning the international human rights regime.[7] For Sudan, the fate of an international rule of law is under serious scrutiny, given the documented claims of international crimes during the current conflict.

In addition, it must be mentioned that political definitions of the rule of law are many – amongst them, as previously mentioned, is the institutional dimension of the rule of law which has been expanded upon in the study of international institutions. The Foucauldian power-analysing concept of governmentality (that is, "how multiple bodies, forces, energies, matters, desires, thoughts and so on are gradually, progressively, actually and materially constituted as subjects"[8]) has been reworked to analyse international law as an international institution, acting as a vehicle for alternative projections of power, carrying with it certain implications for the rule of law. As

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[6] Bellamy, A. J. (2008, July). The Responsibility to Protect and the Problem of Military Intervention. International Affairs (Royal Institute of International Affairs 1944-), 84(4), p. 626.
[7] Annan, K. (2005, May 26). In larger freedom : towards development, security and human rights for all. Available from: https://www.refworld.org/reference/themreport/unga/2005/en/69413, p. 20.
[8] Foucault , M. (2003, December 1). Society Must be Defended: Lectures at the the Collège de France 1976-77. Picador, p. 28.

Nikolas Rajkovic alternatively unpacks the rule of law, global law is seen "less as a constraint on state power and more as a rationale for rule 'through' law by vested actors". In other words, what are the material realities and effects of the rule of law? From this angle, the question then becomes; how will the Sudanese state 'actually' and 'materially' constitute bodies/peoples into subjects via the law? Does the Sudanese state's enforcement of the rule of law, both its domestic and international iterations, essentially mean the introduction of certain political and economic dynamics? Foucault's observation that the "economic would not be what it is without the juridical" [9] is not ill-suited, and although this is beyond the scope of this paper, it is important to acknowledge that though some state-checking functions arise from the rule of law, it can in parallel, be understood as a mode of power expansion for the nation-state, reinforcing political and economic systems.

It is evident why this amalgamation of ideas and theories that we term 'rule of law' cannot be neatly transposed from one context to another. For Sudan, these competing understandings of the rule of law have persisted for decades, both domestically and internationally. To productively navigate a place for the rule of law in Sudan, equal consideration must be given to ideations sensitive to Sudanese politics and interpretations by local legal practitioners, as well as more

[9] Foucault, M. (2008, April 17). The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979. Palgrave Macmillan London, p. 163.

hegemonic understandings, such as the aforementioned institutional or ends-based approaches. For the purposes of this research, this paper adopts a mixed theoretical approach to the rule of law that employs a blend of core legal principles to be viewed as rule of law objectives, affords weight to institutions (such as international criminal law) as tools of rule of law -building, and appreciates its political products. This mixed method allows that any conception of the rule of law is not squarely bound by jurisprudential leaning either (that is to say that whatever one's understanding of 'what' law is, then an understanding of 'what' the rule of law is, automatically follows) but is rather "inescapably a matter of substantive political morality".[10]

As such, when investigating the rule of law in Sudan today, we first acknowledge that its importance to a nation-state lies in both its administrative purposes and key justification for the work of the judiciary. The rule of law should protect the judicial component of a delicate separation of powers - a sophistication of judicial interventionism does not threaten to erode the authority of the executive pillar of the state but rather can embolden the judiciary to more expertly interpret the law. A constitutional tenet to spur healthy constitutionalism in Sudan would be that the government cannot exercise power unless it is expressly authorised to do so by law. A

[10] McDonald, L. (2001, January). Positivism and the Formal Rule of Law: Questioning the Connection. Australian Journal of Legal Philosophy, 26, p. 124.

broader, simpler, formulation of this would be the rule of law, as understood to be when both individuals and state authorities are "bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts ".[11] In this sense, augmenting the rule of law should also introduce more rigorous checks and balances to the government. This can be measured using demonstrable principles, namely, predictability of the law, equality before the law, access to justice, and fairness, all enshrined as constitutional rights. Some institutional tools for fostering the rule of law and its aforementioned principles include a strong judiciary with an organised network of courts across the country, clear and widely disseminated human rights laws, law enforcement thoroughly educated on constitutional and human rights law, and on a macro level, adequately domesticated international law.

The Rule of Law and Transitional Justice Processes

Moving on from the rule of law as an abstraction to more accurately pin its purposes in Sudan currently, its role in a transitional justice process must be addressed. In this context, transitional justice is understood to mean a "framework for confronting past abuse as a component of a major political transformation" in the wake of atrocity and human rights abuses, which "generally involves a combination of

[11] Lord Bingham of Cornhill. (2006, November 16). Speech on the Rule of Law at the Sixth Sir David Williams Lecture. Available from: https://www.cpl.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cpl.law.cam.ac.uk/legacy/Media/THE%20RULE%20OF%20LAW%202006.pdf, p. 5.

complementary judicial and nonjudicial strategies".[12] Since strengthening the rule of law and its connected apparatuses presently must be done via a transitional justice framework for Sudan's post-conflict period, it is worth briefly engaging with transitional justice as a relatively recent legal activity.

From the 1980s onwards, transitional justice emerged as a legal method to address shifts to democracies across various nation-states and to mobilise the will of their populations to see justice served to those that enacted harm – this involved demarcating a space for legal human rights-based activity that would address individual needs amidst an arena of political instability that complicated conditions for more systematic political changes to the nation-state.[13] When speaking of transitional justice today, it is rarely in reference to a material redistribution effort but rather a legal roadmap for the handling of human rights abuse grievances following a period of political violence.[14] For Ruti Teitel's genealogy of transitional justice, its third and final phase, beginning at the end of the twentieth century, is typified by state instability and the normalisation of transitional justice in international legal thinking.[15] From this period on, transitional justice was emboldened and thrust to the forefront of

[12] Shelton, D. L. (2005). Encyclopedia of Genocide and Crimes Against Humanity. Macmillan Reference USA, p. 1045.

[13] Arthur, P. (2009, May). How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice. Human Rights Quarterly, 31(2), p. 340.

[14] Ibid, p. 359.

[15] R. G. (2003). Transitional Justice Genealogy. Harvard Human Rights Journal,16, pp. 69 – 94.

international human rights discourse with the ad hoc international tribunals of Rwanda and the former Yugoslavia; any transitional justice project in Sudan today would be part of this 'new generation'. Furthermore, it must be noted that transitional justice processes occur disproportionately more often in postcolonial settings than in non-postcolonial ones, and this has not only political but also legal ramifications. For example, the legal infrastructure that transitional justice must interact with in a postcolonial setting will often be inherited from the previous colonial regime and foster different environments for human rights laws and programmes to be developed. There are differing opinions on the efficacy of civil systems inherited from continental European imperialism and common law systems inherited from British imperialism. The latter, which partly characterises the Sudanese legal system, has been thought to be "developed with the idea of the protection of individual rights from the state as a primary goal" and this has been used to support the viewpoint that African common law systems perform better in the application of the rule of law than civil systems on the continent.[16] Additionally, expectations should be managed as to the decolonial capabilities of transitional justice. As previously stated, it is ultimately a legal initiative that seeks to "restore the integrity of the existing

[16] Joireman, S. F. (2001, December). Inherited legal systems and effective rule of law: Africa and the colonial legacy. The Journal of Modern African Studies, 39(4), p. 573.

normative and social order"[17] i.e. to repair the laws of a nation-state and its associated mechanisms of enforcement so that they address human rights abuses that are time-specific and geography-specific. A decolonising initiative, which is relevant to Sudan, is beyond the remit of transitional justice.

Having fleshed out transitional justice as a field, its relationship with the rule of law in its practice is apparent. There is a prevailing understanding that the rule of law may serve as a clarifying lens for transitional justice projects when understood to be its goal, no longer separating the rule of law and justice, with the former concept leading to the latter, but rather viewing them as one and the same.[18] Resting on an institutional preconception of the rule of law, in order to navigate "varied goals articulated by different stakeholders"[19], focusing on the rule of law as a primary result privileges the basic shared desire for the non-continuity of abuses and atrocities. Yet, whilst the shared concerns and ensuing work of both the rule of law and transitional justice in post-conflict/post-authoritarian states are undeniable, there are, however, elements of the transitional justice-infused rule of law rhetoric that have been problematised and reworked by critics that are relevant to this discussion. For instance,

[17] Sesay, M. (2022, April 29). Decolonization of Postcolonial Africa: A Structural Justice Project More Radical than Transitional Justice. International Journal of Transitional Justice, 16(2), p. 254.
[18] Andersen, E. (2015). Transitional Justice and the Rule of Law: Lessons from the Field. Case Western Reserve Journal of International Law, 47(1), p.305 – 317.
[19] Ibid, p. 308.

those such as Pádraig McAuliffe acknowledge the potential for competition between the two, citing the lofty aims of transitional justice that require concessions that undermine rule of law rebuilding efforts and favour reform of judicial procedure.[20] Alternatively, from a transitional justice perspective, there is the risk of overemphasising the judicial in what is meant to be a framework also shared by non-judicial initiatives. This 'legalism' does not occur without persuasion, in fact, Kieran McEvoy notes that "claims that the `rule of law' speaks to values and working practices" are "particularly prized in times of profound social and political transition" as the absence of the rule of law is often what marked previous unrest.[21] Nevertheless, as transitional justice actors that normatively perpetuate the importance of the rule of law, there is a "temptation to see victims or violence-affected communities as constituencies which must be managed rather than citizens to whom they must be accountable".[22] Moreover, there is the issue of time, as transitional justice is limited to the 'transition' timeframe. However many years that may take, it inherently implies a pre-transition and post-transition temporality[23]

[20] McAuliffe, P. (2013). Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship. Routledge; Zunino, M. (2014). Review of Transitional Justice and Rule of Law Reconstruction: A contentious relationship. by Pádraig McAuliffe. The Cambridge Law Journal, 73(1), pp. 208 -211.

[21] McEvoy, K. (2007, December). Beyond Legalism: Towards a Thicker Understanding of Transitional Justice. Journal of Law and Society, 34(4), p. 417.

[22] Ibid, p. 424.

[23] Miller, Z. (2021, June). Temporal Governance: The Times of Transitional Justice. International Criminal Law Review, 21(5), pp. 1 -30.

and the transitional justice strategies that complement the rule of law may not hold up by the time of the latter.

In light of this, the relationship between establishing the rule of law and effecting transitional justice in Sudan must be pragmatic. Regarding the legal material to be dealt with in Sudan, it should be kept in mind that a mixed legal system undergoing transitional justice must also encompass informal systems recognised under the law, as well as the formal, if it is to strengthen the rule of law (as elaborated on in the UNSC).[24] Although the language of the rule of law can be utilised, as it is here, to advance both political and popular support for transitional justice, care must be taken not to conflate the two and depict the establishment of the rule of law as inherently reliant on transitional justice. There will need to be local sensitivity and a critical legal approach in efforts to implement the rule of law in a Sudanese transitional context involving a complicated set up of tribunals; this is to avoid the failings of more positivistic-minded experiments like in Sierra Leone, wherein international lawyers expressed greater enthusiasm for the Special Court of Sierra Leone than ordinary civilians, or Iraq, where the conduct of the Iraqi High Tribunal undermined its symbolism of justice.[25] To avoid a disconnect between the legal mechanisms/institutions erected, which often meet the

[24] United Nations Security Council (UNSC). (2004, August 23). The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General. Available from: https://digitallibrary.un.org/record/527647?ln=en&v=pdf.

[25] McEvoy, pp. 426 – 427.

theoretical and international criteria for 'what should be done', and the citizens/civilians they ultimately serve, an accurate mapping of victims' needs, expectations, the legal landscape of Sudan, as well as a measured balancing of compromises, are all required.

The Legal Landscape in Sudan

The contemporary legal landscape in Sudan, particularly its constitutional/public law, implementation of legal obligations, and legal realities, is an important context for the rule of law in Sudan. At the time of writing, a state of emergency has been instituted by General Abdel Fattah al-Burhan in Sudan as a result of the current armed conflict. Under article 40(1) of the 2019 Constitutional Declaration, the Sovereign Council may do so "upon the occurrence of any urgent danger or natural or environmental disaster that threatens the unity of the country, or any part thereof, or its safety or economy". 26 Article 41 allows for the suspension of portions of the Bill of Rights, and although the "right to life, protection from enslavement or torture, or the principle of non-discrimination on the basis of race, gender, religious conviction, disability, or the right to litigate or the right to a fair trial" are exempt, this has not been the reality of many civilians during the conflict. This study of Sudan's legal system deals with the law as written and the legal material that will be available in a post-conflict context, irrespective of its circumstantial abrogation.

[26] (2019, August 17). Sudan Constitutional Declaration 2019. Available from: https://adsdatabase.ohchr.org/IssueLibrary/SUDAN_Constitution.pdf.

The Sudanese Legal System and Tradition

The Sudanese legal tradition is rich and complex and has undergone many transformations. It is a mix of civil, sharia, and customary law but also retains elements of common law judicial practice and use of precedents. Notwithstanding some conceptual tensions between mixed systems and legal pluralism, it is adequate to describe Sudan as having both a mixed legal system and legal pluralism. In this sense, legal pluralism, as formulated by John Griffiths, is a "state of affairs" in which behaviour "pursuant to more than one legal order" occurs.[27], and its more comprehensive definition involves a "normative pluralism" or "pluralism in social control" – in effect, different legal systems in a single jurisdiction perpetuate different social norms.[28]

Sudan's 2019 Constitutional Declaration can be viewed as a neutral constitutional model between a strongly cultural and a universalist one. The Constitution, pursuant to articles 4, 43, 48, and 62, upholds blanket non-discrimination of the law and enshrines the supremacy of the Constitution over any other law in article 3. Yet concurrently, there are elements of sharia incorporated into its civil law and a 'right to culture' clause (article 66) that preserves customs (personal law is

[27] Griffiths, J. (1986). 'What is Legal Pluralism?'. Journal of Legal Pluralism and Unofficial Law, 24(1), pp. 1 -55.

[28] Griffiths, J. (2006, March). The Idea of Sociology of Law and its Relation to Law and Sociology. Law and Sociology. Oxford University Press, pp. 49 -68.

enacted in multiple administrative and civil legislations[29], and customary law remains a primary legal forum is much of rural life, e.g. customary land law[30]). The tentative balancing act of such a constitution opens up the possibility for a purposive interpretation that requires customary law to comply with non-discrimination.

Separate from the judiciary is the Constitutional Court established in article 31 of the Constitution and it is tasked with constitutional interpretation. De jure, the judiciary is separate from the Sovereignty Council, the (planned) Transitional Legislative Council, and the executive branch. The judiciary is given broad powers to "adjudicate disputes and issue rulings in accordance with the law" via article 30(3) and it is headed by the Chief Justice who, under article 29(1), is appointed by the Supreme Judicial Council. However, in February 2025, the Ministry of Justice released a constitutional amendment that, amongst other rewrites, afforded the Sovereignty Council powers to appoint and dismiss the chief justice, their deputies, and members of the Constitutional Court, despite their appointment by the Supreme Judicial Council. Orbiting the state apparatus are tribal-based customary legal mechanisms and adjudicators in some Sudanese states with less judicial infrastructure. Known generally as *rakoba* and

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[29] Tier, A. M. (1990, July). Conflict of Laws and Legal Pluralism in the Sudan. International & Comparative Law Quarterly, 39(3), pp. 611 – 640.; أسامة محمد عثمان خليل. (2002). تاريخ القانون: دراسة مقارنة في النظم القانونية والاجتماعية السودانية. مطبعة جامعة النيلين.

[30] Babiker, M. A. (2018, March 19). Communal Customary Land Rights in Sudan: The Need for a Comprehensive Reform of Statutory Land Laws. Anthropology of Law in Muslim Sudan: Land, Courts and the Plurality of Practice. BRILL, pp. 125 – 144.

jodiya, parties to a conflict deliberate under the supervision of elders who are members of the conflicting parties' tribe and non-member elders – more comprehensive cases can involve local or central government representatives.

So, what does Sudan's mixed legal system/legal pluralism and judicial set-up mean for the rule of law? Firstly, it is worth appreciating that the first introduction of a definitive 'rule of law' concept in Sudan was under the socio-legal relations of British imperialism and relics of this tricky history remain today. Amongst the less serious relics with regard to the state-centric legal pluralism of colonial Sudan is the creation of 'judicial customary law' or 'judicial religious law' categories for all customs or religious practices, which meant they were not equally recognised or given the status of 'law' by the courts. While indigenous laws were accepted, indigenous law-enforcing institutions were mostly set aside. On issues where gaps in the indigenous law were found, courts were encouraged to use 'justice, equity and good conscience' to create new laws. Whilst much of this has been overhauled by the subsequent Sudanese judiciary, elements such as judges' referral to 'justice, equity and good conscience' remain. More pertinent is that the previous implementation of the rule of law in pre-independence Sudan was unequivocally authoritarian, and the law itself was wielded in a broader political project of legitimising the colonial project, with little regard for spending on administration or

accessibility.[31] Across the empire, the British colonial government's rule of law ideology saw laws and legal institutions as "practical mechanisms for shaping the economic and social transformation of the societies they governed".[32] By recognising the first-time use of the rule of law in Sudan to service the domineering colonial project and remembering that the rule of law does not sit neatly in the realm of legal affairs but also encompasses politics, analyses like Mark Fathi Massoud's - that the rule of law in a Sudanese context has not always been used to curtail political rule and this has trickled down into subsequent Sudanese political administrations that strengthened the judicial enforcement of laws beneficial to their regime projections – set the stage for what the rule of law could look like in Sudan's near future. We can see that an institution-centric approach to the rule of law, be it the institutions of the British empire, the expanded legal training of the Omar al-Bashir regime, or the human rights-conscious language of the transitional authorities, does not always engender principles commonly associated with the rule of law. The latter, in particular, was not reflected in the legal realities of Sudan, as evidenced by the current conflict, a sheer state of 'non-rule of law'.

[31] Massoud, M. F. (2013, June). Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan. Cambridge University Press.; Merry, S. E. (2016). The Rule of Law and Authoritarian Rule: Legal Politics in Sudan. Law & Social Inquiry, 41(2), pp. 465–470.

[32] Vincent, J. (1993). Trading Places. The Journal of Legal Pluralism and Unofficial Law, 25(33), pp. 147-159.

In the modern context, there are varying degrees of anticipation for the rule of law in a legal landscape such as Sudan's. A more sceptical reading traditionally anticipates tensions between customary law and international law as the latter concerns itself with well-documented, uniform law emanating from the nation-state as lawmaker and enforcer, whilst the former is often the unwritten product of social groups organised outside a state apparatus and tailored to different regions.[33] A more optimistic reading does not see legal pluralism as automatically antagonistic to the rule of law, in fact, 'new legal pluralism' views the rule of law as not just limited to jurisdictions of the global south, but present across all international jurisdictions. For example, the global legal sphere is internally pluralistic, with a multitude of separate tribunals and functionally distinct bodies perpetuating legal norms tied to specific areas of regulation (e.g., trade, human rights, intellectual property, law of the sea, crimes against humanity, pollution) that are not coordinated with one another and can overlap or conflict. However, this does not deter a strong interest in promoting the rule of law in international law and it can be said that legal pluralism is not intrinsically an obstacle to the rule of law. Additionally, just as in other post-conflict states, like Afghanistan[34], Sudan has demonstrated the use-value of non-formal legal forums in post-conflict Darfur and Kordofan states where the

[33] Grenfell, L. (2011, January 1). Promoting the Rule of Law in Post-Conflict States. Cambridge University Press, p. 80.
[34] Ibid, p. 82.

accessibility of state law was scarce. As Brian Z. Tamanaha explains, local tribunals can satisfy most 'horizontal' purposes of the rule of law "to help coordinate behaviour and resolve disputes between members of a community".[35] Where customs may deviate from the rule of law practice in instances of intergroup conflicts or 'vertical' "government-to-person" interactions, the state is more competent in actualising the rule of law to prevent overexertion of governmental authority.[36] At the state level, there is certainly much legal reform that awaits, but legal practitioners, politicians, activists nor zealous international institutions need not necessarily task themselves with total refurbishing of the Sudanese legal system and disregard for its unique legal matrix. As Abdullahi Ahmed An-Naim writes on the often-contentious subject of sharia for rule of law enthusiasts, in Sudan, the rule of law can be seen as a mechanism to conceptualise and codify sharia. That being said, the Sudanese legal system does offer an undoubtedly un-level playing field for any rule of law plan for Sudan, but there are areas, constitutionally and judicially, that serve as useful catalysts for producing an indigenous and sustainable rule of law.

International Law and its Domestication

Sudan is a party to various international legal instruments and the legal obligations they confer make up the corpus of law in question

[35] Tamanaha, B, Z. (2011, January). The Rule of Law and Legal Pluralism in Development. Hague Journal on the Rule of Law, 3, p. 8.

[36] Ibid.

when establishing the rule of law. These primarily concern themselves with state application but also include state failure to prevent their contravention by non-state actors. Much of this law will be particularly apt for administering justice in the wake of the current armed conflict.

As a monist legal system, per article 42(2) of the Constitutional Declaration and article 50 of its Bill of Rights, all international law Sudan has ratified is directly applicable domestically – in theory. However, as of the time of writing, since a state of emergency has legally been declared since the beginning of the war, segments of the Bill may be compromised and have indeed been. The Sudanese state also reserves this right under international law, as in the International Covenant on Civil and Political Rights (ICCPR), wherein declaring a state of emergency since the outbreak of the war falls in line with article 4(1), and Sudan has derogated from specific international human rights law obligations; however, there are fundamental non-derogable rights reserved in article 4(2).[37] Although Sudan can potentially derogate from some of its obligations to ensure rights provided under the International Covenant on Economic, Social and Cultural Rights (ICESCR), such as access to food (under certain

[37] United Nations General Assembly (UNGA). (1966, December 16). International Covenant on Civil and Political Rights (ICCPR). Available from: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.

circumstances meeting the notion of 'general welfare'),[38] there are core obligations that must be kept to. Other relevant international legal instruments to a rule of law plan for Sudan include the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), the Convention on the Rights of Persons with Disabilities (CRPD), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Convention on the Prevention and Punishment of the Crime of Genocide, and the Convention on the Rights of the Child (CRC) and its Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC-OP-AC) and the Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography (CRC-OP-SC).

Additional relevant regional instruments ratified by Sudan include the African Charter on Human and People's Rights (Banjul Charter), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), the African Charter on the Rights and Welfare of the Child, and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. Sudan has signed the

[38] Müller A. (2009, December 1). Limitations to and Derogations from Economic, Social and Cultural Rights. Human Rights Law Review, 9(4), pp. 557-601.

African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) but has not yet ratified it.

Sudan is also a party to all four Geneva Conventions and both Protocols I and II of the conventions.

The Rule of Law and State-building

Finally, we must, in short, refer to the rule of law as a tool for Sudanese state-building and governance-building exercises (following a conflict that has overridden the democratic process and threatened Sudanese sovereignty), as well as the grey area of non-state actors.

Sudan must walk a fine line between past-facing and future-facing rule of law initiatives; as discussed above, its transitional period post-conflict could risk falling into a common mistake made by many new regimes in weak and developing nations who "spend considerable time and resources in purging the old regime through criminal prosecutions" at the expense of "present-day crimes", so that "the citizenry focuses on the past instead of on the program of state building".[39]As Susan Rose-Ackerman describes it, the aim should be "a legal system that can complement other efforts at state building and economic and social revival".[40] The reality is that a revival, encompassing every aspect of the nation-state and its constituents,

[39] Rose-Ackerman, S. (2004). Nine. Establishing the Rule of Law. When States Fail: Causes and Consequences. Princeton University Press, p. 185.

[40] Ibid, p. 211.

is desperately needed in Sudan. The nature of the current conflict in Sudan and its impact on state-building is damaging, just like its predecessor conflicts – flagrant disregard for democracy, due process, and good governance chip away at the nation-state. Worryingly, there are also metanarratives surrounding the rule of law that have been challenged during the current conflict – how can the Sudanese nation-state foster the rule of law within its borders when its state sovereignty, the very linchpin of international law, has been threatened by foreign actors' involvement in its internal armed conflict? This is an awkward question, with admittedly political tinges, that legal practitioners must, unfortunately, grapple with if they wish to promote the rule of law successfully within the political reality of the nation-state. Hence, the rule of law, with its strengthening of the judicial branch of the state to regulate legislative authority, rolling back of military influence, and promotion of justice principles for all in Sudan, should be seen as part of a broader state-building and galvanising project; the rule of law will not just bring about legal or domestic political changes, but it also has the potential to deter foreign interference, improve the international relations of the Sudanese state, and cultivate economic development.[41] As the rule of law in Sudan once served to prop up the British Empire and its beneficiaries, it is not beyond the realm of possibility that it can be

[41] Nwabuzor, A. (2005, June). Corruption and Development: New Initiatives in Economic Openness and Strengthened Rule of Law. Journal of Business Ethics, 59, pp. 121 – 138.

repurposed and reformulated to prop up Sudan and have its constituents benefit from a law-respecting nation-state.

On legitimate non-state actors, room for them in a rule of law concept for Sudan has been discussed above under the umbrella of customs and customary law; their legitimacy should derive from the state's (i.e. the legislature's) reasonable recognition of historical and cultural factors that necessitate their inclusion to indigenise and accomplish a rule of law initiative. Outside of this limited scope, it should go without saying that violent non-state actors such as the Rapid Support Forces (RSF) and other armed groups/militias cannot, and should not, 'administer' the rule of law in Sudan. Yet, de facto, reports of civilians under RSF-occupied regions resorting to kangaroo courts headed by militiamen to resolve civil disputes indicate that a 'gap in the market' for the rule of law is being filled. Dismantling this arrangement is the introductory step in a transitional justice deployment of the rule of law, and both domestic and international legal mechanisms serve as vehicles for this.

III. The Rule of Law in Previous Sudanese Experiences

The Secretary-General of the United Nations has described the rule of law as:

"*a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires measures to ensure adherence to the principles of the rule of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.*" [42]

This definition aligns with the present conception of the foundational principles underlying the rule of law, examined in detail throughout the course of this paper. Indeed, the practical application of these principles in the enforcement of laws constitutes the very essence of the rule of law within the state.

The notion of the rule of law was also articulated in the Constitutional Declaration, in article 6(1), which states: "All persons, bodies, and

[42] UN Secretary General. (2004, August 23). The rule of law and transitional justice in conflict and post-conflict societies : report of the Secretary-General. Available from: https://digitallibrary.un.org/record/527647?ln=en&v=pdf.

associations, whether official or unofficial, shall be subject to the rule of law."[43]

In this context, the principle of the rule of law denotes more than a mere rhetorical consensus; while it is widely acknowledged as a fundamental tenet of good governance across political systems, such consensus often pertains to the terminology rather than the substantive content. There exists a plurality of interpretations concerning the meaning and scope of the rule of law.

To ensure supremacy of the rule of law, it is imperative to safeguard the supremacy of the constitution, for it is only under the aegis of constitutional supremacy that the rule of law can truly prevail. Law must emanate from the free will of the people. Since the constitution determines both the authority empowered to legislate and the manner by which laws are enacted, the first condition for upholding the rule of law is that the constitution must permit the popular will to express itself in the form of binding legislation. Accordingly, this implies that the law itself is subordinate to the supreme law of the land — namely, the constitution. It follows, therefore, that legislation must be promulgated by the authority designated by the constitution for that purpose; the organs of the state cannot legislate arbitrarily or in accordance with their own whims.

[43] Ibid, 27.

The 2019 Constitutional Declaration

The Constitutional Declaration emerged as the product of an agreement between the Forces of Freedom and Change (FFC) and the Transitional Military Council (TMC) in the aftermath of the December 2018 Revolution, which followed more than four months of sustained mass protests and popular demonstrations. In April 2019, the commemorative demonstrations marking the anniversary of the April 1985 uprising culminated in a march to the Sudanese Armed Forces General Command, where demonstrators established a sit-in.

On 11 April 2019, President Omar al-Bashir's regime—commonly referred to as the "Inqaz" (Salvation) regime—was overthrown. The Security Committee of the former regime appointed General Awad Ibn Auf as the head of the Transitional Military Council. However, given his association with the previous regime, including his tenure as Minister of Defense under al-Bashir, the revolutionary masses rejected his appointment. Sustained popular pressure forced the Security Committee to retract his nomination, replacing him with Lieutenant General Abdel Fattah al-Burhan.

Negotiations between the Transitional Military Council and the Forces of Freedom and Change commenced thereafter, seeking to define the structure of governance and the parameters of the transitional period. However, talks were suspended following the brutal dispersal of the General Command sit-in in June 2019—a massacre marked by egregious violations and crimes against peaceful protesters.

Subsequent renewed negotiations resulted in the adoption of the Constitutional Declaration, which was signed in August 2019. The document spans 28 pages and contains 78 articles. It established the legal and institutional framework for a transitional period of 39 months, serving as the supreme law of the land during this time.

Rule of Law and the Constitutional Declaration

The supremacy of the rule of law is enshrined as one of the fundamental principles within the constitution, delineating the structure of governance during the transitional period and sought to promote justice, restore public trust in state institutions, and lay the foundation for a democratic, civilian-led state that upholds and respects human rights.

Judicial Independence

Article 30 of the 2019 Constitutional Declaration affirms the independence of the judiciary from both the Legislative Council and the Sovereignty Council, as well as from the Executive Authority. It guarantees the judiciary both administrative and financial autonomy. The judiciary is vested with exclusive jurisdiction to adjudicate disputes and render judgments in accordance with the law.

Additionally, the Constitutional Court is established as an independent and separate entity, vested with the authority to exercise constitutional review, assess the constitutionality of laws and governmental measures, safeguard fundamental rights and liberties, and adjudicate constitutional disputes.

Article 29 stipulates the establishment of the High Judicial Council, which replaces the former National Judicial Service Commission. The Council is to be constituted by law and endowed with the mandate to oversee judicial affairs, including the nomination of the Chief Justice, their deputies, and the judges of the Constitutional Court. Nevertheless, the transitional government failed to establish the High Judicial Council and did not form the Constitutional Court. In a clear breach of the principles of the rule of law and separation of powers, the Transitional Sovereignty Council dismissed Chief Justice Neemat Abdullah, usurping authority that the Declaration had vested in the High Judicial Council. This act constituted a flagrant violation of constitutional provisions.

Human Rights

The Constitutional Declaration commits the state to the protection of human rights. Article 42 enshrines the Bill of Rights, establishing it as a covenant between all Sudanese citizens and all levels of government. The state is bound to uphold, respect, and advance human rights. The Declaration further affirms that all international and regional human rights treaties and instruments ratified by the Republic of Sudan form an integral part of the Constitutional Declaration itself.

Constitutional Guarantees

The constitution pledges to safeguard and promote all rights articulated within the document, ensuring their equal enjoyment by

all persons without discrimination based on race, color, gender, language, religion, political opinion, social status, or any other status.

Legal Accountability

All individuals, bodies, and associations—whether public or private—are subject to the rule of law. The transitional government is bound to uphold legal accountability, implement justice, and provide redress for grievances and the restitution of unlawfully deprived rights.

Observations on the Constitutional Declaration

The Constitutional Declaration represented a pivotal juncture in Sudan's political trajectory, garnering widespread public support. However, it was not without shortcomings and criticisms, which include:

Political Divisions: Despite its broad public endorsement, the Declaration was subject to critique from certain political actors and groups who viewed its provisions as either insufficient or exclusionary.

Transitional Period: Concerns were raised regarding the protraction of the transitional period beyond the timeline stipulated in the original Declaration. These concerns were exacerbated by the first amendment to the Declaration following the Juba Peace Agreement, which reset the start date of the transitional period to the date of the agreement's signing—rather than that of the Declaration itself.

Human Rights Violations: Despite the explicit constitutional commitments to human rights, enforcement during the transitional

period was inconsistent. Instances of arbitrary detention and other violations were carried out by entities lacking legal arrest powers, even after the Declaration had entered into force.

Implementation Deficits: The transitional government failed to implement several core institutional provisions of the Declaration. These include the establishment of the Legislative Council, the Constitutional Court, the High Judicial Council, and the Supreme Council of the Public Prosecution. Moreover, there was no accountability process for the leaders of the former regime or those responsible for crimes committed against civilians from the start of the revolutionary movement through the massacre of the General Command sit-in. A critical institutional gap remains in the form of the absence of a clear mechanism to enforce the provisions of the Declaration and hold accountable those who obstruct their implementation—undermining both the rule of law and the principle of separation of powers.

Security Sector Reform: The Declaration failed to clearly address the security and military sectors or outline specific reforms within the armed forces and other security institutions. This omission constitutes a fundamental weakness, as such reforms are essential for achieving stability and upholding the rule of law.

Legal Reforms During the Transitional Period (2019–2021)

The legal reform efforts undertaken by Sudan's transitional government between 2019 and 2021 were not the first of their kind.

The earliest significant attempt at legal and constitutional transformation came with the Comprehensive Peace Agreement (CPA) in 2005 and the ensuing Interim National Constitution. However, those earlier efforts failed to yield comprehensive legislative measures that could effectively safeguard human rights. In contrast, the post-2019 transitional government implemented a number of promising legal reforms, particularly in the domains of human rights, personal status laws, criminal law, and other areas of legal regulation. Notable among these reforms were the following legislative instruments:[44]

The Law Establishing the Commission for the Reform of the Justice and Legal System (2020): this law provided for the creation of a commission mandated to lead and structure the process of reforming and developing Sudan's justice and legal system.

The Miscellaneous Amendments Act (Fundamental Rights and Freedoms), 2020: this legislation implemented part of the human rights reform agenda set forth in the 2019 Constitutional Declaration, including provisions enhancing the rights of women and children. For instance, it repealed several statutory provisions that previously undermined the dignity of women, such as those restricting a woman's right to travel abroad with her children without male consent.

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[44] Redress. (2021, March).الاصلاحات القانونية والمؤسسية في السودان : موجز سياسات. Available from: https://redress.org/wp-content/uploads/2021/03/Sudan-Legal-and-Institutional-Reforms-Policy-Briefing-Arabic.pdf.

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The Cybercrime Act (Amendment, 2020): the amendment to this act introduced stricter penalties aimed at protecting user rights, safeguarding digital privacy, and curbing the spread of harmful content and misinformation online.

The Criminal Act (Amendment, 2020): among its provisions, the amendment increased the maximum penalty for the crime of identity impersonation from six months to ten years imprisonment, thereby emphasising the gravity of such offences.

In February 2021, Sudan acceded to a number of international and regional human rights instruments, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention for the Protection of All Persons from Enforced Disappearance, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). However, it should be noted that these accessions were not finalised as full ratifications. Nonetheless, these international commitments did not prevent ongoing violations, including cases of enforced disappearance and abuse, due to structural deficiencies in legal protections and inconsistencies in enforcement. This historical lack of adequate legal safeguards has eroded public trust in Sudan's judicial institutions, including both the judiciary and the Public Prosecution Service, which remain plagued by a persistent lack of accountability for human rights violations.

Challenges to the Rule of Law during the Transitional Period

Any obstacles to implementing a rule of law project during Sudan's transitional period serve as useful indicators for identifying a hostile political and legal environment. Key identified challenges include:

Political Fragmentation: the internal divisions within the Forces of Freedom and Change (FFC), and the emergence of a splinter group under the same name—Forces of Freedom and Change – Democratic Bloc—contributed significantly to political instability. Additionally, unrest in eastern Sudan, particularly the blockade of ports and major roads, severely undermined the rule of law and culminated in the military coup of October 2021, which marked the end of the transitional period and ushered in a new authoritarian phase.

Armed Conflicts: despite the signing of the Juba Peace Agreement in 2020, armed conflicts persisted in Darfur and the Blue Nile region, further complicating the country's legal and political landscape.

Entrenched Corruption and the Deep State: despite the fall of the former regime, its entrenched influence within civil service institutions remained intact. Widespread corruption within these institutions undermined the impartial application of laws, which were often enforced selectively or ignored entirely. This influence extended beyond civil institutions to judicial and law enforcement bodies, including the police, forensic services, and medical examiners.

Weak Judicial Institutions: upholding the rule of law necessitates not only the existence of sound legal frameworks but also the effective

application of the law across all contexts. This, in turn, depends on the structural reform, independence, and functional capacity of judicial institutions. However, the reforms implemented during the transitional period were superficial and did not address the core deficiencies of the justice sector, resulting in a continued lack of public confidence in the legal system.

Socioeconomic Pressures: the complex socioeconomic challenges faced during the transitional period contributed to political and legal instability, which in turn impeded efforts to establish a rights-based state governed by the rule of law.

IV. Application of International Criminal Law in Sudan

What is International Criminal Law?

International criminal law is a branch of international law which deals with what has been coined as the most serious crimes of concern to international community as a whole[45], which includes genocide[46], war crimes, crimes against humanity[47] and the crime of aggression.[48] This branch of international law does not deal with the State as a whole, but rather establishes individual criminal responsibility. A core foundation of International Criminal Law is the principle of legality called *nullum crimen sine lege*, no crime without law, which highlights that an individual can only face criminal punishment for an act criminalised by law. As mentioned in the ICCPR, "no one shall be held guilty of any criminal offence or account of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed."[49]

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[45] (1998, July 17). Rome Statute, Preamble. Available from: https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf.

[46] United Nations General Assembly (UNGA). (1948, December 9). Convention on the Prevention and Prohibition of the Crime of Genocide 1948, Article 2. Available from: https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

[47] Ibid, 47; Acquaviva, G., Fausto Pocar, F. (2008). Crimes against humanity. Available from: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e768.

[48] Ibid, 47.

[49] Ibid, 39.

The individual criminal responsibility applies in principle to all[50], regardless of rank or authority. However, this has shown to be often impossible, such as the Special Court for Sierra Leone which will be looked at in more detail in this research. Individual criminal responsibility is a basic principle of criminal law wherein a crime has been attempted or committed, as well as assisting in, facilitating, aiding or abetting, the commission of a crime. It also includes planning or instigating the commission of a crime.[51]

A similar provision can be found in the Sudanese Criminal Act of 1991 provides a similar definition to the basis of criminal responsibility. As found in article 8, criminal responsibility is only applicable to a mature person of free will[52] and will be deemed criminally responsible only when an unlawful act is done with intent or negligence.[53] Unlike the Constitution, this legislation aligns with the international definition as found in the Rome Statute.[54]

[50] According to the ICTY's jurisprudence, the secondary responsibility of those participating in the commission of the crime is also punishable if the participation is direct and substantial, something that is not expressly stated in the Rome Statute, Article 25(3)(a); see The Prosecutor v. Dusko Tadic, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, paras. 691 and 692.

[51] Ibid, 47.

[52] Criminal Act 1991. (1991). Available from: https://www.refworld.org/legal/legislation/natlegbod/2009/en/120353.

[53] Ibid.

[54] Ibid, 47.

International Criminal Law Application in Sudan

Regarding the application of international criminal law in the Sudanese conflict, it must be noted that there have been various attempts to provide justice and reconciliation in the international legal realm through the establishment of ad hoc tribunals to address the various violations which have been committed. In this chapter, we will look at those attempts; the International Criminal Tribunal for former Yugoslavia (ICTY) and the Special Court of Sierra Leone (SCSL) will be analyzed to provide an outlook on how justice and rule of law can prevail in providing transitional justice. In addition, the International Criminal Court's (ICC) treaty, the Rome Statute, and the Elements of the Court will be looked at in this research.

The aim of this chapter is to explore what are the possibilities of establishing a hybrid criminal tribunal that would assist in providing transitional justice for the victims and society as a whole. In this chapter, international criminal law and domestic law of Sudan will be looked at and an analysis will be provided on the practices developed by the ICTY, SCSL, and ICC. The ultimate aim is to achieve a situation in conformity with the rule of law and human rights, with a firm understanding and awareness of the crucial need for implementation at the phase of transitional justice.

Before going onto the applicable statute to the respective courts, the temporal jurisdiction of the court should be not based on a political perspective, but on what is needed for transitional justice: truth,

justice, and non-recurrence. The International Criminal Tribunal for Rwanda (ICTR), which will not be analyzed in this research, must be mentioned to highlight the arbitrary setting of temporal jurisdiction of the court. The compromise to establish that 1 January 1994 to 31 December 1994 as the temporal jurisdiction of the court[55] was provided with no 'symbolic meaning or political connotation'[56]. However, seeing as the conflict in Sudan is still ongoing, the usage of the open-ended jurisdiction of the ICTY[57] is more appropriate to include crimes that are still being committed by both parties involved, the Sudanese Armed Forces (SAF) and the Rapid Support Forces (RSF).

The Statute of ICTY has provided a guideline on the proposal of a territorial and temporal jurisdiction for crimes committed. Seeing as the conflict in Sudan is considered a non-international armed conflict[58] - which will be uncovered further in following chapters - this research will disregard the territorial jurisdiction with an assumption of the inclusion of all 13 states within Sudan. Nevertheless, the temporal jurisdiction can be proposed to either the beginning of the

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[55] United Nations. (1994, November 8). Statute of the International Criminal Tribunal for Rwanda. Available from: https://legal.un.org/avl/ha/ictr/ictr.html.

[56] Shraga, D.; Zacklin, R. (1996). Symposium Towards an International Criminal Court. Available from http://ejil.org/pdfs/7/4/1390.pdf.

[57] United Nations. (2009, September). Updated Statute of the International Criminal Tribunal for Former Yugoslavia, Article 9. Available from: https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

[58] International Committee of the Red Cross (ICRC). (2008). How is the term 'Armed Conflict' Defined in International Humanitarian Law?. Available from; https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

conflict of 15 April 2023 or include crimes committed prior to the initiation of the conflict to begin – for crimes committed during the 2019 revolution and massacre that occurred on June 3rd of that year – on 1 January 2019. The latter proposed date is more appropriate to include various crimes and tensions which have resulted in the war to begin and consists of core crimes committed by both parties to the conflict.

When discussing territorial jurisdiction of a proposed court, the Sudanese Criminal Act of 1991, "the provisions of this Act shall apply to every offense committed wholly or partly in the Sudan." Therefore, to further the concept of complementarity of the court, Sudanese legislation must be incorporated to legitimise the court to give it a stronger standing, both in the international and national recognition.

Furthermore, the subject-matter jurisdiction for a court that will adjudicate the crimes committed in Sudan must adhere to the Rome Statute of the International Criminal Court[59], the four Geneva Conventions[60] and crimes mentioned in the international norms of international humanitarian law. The Rome Statute crimes as mentioned in article 5 to 8*bis* and the Elements of the Court[61] will be

[59]Ibid, 47.

[60] ICRC. (2020). The Geneva Conventions and their Commentaries. Available from: https://www.icrc.org/en/law-and-policy/geneva-conventions-and-their-commentaries.

[61]Ibid, 47.

analyzed to further give grounds to language used in providing judgements in the creation of hybrid tribunal for Sudan.

Following an analysis of applicable laws and legal sources to provide a concrete background of what a court can deduce in Sudan, the post-conflict analysis of justice, truth and reconciliation will be provided with an analysis of the SCSL in the provisions utilised to ensure retribution with a victim-centered approach undertaken. The analysis provided will highlight the harmonisation of objectives of the proposed court[62], provisions on retribution[63] and non-applicability of amnesty to international crimes.[64] As mentioned in the revised 2019 constitution, article 68(6) provides "issuing a general amnesty for the rulings issued against political leaders and members of armed movements due to their membership in them." This article allows for a blanket immunity, as mentioned in article 52 of the 2019 revised constitution of The Republic of the Sudan, to leaders and members of both the RSF and SAF, therefore it must be revisited.

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[62] Varney, H. (2007). Retribution and Reconciliation: War Crimes Tribunals and Truth Commissions – can they work together? Our Freedoms: A Decade's Reflection on the Advancement of Human Rights. International Bar Association's Human Rights Institute.

[63] Sierra Leone Truth and Reconciliation Committee. (2004). Chapter Four, Reparations. Available from: https://www.sierraleonetrc.org/index.php/view-report-text-vol-2/item/volume-two-chapter-four?category_id=20.

[64] UNSC. (2000, October 4). Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, p. 5. Available from: https://www.refworld.org/reference/countryrep/unsc/2000/en/30376.

It must be noted that the safety of any party that provides information to the court should be treated with high confidentiality and any party which chooses to publicise their testimony must be provided with the necessary protection to ensure their safety and of their families.

The Link Between ICL and the Rule of Law

The main link between international criminal law and the maintenance of the rule of law is the adherence to customary international law and international humanitarian law. Customary international law (*jus cogens)* are unwritten rules that come from a general practice accepted as a law and it exists independently from treaty law while remaining binding to all States. Many rules have also acquired the status of *jus cogens*, a peremptory norm of international law accepted, and recognised by the international community of States, as a whole as a norm from which no derogation is permitted, which may also be reflected in rules of international criminal law (see article 52 of Vienna Convention on the Law of Treaties 1980).[65] The rules of customary international law were created to fill some essential gaps in regulating non-international armed conflicts.[66] It includes, but not limited to, the prohibition of starvation, the prohibition of attacks on objects indispensable to the survival of the civilian population, the

[65] United Nations. (1969, May 23). Vienna Convention on the Law of Treaties 1980. Available from: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[66] Henckarts, J.; Doswald-Beck, L. (2005). Customary International Humanitarian Law, Volume I: Rules. Cambridge University Press.

obligation to respect the fundamental guarantees of persons who are not taking a direct part, or who have ceased to take a direct part.

On the other hand, international humanitarian law (IHL) governs the conduct of individuals during an armed conflict.[67] It acts similarly to international criminal law wherein it is applicable to all parties equally with an obligation to limit the effects of an armed conflict and minimise human suffering. The principle of military necessity ensures that lawful use of force is necessary to achieve a military goal and prohibits excessive violence.[68] International humanitarian law is a body of law that provides essential protection for those directly affected by an armed conflict, if it is respected by the parties to that conflict. Where IHL is not respected, human suffering increases and the consequences of the conflict become more difficult to repair. As affirmed by the International Court of Justice in 1986, the provisions of common Article 3, which will be looked at in more detail later, reflect customary international law and represent a minimum

[67] Kleffner, J. (2011). 'The Applicability of International Humanitarian Law to Organized Armed Groups'. International Review of the Red Cross, 93(882), p. 443.

[68] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (1868, December 11).:"That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable..."; See also Principle of Distinction. Available from: https://ihl-databases.icrc.org/en/customary-ihl/v1/rule1.

standard from which the parties to any type of armed conflict must not depart.[69]

As once mentioned by Catherine Powell[70]:

"*International criminal justice is important not only to secure justice for victims, but also to preserve rule of law and promote greater peace, security, and stability in an otherwise tumultuous world. When courts dispense justice, aggrieved individuals and communities are less likely to take matters into their own hands, which can escalate into serious conflicts with spillover effects for all. National courts can occasionally prosecute these crimes, but are sometimes not willing or able to do so.*"[71]

Throughout the ongoing conflict between the two warring parties in Sudan, the rule of law and all the aforementioned international regulations have been violated. To ensure peace, reconciliation, and rebuilding of the State can take place, there must be a clear path for justice to take shape. This path must be paved by the goal of uncovering the key aspects and a wider-truth seeking approach. The application of *jus cogen* and IHL in Sudan will require the inalienable right to truth through unpacking the political and historical context of the formation of the SAF and RSF. The political context includes the

[69] See International Court of Justice. (1986). Military and Paramilitary Activities In and Against Nicaragua. I.C.J. Reports, p.114, paras 218 and 219.

[70] https://www.cfr.org/expert/catherine-powell

[71] Powell, C. (2018, September 11). International Criminal Court plays important role in global rule of law. Available from: https://www.cfr.org/article/international-criminal-court-plays-important-role-global-rule-law.

rewriting of the constitution in 2019 and the Juba Peace Agreement that followed, which led to the power vacuum and struggle for leadership which caused this war. The root cause of the erosion of the rule of law in Sudan in the formation of a government which allowed the government to include armed forces, that are created to protect the nation, has denied the people their right of the citizens to prevail.

International criminal justice allows for the advancement of national reconciliation by providing retribution to the affected peoples by allowing the rule of law to prevail, which in turn maintains stability, protects future violations from reoccurrence, and allosg for local needs to come first. As Volker Turk, the High Commissioner of OHCHR, has stated: "Above all, transitional justice is about victims, dignity and healing."[72]

Creation of ICL to Preserve the Rule of Law

International criminal law currently works through various systems, which are international ad hoc tribunals, hybrid tribunals and the International Criminal Court. Ad hoc tribunals are tribunals established to crimes committed in specific contexts, such as the International Criminal Tribunal for the Former Yugoslavia, which was created to prosecute international crimes which have been committed in the former Yugoslavia since 1 January 1991, during the conflicts in

[72] OHCHR. (2025, March 5). Transitional justice is about victims, dignity and healing. Available from: https://www.ohchr.org/en/statements-and-speeches/2025/03/transitional-justice-about-victims-dignity-and-healing

the Balkans[73]; the International Criminal Tribunal for Rwanda, which was created to prosecute persons who had committed international crimes between 1 January 1994 and 31 December 1994, during the Rwandan genocide.[74] Hybrid tribunals combine features of ad hoc international criminal tribunals and domestic courts to apply both international and national law, such as the Special Court for Sierra Leone[75] and Special Tribunal for Lebanon.[76]

The International Criminal Court is a permanent autonomous international court established to investigate, prosecute and try individuals accused of committing the most serious crimes of concern to the international community as a whole, namely the aforementioned core crimes. The International Criminal Court does not replace national criminal justice systems but rather complements them. It can investigate, and, where applicable, prosecute and try individuals only if the State concerned does not, cannot or is unwilling to do so with genuinity.[77]

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[73] International Criminal Tribunal for the former Yugoslavia. Available from: https://www.icty.org

[74] United Nations International Residual Mechanism for Criminal Tribunals. The ICTR in Brief. Available from: https://unictr.irmct.org/en/tribunal.

[75] UNSC. (2000, August 14). UN Security Council Resolution 1315. Available from: https://digitallibrary.un.org/record/420605?ln=en&v=pdf.

[76] UNSC. (2005, December 15). UN Security Council Resolution 1644. Available from: https://digitallibrary.un.org/record/563081?ln=en&v=pdf .

[77] International Criminal Court (ICC). (2020). Understanding the International Criminal Court. Available from: https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf.

In all the forms that international criminal law undertakes, "their jurisprudence, although not an independent law-making process, is a particularly useful additional means of determining the existence of a rule of law, its meaning and its scope."[78]

Non-International Armed Conflict

According to a detailed definition of a non-international armed conflict (NIAC), it is proposed that "the hostilities have to be conducted by force of arms and exhibit such intensity that, as a rule, the government is compelled to employ its armed forces against the insurgents instead of mere police forces. Secondly, as to the insurgents, the hostilities are meant to be of a collective character, i.e. they have to be carried out not only by single groups. In addition, the insurgents must exhibit a minimum amount of organisation. Their armed forces should be under a responsible command and be capable of meeting minimal humanitarian requirements."[79]

This definition has been formulated on the basis of an in-depth analysis of the legislations that have been laid out in common Article 3 of the Geneva convention, which applies to "armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties." However, as the four Geneva Conventions have

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[78] Gutierrez Posse, H. D. T. (2006, March). The relationship between international humanitarian law and the international
criminal tribunals. International Review of the Red Cross, 88(861), p. 68.

[79] Schindler, D. (1979). The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols. RCADI, 163, p. 147.

universally been ratified - in Sudan on 23 September 1957 - the requirement that the conflict must occur in one of the High Contracting Parties has lost its importance in practice.

Furthermore, the minimum threshold that the conflict must reach to be considered an NIAC can be derived from the Addition Protocol II in Article 1(2), which is a twofold criterion. The first criteria, as aforementioned, must show that the hostilities have reached a minimum level of intensity when they are of a collective manner or the government is obligated to respond with by using military force against insurgents, instead of a mere police force. The second criteria require non-governmental groups involved in the conflict must be considered as "parties to the conflict", meaning they possess organised armed forces. This means that these forces there must be under a certain command structure and have the capacity to sustain military operations.[80]

The Tadić case (Prosecutor v. Dusko Tadić, ICTY-94-1) establishes the criteria for non-international armed conflicts. Applying these criteria to Sudan:

> ***Intensity of the Conflict***: the protracted and widespread violence between the Sudanese Armed Forces (SAF) and the Rapid Support Forces (RSF) meets the intensity threshold.

[80] ICTY. (2005, November 30). The Prosecutor v. Fatmir Limaj, Judgment. Para 94-134.

Organization of the Parties: the RSF, with its command structure, training, and recruitment, satisfies the requirement of an organised armed group.

When applying these criteria to Sudan, it can be shown as follows: firstly, the attacks conducted by the RSF, a paramilitary force, have reached a level of intensity which required the SAF to respond to their offensive with the entirety of their armed forces. This satisfies the first criteria of minimum level of intensity. Secondly, the RSF derives from the Janjaweed forces which terrorised the west of Sudan since the early 2000s. The organised forces of the RSF may have been formed under the previous government of Al-Bashir but was not created for the protection of the State from outside forces, therefore, for the purposes of this analysis, the RSF is to be considered a non-governmental, organised armed forces which is led by Hamdan Dagalo as their leader. This satisfies the second criteria to consider the RSF as "parties to the conflict". This concludes that the ongoing conflict in Sudan can be considered as an NIAC under international law.

Furthermore, the Sudanese Criminal Act of 1991 holds the commitment of a crime with the intention of undermining the constitutional system of the country or exposing to danger the unity and independence shall be punished.[81] In addition, the commission of the offense of waging war against the State, in particular ruins,

[81] Ibid, 54.

damages or injuries, with intent to prejudice the position of the military, is also deemed punishable by law.[82] Both of these offences hold punishments of death or life imprisonment. However, the application of capital punishment must adhere to international norms as found in the ICCPR, which states that "sentence of death must be imposed only for the most serious crimes in accordance with the law in force at the time of commission."[83]

State and Non-State Actors

The main component in articulating an internationally wrongful act is to determine the responsibility that lies to a State.[84] Every wrongful act of a State entails the international responsibility of the State where it has been committed.[85] The internationally wrongful act can be characterised by the action or omission in two separate occasions: the attribution of the act or omission to the State under international law and the breach of international law through aforementioned act or omission.[86] The characterisation falls under international law only and is not affected by the characterisation of the same act or omission under national law.[87]

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[82] Ibid, article 51(b).

[83] Ibid, 39, Article 6(2).

[84] United Nations, International Law Commission. (2001). Report on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001. Available from: https://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf.

[85] Ibid, article 1.

[86] Ibid, article 2.

[87] Ibid, article 3.

By contrast, non-state actors have been explained by Claude Bruderlein, director of the Harvard Program on Humanitarian Policy and Conflict Research, that they must satisfy the criterion of "[first,] combatants are organized according to a unitary command structure and commanders have at least a minimum of control over the conducts of the combatants. [Second,] the group is engaged in a political struggle to redefine the political and legal basis of the society through the use of violence. [Finally,] armed groups are independent from state control."[88]

As such, the application of customary international law "represents the common standard of behavior within the international community, thus even armed group hostile to a particular government have to abide by these laws."[89] This notion has been fortified by UN Secretary-General at the time, Kofi Annan, during the establishment of the Special Court for Sierra Leone:

"*Violations of common article 3 of the Geneva Conventions and of article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law, and in particular since the establishment of the two International Tribunals,*

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[88] Bruderlein, C. (2000, May). The Role of Non-State Actors in Building Human Security: The Case of Armed Groups in Intra-State Wars. Available from: https://www.files.ethz.ch/isn/7284/doc_7302_290_en.pdf.

[89] Residual Special Court for Sierra Leone (RSCSL). (2004, May 31). Prosecutor v. Norman, Kondewa and Fofana, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment). Available from: https://www.rscsl.org/Documents/Decisions/CDF/Appeal/131/SCSL-04-14-AR72(E)-131.pdf.

have been recognized as customarily entailing the individual criminal responsibility of the accused."[90]

Application of ICL to Sudan (During Conflict)

In 2002, the Special Court for Sierra Leone (SCSL) was created through an agreement between the Sierra Leone government and the United Nations.[91] It was created to prosecute those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed within the territory of Sierra Leone since 30 September 1996.[92] In this section, the statute, proceedings and judgements of the SCSL will be analyzed and contrasted to the ongoing conflict in Sudan. The main focus will be the application of international criminal law during a conflict.

The statute of the SCSL gave power to the Court to prosecute persons who committed crimes against humanity, serious violations of Article 3 Common to the 1949 Geneva Conventions for the Protection of War Victims and Additional Protocol II, while also including serious violations of international humanitarian law and specified crimes under Sierra Leonean law.[93] Furthermore, the Rule of Procedure and Evidence implemented in the SCSL were derived from the ICTR, with

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[90] Ibid, 77.

[91] (2002, January 16). Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, United Nations and Sierra Leone. Available from: https://treaties.un.org/pages/showDetails.aspx?objid=08000002800860ff.

[92] Statute of the Special Court for Sierra Leone. (2002). Available from: https://www.rscsl.org/Documents/scsl-statute.pdf.

[93] Ibid, articles 2-5.

applicability allowing for necessary changes to be made in accordance (*mutatis mutandis*) with the conduct of the legal proceedings before the SCSL.[94] The determination of international customary law was derived from judgements of the ICTR and ICTY, considering that such decisions held persuasive value.[95] Where appropriate, the Court had also considered the Rome Statute and its impact on international customary law.[96]

In direct relation, the application of the Rome Statute comes with many prerequisites which can be found in Article 21 of the Statute which holds that there is a hierarchy of application of the Court's documents. Firstly, the Statute, Elements of Crime, and the Rules of Procedure are to applied.[97] Secondly, if applicable, treaties, principles, and rules of international law, which also includes established principles of international law of armed conflict.[98] Thirdly and lastly, the application of national laws which holds jurisdiction over the crimes which have been committed and these laws must be consistent with international law and internationally recognised norms and

[94] Ibid, article 14.

[95] RSCSL. (2007, June 20). Prosecutor v. Brima, Kamara and Kanu, Decision on Form of Indictment (Case No. SCSL-04-16-T). Available from: https://www.refworld.org/jurisprudence/caselaw/scsl/2007/en/91904.

[96] ICTY. (1998, December 10). Prosecutor v. Furundzija, IT-95-17/1-T. Available from: https://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf.

[97] Ibid, 47, article 21(1)(a).

[98] Ibid, 47, article 21(1)(b).

standards.[99] In addition, the application of precedence has been evident in this article to be utilised for future cases.[100]

During the proceedings of the Prosecutor v Sesay, Kallon and Gabo[101], the three accused persons were in front of the Court as previous senior members of the Revolutionary United Front (RUF) – a rebel force which was created to overthrow the ruling government of Sierra Leone at the time, All Peoples Congress (APC), and had occupied the capital of Freetown and committed "systemic and widespread perpetration of all classes of atrocities against the civilian population"[102] – who were each charged with a plethora of crimes, including, but not limited to, crimes against humanity, war crimes, enslavement, pillage and outrages upon personal dignity.

To align with the purposes of this research, the main crime which will be looked at from the aforementioned case is crimes against humanity. This crime falls in direct relation to the Rome Statute and allows for greater further analysis of the application of the law when it is applied to a tribunal or court that is to be created to adjudicate in Sudan. For the court to find that crimes against humanity have been committed the following requirements must be met. First, there

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[99] Ibid, 47, article 21(1)(c).

[100] Ibid, 47, article 21(2).

[101] RSCSL. (2009, March 2). Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gabo [Sesay et al] (Case No. SCSL-04-15-T). Available from: https://www.refworld.org/jurisprudence/caselaw/scsl/2009/en/92027.

[102] Human Rights Watch. (1999, June). Getting Away With Murder, Mutilation, and Rape: New Testimony From Sierra Leone. 11(3(A)), p. 19375.

must be an attack, which means that "an attack is not limited to the use of armed forces, but also encompasses any mistreatment of civilian population. An attack can precede, outlast, or continue during an armed conflict and thus it may be, but need not be part of an armed conflict."[103]

The second requirement to prove the commission of a crime against humanity, must be widespread or systematic. To satisfy this requirement, 'widespread' must mean the large-scale nature of the attack and the number of victims, and 'systematic' must mean the organised nature of the violence undertaken and the unlikability of their random occurrence.[104] Furthermore, the third requirement is that the attack must be directed against a civilian population. The determination of a civilian population can be found in customary international law wherein they are defined as 'persons who are not members of the armed conflict.'[105] It should be noted that the presence of non-civilians in their midst does not alter the characteristic of the population being civilian, and it is up to the Court to determine if the number of soldiers and their status would alter the classification of the population.[106]

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[103] Ibid, 103, para. 77.

[104] Ibid, para. 78.

[105] Henckaerts, J.M. (2005, March). Study on customary international humanitarian law. International Review of the Red Cross, 87(857), p. 198.

[106] ICTY. (2005, November 30). Limaj et al. Trial Judgement, para. 186. Available from: https://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf.

The fourth requirement to determine if a crime against humanity has occurred is when the accused is part of the attack. This requirement is satisfied when the 'commission of an attack which, by its nature or consequences, is objectively part of the attack.'[107] Therefore, the determination of an alleged crime is if there is a link to an attack on a civilian population, and it need not have been committed in the midst of the attack. However, it cannot be an isolated attack, which its occurrence is so far removed from the attack, that it cannot be reasonably considered as being part of the attack.[108]

The final requirement to establish crime against humanity has occurred is the knowledge (*mens rea*) of the attack against a civilian population and the acts of the accused are part thereof. It is up to the prosecution to determine if the accused had previous knowledge or had reason to know that his acts had been part of the attack. The motivation of the accused and goal behind the attack are irrelevant, but it must be shown that they understood the overall context in which the acts had taken place.[109] In essence, 'victims of...crimes against humanity may be targeted because of who they are perceived to be.'[110]

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[107] ICTY. (2002, June 12). Kunarac et al. Appeal Judgement, para. 99. Available from: https://www.icty.org/x/cases/kunarac/acjug/en/.

[108] ICTY. (1999, July 15). Tadic Appeal Judgement, para. 271. Available from: https://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf.

[109] Ibid, 103, para. 90.

[110] Ibid, para. 127.

In the application of the aforementioned requirements as discussed in *Sesay et al.* to the current conflict in Sudan, it is believed that crimes such as unlawful killings, sexual violence, physical violence and enslavement can be proven. According to OHCHR, the UN human rights monitoring mechanism, there are allegations of 'killing of human rights defenders in El Geneina, West Darfur, and threats of sexual violence against human rights defenders in the region'[111]; 'repeated, widespread and credible allegations of trafficking in persons, in particular for the purpose of sexual slavery and sexual exploitation, child marriage, child labor and recruitment and use of children in combat roles and in support roles'[112]; allegations of 'large numbers of summary executions of civilians particularly of members of non-Arab ethnic groups'[113]; allegations of 'widespread violence

[111] Special Rapporteur On The Situation Of Human Rights Defenders; Special Rapporteur *On* Extrajudicial, Summary *Or* Arbitrary Executions. (2023, October 18). *Ref.*: AL SDN 4/2023. Available from: AL SDN 4/2023.

[112] Special Rapporteur On Tafficking In Persons, Especially Women And Children; Special Rapporteur On The Human Rights Of Internally Displaced Persons; Special Rapporteur On Contemporary Forms Of Racism, Racial Discrimination, Xenophobia And Related Intolerance; Special Rapporteur On The Sale, Sexual Exploitation And Sexual Abuse Of Children; Special Rapporteur On Contemporary Forms Of Slavery, Including Its Causes And Consequences. (2024, March 8). Ref.: AL SDN 1/2024. Available from: AL SDN 1/2024.

[113] Special Rapporteur On Extrajudicial, Summary Or Arbitrary Executions; The Special Rapporteur On The Right To Food; Special Rapporteur On The Right Of Everyone To The Enjoyment Of The Highest Attainable Standard Of Physical And Mental Health; Special Rapporteur On The Human Rights Of Internally Displaced Persons; Special Rapporteur On Minority Issues; Special Rapporteur On Violence Against Women And Girls, Its Causes, Consequences; The Working Group On Discrimination Against Women And Girls. (2024, August 6). Ref.: UA OTH 115/2024. Available from: UA OTH 115/2024.

against women and children'.[114] If these allegations are found to be credible and associated to high ranking members of the RSF, such as Mohamed Hamdan Dagalo, Abdul Rahim Hamdan Dagalo, or any of the commanders and field commanders appointed by the leadership to conduct the mentioned alleged crimes in a state within Sudan, then there's a high probability of the perpetrators can be found to be guilty of, but not limited to, crimes against humanity. In addition, members of the SAF could be found guilty of crimes against humanity, such as the recent attack in the Kanabi settlement in El Gezeira where it is reported that "SAF and allied forces attacked, kidnapped, and killed Kanabi residents, and burned down their homes."[115] These conclusions are drawn from the satisfaction of the SCSL in determining that crimes against humanity have been committed in *Sesay et al.*[116]

Prospectives of Application of ICL to Sudan (Post-Conflict)

The first war crimes court to be established following the Nuremburg and Tokyo tribunals of the Second World War was the International Criminal Tribunal for Former Yugoslavia (ICTY). The ICTY was created

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[114] Special Rapporteur On Violence Against Women And Girls, Its Causes, Consequences; The Working Group On Discrimination Against Women And Girls Special Rapporteur On Extrajudicial, Summary Or Arbitrary Executions Special Rapporteur On The Human Rights Of Internally Displaced Persons Special Rapporteur On The Human Rights Of Migrants; Special Rapporteur On The Sale, Sexual Exploitation And Sexual Abuse Of Children; Special Rapporteur On Contemporary Forms Of Slavery, Including Its Causes And Consequences. (2024, August 21). Ref.: AL OTH 116/2024. Available from: AL OTH 116/2024.

[115] Centre for Information Resilience. (2025, January 31). Kanabi settlements burn as violence spreads across Gezira. Available from: https://www.info-res.org/sudan-witness/reports/kanabi-settlements-burn-as-violence-spreads-across-gezira/.

[116] Ibid, 103, para. 963.

on 25 May 1993 after the UN Security Council had passed Resolution 827 to establish the Court.[117] For the purposes of this research, the main focus will be on the proceedings of chosen judgements. As seen in the previous section, the administration of international criminal law during a conflict requires the implementation of various legal instruments such as Article 3 Common and Protocol II of the Geneva Convention. In this section, an analysis of post-conflict application of ICL in Sudan will be seen by using judgements from the ICTY and ICC.

The first judgement that will be looked at is the trial of former leader of the Serb Democratic Party, Dusko Tadic, who was accused by the Prosecutor, including but not limited to, on the basis of individual criminal responsibility of crimes against humanity of acts of persecution, deportation, confinement, rape, murder, and inhumane acts. The Tadic trial had established the overall control test for determining if an individual's actions were part of the war when they were performed by a paramilitary or non-State group. This control test was recognised as the "Tadic Conditions".[118]

The Tadic Conditions, a fourfold test as provided by the ICTY, constitutes that the first Tadic Condition requires for the violation to amount to an infringement of a rule of international humanitarian

[117] UNSC. (1993, May 25). UN Security Council Resolution 827. Available form: https://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf.
[118] ICTY (1997, May 7). Prosecutor v. Dusko Tadic (Case No. IT-94-1-T). Available from: https://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf.

law. The second Tadic Condition requires that the rule must be customary in nature or, if it belongs to treaty law, that the required conditions must be met. The third Tadic Condition requires the violation to be "serious", as in it must constitute a breach of a rule protecting important values, and such breach constitutes grave consequences for the victim. The fourth and final Tadic Condition is that the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the law.[119]

Through the application of these conditions, Tadic was found guilty of acts as found in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, which outline that "the civilian population as such, as well as individual civilians, shall not be made the object of attack." The application of these articles can be found through the principle of military necessity, which had been violated by Tadic and other defendants in front of the ICTY. In its broad sense, military necessity means "doing what is necessary to achieve a war aim".[120] The principle of military necessity acknowledges the potential for unavoidable civilian death and injury ancillary to the conduct of legitimate military operations. However, this principle requires that

[119] ICTY (1995, October 2). Prosecutor v. Dusko Tadic Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction, para. 94. Available from: https://www.icty.org/x/cases/tadic/acdec/en/51002.htm.

[120] Verri, P. (1992). Dictionary of International Law of Armed Conflict. Available from: https://www.icrc.org/sites/default/files/external/doc/en/assets/files/publications/icrc-002-0453.pdf.

destroying a particular military objective will provide some type of advantage in weakening the enemy military forces. Under no circumstance are civilians to be considered legitimate military targets. Consequently, attacking civilians or the civilian population as such cannot be justified by invoking military necessity.

The prerequisites to establish individual criminal responsibility, the mental (*mens rea)* and physical (*actus rea*) elements of the crime must be established. As seen in the Blaskic case, it was found that the *actus rea* involved that "the attack must have caused deaths and/or serious bodily injury within the civilian population or damage to civilian property...Targeting civilians or civilian property is an offence when not justified by military necessity."[121] It was also found that on the *mens rea* that "such an attack civilian or civilian property were being targeted not through military necessity."[122]

By applying these conditions and prerequisites to the Sudanese conflict, it is possible for a court to find both the SAF and RSF to be guilty of the alleged crimes that have been documented as of the writing of this research. These crimes may include, but not limited to, the killings of civilians in the Kabkabiya, North Darfur when the SAF had conducted air strikes on a crowded market which caused dozen

[121] ICTY. (2000, March 3). Prosecutor v. Tihomir Blaskic (Trial Judgement). Available from: https://www.refworld.org/jurisprudence/caselaw/icty/2000/en/19490.
[122] Ibid.

civilian casualties.[123] This attack contradicts the principle of military necessity and the principle of distinction between civilian and combatants. Similarly, the RSF had carried out various attacks in Fayu and Habila in South Kordofan, where it is alleged that the crimes included killings, rape, abductions of ethnic Nuba residents, and looting and destruction of homes. The application of the first and second Tadic conditions are met when both the attacks are infringing international humanitarian law and they are established in customary law. The third Tadic Condition has been met since these attacks are "serious" that they infringe various principles, such as the aforementioned principle of military necessity and distinction of civilians and combatants. The fourth and final Tadic Condition has been satisfied through the establishment of individual criminal responsibility. The final condition requires the application of the mental and physical elements of the crime, wherein the attacks have caused scores of civilian deaths and displacement, and these areas were targeted for purposes that surpass the principle of military necessity.

Furthermore, the establishment of individual criminal responsibility can be found through the application of the ICC's judgement in the

[123] Amnesty International. (2024, December 12). Sudan: SAF airstrike on crowded market a flagrant war crime. Available from: https://www.amnesty.org/en/latest/news/2024/12/sudan-armed-forces-saf-killed-dozens-in-an-air-strike-on-a-crowded-market-in-the-rapid-support-forces-rsf-controlled-town-of-kabkabiya-in-north-darfur/.

trial of Jean-Pierre Bemba Gombo.[124] The Rome Statute provides in Article 28 that "a military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court, committed by forces under his or her direct effective command and control, or effective auhtority and command as the case may be."[125] This article further goes on to determine the mental element of the crime to establish that the "military commander or person either knew or...should have known that the forces were committing or about to commit such crimes"[126] and through their position as a commander have "failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission."[127] The Court had outlined elements which must be satisfied to align with the requirements of Article 28(a).[128] These elements include:

> The suspect must be either a military commander or a person effectively acting as such;
>
> The suspect must have effective command and control, or effective authority and control over the forces (subordinates)

[124] ICC. (2011, May 3). Prosecutor v. Jean-Pierre Bemba Gombo [Bemba] (ICC-01/05-01/08). Available from: https://www.icc-cpi.int/court-record/icc-01/05-01/08-1386.
[125] Ibid, 47, article 28(a).
[126] Ibid, 47, article 28(a)(i).
[127] Ibid, 47, article 28(a)(ii).
[128] Ibid, 126, para. 407.

who committed one or more of the crimes set out in articles 6 to 8 of the (Rome) Statute;

The crimes committed by the forces (subordinates) resulted from the suspect's failure to exercise control properly over them;

The suspect either knew or, owing to the circumstances, should have known that the forces (subordinates) were committing or about to commit one or more of the crimes set out in articles 6 to 8 of the (Rome) Statute; and

The suspect failed to take the necessary steps and reasonable measures within his or her power to prevent or repress the commission of such crime(s) or failed to submit the matter to the competent authorities for investigation and prosecution.

The ***command responsibility principle*** could apply to Sudanese leaders. In applying these elements to the RSF and SAF, it is possible to find both leaders, Hemedti and Burhan, to be criminally responsible for the crimes that have been committed in Sudan from April 2023. During the consideration of the crimes included there must be inclusion of sexual violence, as it is often systematically used as a weapon of war. As found in the Rome Statute, the crime against humanity of rape can be found in Article 7(1)(g) and the war crime of rape can be found in Article 8(2)(e)(vi). The legal elements of the crime against humanity of rape includes, but not limited to, that "the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual

organ, or of the anal or genital opening of the victim with any object or any other part of the body,"[129] and that this "invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such or another person."[130] The legal elements of the war crime of rape includes, but not limited to, that "the perpetrator's conduct was deliberate and the perpetrator: (i) meant to cause the consequences; or (ii) was aware that it would occur in the ordinary course of events."[131] In Prosecutor v. Bosco Ntaganda, the Court had indicated that the act of rape does not require physical force.[132]

By applying the conditions and elements of the crimes as mentioned in Article 7(1)(g) and 8(2)(e)(vi) to the war in Sudan, in particular the crimes committed by the RSF, it could be found that the occurance of rape as a war crime and crime against humanity in instances such as the attack in El Genina, West Darfur between late April and late June of 2023.[133] Furthermore, there have been allegations of rape and sexual

[129] ICC. (2010). Elements of Crimes. Available from: https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf.

[130] Ibid.

[131] Ibid, 126, para. 89 to 90.

[132] ICC. (2019, July 8). Prosecutor v. Bosco Ntaganda [Bosco] (ICC-01/04-02/06). Available from: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03568.PDF.

[133] Human Rights Watch (HRW). (2023, August 17). Darfur: Rapid Support Forces, Allied Militias Rape Dozens. Available from: https://www.hrw.org/news/2023/08/17/darfur-rapid-support-forces-allied-militias-rape-dozens.

slavery in South Kordofan state since September 2023.[134] If these allegations are found to be true, commanders and members of the RSF are liable to be found guilty of using rape as a war crime and crime against humanity.

As highlighted by the UN Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence, the advancements made by the previous hybrid and ad hoc international tribunals have "raised the standards for the prosecution of sexual and gender-based crimes in national courts, positively guiding representatives of the civil party, the prosecution and/or judiciary."[135]

Victim Participation and Reparations

A key innovation of the ICC is victim participation, allowing victims to engage directly in proceedings. In addition, the ICC provides a reparation system aimed at compensating victims for the harm they have suffered. This approach reflects a shift toward restorative justice, which balances punishment with efforts to repair the damage done. Despite these advancements, both victim participation and reparation mechanisms face significant challenges in practice.

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[134] HRW. (2024, December 15). Sudan: Fighters Rape Women and Girls, Hold Sex Slaves. Available from: https://www.hrw.org/news/2024/12/15/sudan-fighters-rape-women-and-girls-hold-sex-slaves.

[135] Special Rapporteur On Truth, Justice And Reparation. (2020, July 17). Report on gender perspective in transitional justice processes (A/75/174). Available from: https://www.ohchr.org/en/calls-for-input/report-gender-perspective-transitional-justice-processes.

Article 68(3) of the Rome Statute allows victims to present their views and concerns at appropriate stages of the proceedings. This provision recognises victims as active participants, distinct from witnesses, who can engage through legal representatives. The ICC seeks to ensure that victims are not just passive subjects but integral stakeholders in the justice process. The goal is to empower victims by giving them a platform to influence proceedings, fostering a sense of justice.

Victims may participate in the pre-trial, trial, and appeal phases of proceedings. In the pre-trial phase, victims can submit observations on jurisdiction or admissibility. During the trial, victims may express concerns through their legal representatives, particularly regarding sentencing and reparations. In the appeal phase, they may challenge decisions, including those related to reparations.

Despite the legal framework, the current obstacle that victims participation faces includes budget constraints which limits the provision of sufficient legal representation to victims who may not be able to access legal aid; the complications to become a recognised participant may hinder inclusive victim representation; victims may face reprisals to themselves or loved ones in conflict areas, which may deter them from participating in proceedings; victims have limited or reduced influence on the decision-making process.

Through Article 75 of the Rome Statute, the Court may order convicted individuals to provide reparations which may include restitution to restore victims to their position before the crime, financial

compensation for damages suffered, psychological, medical or social rehabilitation and support, and public apologies or memorials. These reparations aim to address the lasting harm suffered by victims and provide them with meaningful redress for their suffering.

Because many convicted individuals lack the financial means to pay reparations, the ICC established the Trust Fund for Victims (TFV). The TFV, funded through voluntary contributions, provides both individual reparations and collective reparations. The TFV's role is critical in ensuring that victims can receive compensation when the perpetrator is unable to pay.

While essential, the reparation system faces challenges wherein convicted victims may lack the financial means to provide reparations, which may cause difficulties in enforcing the orders. Since the TFV is maintained through voluntray contributions, the lack of funds and inconsistency may hinder the provision of reparations. Furthermore, determining who qualifies as a victim and what constitutes adequate reparations can be complex and may cause delays in the process because of bureacracy, which undermines the effectiveness of reparations.

Victim participation and reparations have had a mixed impact. On one hand, these mechanisms empower victims by providing them with a voice in the justice process, offering them an opportunity to seek redress. This participatory approach has helped set a precedent for victim-centred justice in international law. On the other hand,

practical challenges, such as financial constraints, delays, and security issues, often undermine their full potential. Victims may feel frustrated by the slow pace and limited outcomes of these mechanisms.

Nevertheless, these innovations are critical for fostering reconciliation and restoring dignity to victims. The ICC's efforts represent a broader shift in international criminal justice, focusing not only on punishment but also on addressing the needs and rights of victims. With greater funding and more streamlined processes, victim participation and reparations could enhance the legitimacy of the ICC and improve its impact on affected communities.

Victim participation and reparations are groundbreaking features of the ICC, distinguishing it from earlier international criminal tribunals. These mechanisms recognise victims as active participants in the justice process and offer a path toward addressing the harm they have suffered. While challenges remain in the practical implementation of these systems, victim participation and reparations are crucial for ensuring that international justice is not solely punitive but also restorative. To enhance their effectiveness, the ICC must address the funding, procedural, and security challenges it faces. With these improvements, the ICC can better fulfil its mission to provide justice not only for the accused but also for the victims.

In the formation of a hybrid tribunal to adjudicate on the crimes that have been, or are being, committed in Sudan, the protection and

safety of victims, witnesses, and other people cooperating with the court rests with the State. The legal obligation that Sudan is liable to can be found in Article 5 of the African Charter on Human and Peoples' Rights (African Charter), which provides:

"*Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman, or degrading punishment and treatment shall be prohibited.*"[136]

This obligation has been addressed in particular to ensure the right to redress for victims of torture and other cruel, inhuman, or degrading punishment or treatment through the obligation as found in General Comment No.4 on the African Charter. This is highlighted by State Parties requirement to "ensure that victims of torture and other ill-treatment are able in law and in practice to claim redress by providing victims with access to effective remedies."[137] This obligation by the African Charter highlights the significant challenges that are faced which prevents victims of torture and other ill-treatment from fully realizing the right to redress, mainly "impunity, gaps in the rule of law,

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[136] African Union. (1981, June 1). African Charter on Human and Peoples' Rights. Available from: https://au.int/en/treaties/african-charter-human-and-peoples-rights.

[137] African Commission on Human and Peoples' Rights. (2017, March). General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman, or Degrading Punishment or Treatment (Article 5), para. 8. Available from: https://policehumanrightsresources.org/content/uploads/2021/07/achpr_general_comment_no._4_english.pdf?x49094.

corruption, inadequate torture prevention safeguards and a lack of implementation of legislation where it exists."[138]

Furthermore, the African Charter highlights the importance of seeking to address the legacy of large-scale past abuses occasioned by conflicts. The Charter obliges State Parties to "ensure that their justice approaches are premised on a consultative, all-inclusive and participatory approach that ensures both respect for the dignity and rights of victims and victim communities and the demands for building a common future transcending the divisions that conflicts occasion and guaranteeing non-repetition."[139] This notion has been fortified by the UN Secretary-General by recalling that providing redress to violations is " a tool to give visibility to and facilitate the participation of victims, and places emphasis on the individuals, communities or populations historically subject to discrimination, especially women."[140]

In conclusion, the Sudanese State must "ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatisation in the course of legal and

[138] Ibid, para. 14.

[139] Ibid, para. 70.

[140] UN Secretary General. (2012, September 13). Promotion of truth, justice and guarantees non-recurrence (A/67/368). Available from: https://digitallibrary.un.org/record/736415?ln=en&v=pdf.

administrative procedures designed to provide justice and reparation."[141]

Final Observations

In 2019, the Transitional Legislative Council was supposed to be serve as a check on military power and ensure legal reforms. However, due to political disagreements and military interference, it was never fully established, leaving the government without proper legislative oversight. The weak transitional justice efforts through the creation of the Transitional Justice Mechanism failed to deliver meaningful accountability. As the Sudanese Woman's Union (SWU) has once said, the results of the commission of inquiry that was established by the Transitional Military Council "covers up those who confessed committing crimes" and, furthermore, "confirms the alienation of the Military Council from the Sudanese people. They do not feel any responsibility towards this [Sudan] country or its people." The SWU goes on to urgently call for the creation of "an independent, transparent and just commission under regional control."

The transitional framework failed due to military dominance, lack of institutional reform, weak transitional justice mechanisms, and economic instability. Without genuine civilian leadership, judicial, judiciary, and security sectors reform, and accountability for crimes

[141] UNGA. (2005, December 16). United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation. Available from: https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation.

committed, Sudan remains vulnerable to further military takeover and prolonged conflict. For Sudan to achieve justice and long-term stability, it must prioritise victim and witness protection, judicial and security reforms, and the establishment of a hybrid court. Through lessons learned from previous ad hoc and hybrid tribunals, Sudan has the opportunity to design a justice system that hold perpetrators accountable while fostering national reconciliation.

"A State may not dispatch a crime into oblivion if it is a crime against international law, for other States may have the right to remember it."[142]

From what has been seen from this research, the need for international and regional cooperation is required to ensure a just and participatory transitional justice in a criminal mechanism to allow for peace and stability to flourish. In the recommendations section, the legal reforms and recommendations will be provided for the various stakeholders in this process, including international and regional actors, civil society organisations, and the Sudanese state.

[142] Hazan, P. (2020, March 26). Amnesty: a blessing in disguise? Available from: https://hdcentre.org/news/amnesty-a-blessing-in-disguise-making-good-use-of-an-important-mechanism-in-peace-processes/.

V. Recommendations (To Sudanese state, civil society and international actors)

The Sudanese state should:

Oversee implementation of comprehensive transitional justice measures can be done through formally recognizing victims and providing reparations; setting up a truth and reconciliation commission to document past crimes; and reforming judicial institutions to ensure fair trials for human rights violators.

Ensure that transitional justice mechanisms include victims, displaced communities, and civil society representatives to ensure meaningful dialogue with civil society organisations.

Ratify international legal instruments relevant to civil and political rights (such as the Kampala Convention and the Convention on the Elimination of All Forms of Discrimination Against Women) and also aim to ratify the Rome Statute and the Protocol to the African Charter on Human and Peoples' Rights On the Establishment Of an African Court On Human and Peoples' Rights. All subsequent domestication should be formulated into clearly understood laws that encourage effective and uniform application by the judiciary.

Implement a national witness protection program by establishing legal and institutional frameworks for victims and witness protection, modelled after international best practices. There must be enforcement of strict legal penalties for threats, harassment, or violence against

individuals cooperating with justice mechanisms by criminalizing all forms of retaliation against victims and witnesses.

Establish secure and confidential reporting mechanisms by setting up anonymous reporting systems within national justice and human rights institutions to encourage victims to come forward.

Provide resources allocated for victim rehabilitation through providing medical care, psychological support, and financial compensation for victims of war crimes and human rights abuses.

Ensure the Sudanese judicial system and security forces are rebuilt post-conflict through vetting and removal of corrupt officials by conducting thorough background checks to remove individuals implicated in human rights violations from the judiciary.

Promote investment in legal education and training of new judges, prosecutors, and lawyers in international criminal law, transitional justice, and human rights protections. This would allow for the decentralisation of the judiciary section and allow for the establishment of regional courts to improve access to justice and marginalised communities. This can be done through cooperation with tribal and Sufi leaders, who "have long played a crucial role in mediating disputes, fostering reconciliation, and promoting peace through culturally ingrained practices." [143]

Reform the security sector within Sudan by disarming and integrating former armed groups through the implementation of a demobilisation and reintegration program for former combatants, ensuring they do not return to violence. The creation of an independent oversight mechanism through a civilian-led commission can monitor the reintegration of former combatants, and monitor police and military conduct. This would allow to professionalise the security forces by providing human rights training and oversight, both nationally and internationally, to prevent future state-led atrocities.

Revisit the constitution's amnesty provisions sop as not to provide amnesty to SAF, the RSF, or armed affiliates. The 2019 Sudanese Constitution grants broad amnesty to armed groups. This provision contradicts international law and should be repealed. Sudan should explicitly integrate Common Article 3 of the Geneva Conventions and customary IHL into its legal framework. The Sudanese Criminal Act of 1991 does not fully align with the Rome Statute. Amendments should incorporate definitions of genocide, crimes against humanity, and war crimes.

Civil society organisations should:

Strengthen efforts to collect victim testimonies and evidence of war crimes, ensuring their admissibility in international courts.

Provide capacity building for legal and psychological support through training sessions for local lawyers and human rights defenders to assist victims in navigating international justice mechanisms. This

can be done through working with international legal networks to bring cases before regional and international courts by engaging in strategic litigation. This would allow an increase in international advocacy by partnering with global human rights organisations to maintain pressure on international actors to act on Sudan's situation.

Establish local victim support structures to monitor and respond to threats against those seeking justice. There must be coordination with international organisations to provide emergency relocation and safe houses to victims facing imminent threats.

Empower victims through legal awareness campaigns by conducting outreach programs to educate them on their rights and available protection mechanisms.

Support female and child victims of gender-based violence (GBV) by offering specialised services, including medical aid, psychosocial support, and safe reporting channels for survivors of sexual violence.

International and regional actors should:

The ICC and other international criminal law tribunals should] strengthen investigations and prosecutions through ensuring that robust evidence collective mechanisms, particularly for crimes committed by all parties in Sudan, including non-state actors.

Enhance of victim participation must be expanded to provide outreach efforts to Sudanese victims and civil society organisations to ensure better participation under Article 68 of the Rome Statute. Through

cooperation between international tribunals and domestic authorities, pressure must be exerted on the Sudanese authority to uphold their obligations under the Juba Peace Agreement and cooperate with the ICC through upholding and implementing the memorandum of understanding that was signed in August 2021.[144]

UN's OHCHR, Human Rights Council, and other independent mechanisms must strengthen monitoring and documentation efforts of the fact-finding mission in Sudan to ensure documentation of crimes for future prosecutions. Additionally, to work with Sudanese judicial institutions to provide capacity building training, legal training, and technical assistance for national prosecution. There must also be a push for further UN Security Council resolutions reinforcing Sudan's cooperation with the ICC and accountability for human rights violations.

The African Union, the African Court on Human and People's Rights, and the Arab League should encourage the establishment of a special court for Sudan, similarly to the Special Court for Sierra Leone, which was discussed in this research

[144] ICC. (2021, August 17). The Prosecutor of the International Criminal Court, Mr Karim A. A. Khan QC, concludes his first visit to Sudan with the signing of a new Memorandum of Understanding ensuring greater cooperation. Available from: https://www.icc-cpi.int/news/prosecutor-international-criminal-court-mr-karim-khan-qc-concludes-his-first-visit-sudan.

Encourage Sudanese authorities to ratify the African Court's jurisdiction to allow for human rights cases against the State. This can be done through leveraging the African Union and the Arab League to exert diplomatic pressure to support a transitional justice in Sudan rather than shielding state actors from accountability. Sudan's fluctuating stance on ICC cooperation necessitates stronger diplomatic efforts and potential AU involvement. The African Union and IGAD could play a role in ensuring compliance with international legal standards.

International courts, human rights monitoring bodies, and criminal mechanisms must enhance security measures for victims and witensses, including relocation, pseudonym usage, and secure testimony mechanisms. The improvement of legal and psychological support to provide free legal and trauma-informed counselling for victims engaging with international justice mechanisms.

Establish stronger safeguards to prevent leaks of victims' identities and testimonies, especially in digital case management systems, and utilizing technology to allow for testimonies to be provided without physically appear in court would snure security from retaliation. The African Union and the UN should collaborate on victim protection mechanisms, ensuring access to emergency response programs.

To all actors and stakeholders:

Thorough consideration must be given to creating a uniquely Sudanese understanding of the rule of law that is sensitive to

Sudanese politics and interpretations by local legal practitioners. This conceptualisation should capture the domestic legal and customary mechanisms to be used as vehicles for promoting the rule of law and any hegemonic understandings, that privilege institutions or ends-based approaches should be sustainable in a Sudanese context. Sudanese government and civil society should emphasise the importance of the rule of law in rebuilding and fortifying the Sudanese nation-state and its administration in the wake of a turbulent and destabilising conflict.

Actors particularly interested in transitional justice post-conflict, whilst incorporating the rule of law as a tenet of their legal project, should be cautious not to depict the establishment of the rule of law as inherently reliant on transitional justice, and endeavour to introduce the rule of law initiatives that are sustainable beyond an immediate post-conflict timeframe.

The creation of a hybrid court is paramount – combining international and national elements – and could be an effective model for Sudan. The success of former ad hoc and hybrid tribunals, such as the ICTY and SCSL, provide valuable lessons.

The jurisdiction of the court should have the authority to prosecute crimes against humanity, war crimes, and genocide committed during the conflict. The court should be composed of a mix of Sudanese and international judges to ensure impartiality and local legitimacy; the prosecutors will include Sudanese and international legal

professionals with experience in war crimes cases; and the insurance of equal access to legal representation from both defendants and victims.

This court should be based in Sudan, with the option for trials abroad for high-risk cases. The court should be modelled after the ICC's victim participation framework, ensuring reparations and testimony opportunities. The funding of this court should be from Sudan in partnership with international actors such as the AU, UN, and the EU to ensure sustainability and independence.

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The Dialectic of Governance and Justice: Conceptualising and Implementing the Rule of Law in Sudan

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