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Front cover photograph: Coffee Pots in a souq, Sudan (Credit: Imogen Thurbon).

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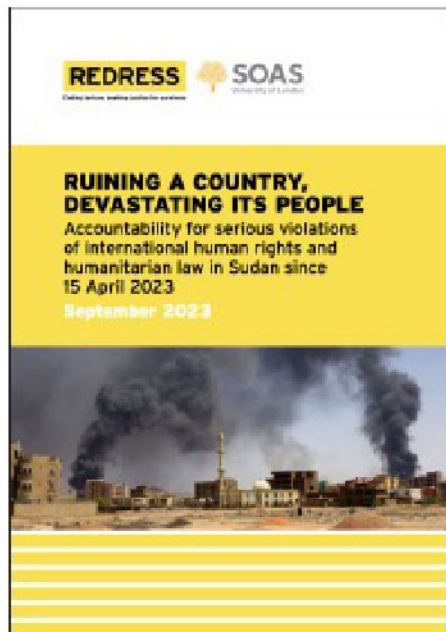
War, International Crimes, and the Breaking of the Cycle of Violence and Impunity in Sudan

Lutz Oette and Mohamed Abdelsalam Babiker*

This article draws on our presentation on war, international crimes and justice at this year's SSSUK Annual meeting.¹ It coincided with the publication of the joint REDRESS and SOAS Centre for Human Rights Law report, *Ruining a Country, Devastating its People: Accountability for serious violations of international human rights and humanitarian law in Sudan since 15 April 2023*,² to which both of us have contributed.

The ongoing armed conflict in Sudan cannot, and must not be viewed in isolation. It is part of the processes of aborting the Sudanese peaceful revolution since December 2018 by both the Sudanese Armed Forces (SAF) and Rapid Support Forces (RSF) supported by regional and international actors. In this five-years period, civic forces have witnessed unprecedented violence, including massacres against peaceful protesters, excessive use of lethal force in response to massive peaceful street protests against the military coup of 25th October 2021 and eventually an eruption of internal rifts within the military 'Islamist elements of the regime'. These developments culminated in the increas-

ingly well documented, commission of war crimes, crimes against humanity and, potentially, genocide. The armed conflict therefore forms part of a wider history in which, particularly since the coup in 1989, ubiquitous violence – both direct and structural – as a mode of doing politics and business has been paralleled by an almost complete impunity. The lack of accountability



Cover of the Report.

¹ This took place on 16th September 2023 at SOAS.

² The report is available at https://redress.org/wp-content/uploads/2023/09/Sudan_IHL-Executive-Summary_ENG_for-web.pdf.



The Authors at the Symposium in September.

has operated in an environment which lacked independent justice institutions that function with respect for the rule of law, instead ruling by law, including the application of repressive laws. This situation fostered autocracy, that is a political logic whereby recourse to violence with impunity replaced democratic processes and the rule of law. International and regional justice initiatives over the last two decades helped to build a wider momentum and understanding of key mechanisms and issues in Sudan. They did not, however, seriously disrupt or change the premium placed on the politics of violence or even act as a deterrent to the commission of further violations. The slogan of the revolution that began in 2018, 'freedom, peace and justice', provides a mirror image of the negative consequences of these political developments, 'unfreedom, war and injustice'.

The transitional period following the departure of the former dictator President al-Bashir was marked by a serious defect. It included, albeit reluctantly, key actors or 'partners', both personally and institutionally, who have been responsible for serious human rights violations in Sudan over the last three decades. The political calculus, which was also, mistakenly, endorsed by diplomatic actors and regional (AU, IGAD) and international institutions (UN), of appeasing these actors without any accountability process, parameters or

conditions for their involvement in political and civic processes proved to be fatally flawed. It was also unacceptable when viewed through the lens of international law norms and standards. Combined with the emergence of the RSF as a powerful military-tribal, mercenary militia force (with considerable economic powers) that rivalled the Sudanese army, this development accelerated the still prevailing political logic of violence and raised it to an unprecedented level in Sudan's contemporary history. Its escalation is etched in living memory as traumatic moments: the massacre of 3rd June 2019, the October 2021 coup, and the systematic and widespread killings and wounding of hundreds of peaceful protesters thereafter. The outbreak of the war in April 2023 is the culmination of this destructive trajectory. As outlined above, it is part of persistent efforts to undermine the Sudanese dream of democratisation and the realisation of the revolution's slogans: freedom, peace and justice.

This article first identifies the specific features and challenges posed by the current armed conflict in Sudan for accountability, particularly criminal accountability; it views such accountability as a prerequisite for a symbolic and effective break with Sudan's violent past and justice for the many victims of violations. It then examines the avenues for such accountability, with a particular emphasis on national responses in any forthcoming transition.

The specific features of the armed conflict and associated challenges for accountability and justice are both factual and legal. Several of the violations that have been documented in the current conflict are not new; extrajudicial killings, arbitrary arrest and detention, torture, sexual violence and sexual slavery, enforced disappearances, destruction and occupation of buildings and livelihoods, destruction of civilian infrastructure indispensable for the survival of the civilian populations, destruction of cultural properties (monuments, religious sites, archives, scientific materials), starvation of civilians, denial of humanitarian assistance and forced displacement have characterised the international crimes committed in the Darfur region and elsewhere in Sudan since 1989. Yet, their modalities, in certain circumstances, scale and settings differ. This includes, particularly, the targeting of journalists, doctors, humanitarian workers, and activists all over Sudan, and the renewed targeting of ethnic groups in Darfur. The urban warfare, in particular in the urban centres such as Khartoum and other cities, has been marked by novel developments. This applies especially to the indiscriminate killing of civilians, destruction of infrastructure, the use of human shields, taking of hostages and the widespread pillage, looting and occupation of homes. The perpetrators, particularly the RSF on the ground, appear to act with little restraint and their command structures, including the effectiveness of any such structure, is unclear. Another major factor is the involvement of, and complicity in the conflict of various actors,

both internally, such as businesses related to the parties of the conflict, and externally, such as the United Arab Emirates and other neighbouring countries. The ongoing fighting and destruction in, and displacement of millions from urban centres is not only deeply traumatic for the Sudanese population, it also makes the documentation and collection of evidence difficult and dangerous. This observation notwithstanding, a considerable body of *prima facie* evidence has emerged, based on the documentation of people on the ground, eyewitness accounts and audio-visual materials which details the nature and scale of serious, massive and systematic violations by both sides to the conflict.

The armed conflict engages several legal regimes. Both parties are bound by the rules of international humanitarian law applicable to non-international armed conflicts. This includes general principles such as distinction, proportionality, necessity, and the prohibition of superfluous injury and unnecessary suffering as well as the humane treatment of detainees, prohibition of torture and judicial guarantees. The State, particularly through the SAF, is also responsible for human rights violations committed during the armed conflict in breach of Sudan's international obligations. International criminal law governs individual liability for international crimes, including command responsibility. In the current conflict, emerging evidence indicates the commission of numerous war crimes and crimes against humanity – specific acts, such as torture or rape, arbitrary arrests, death in unknown detention centres, and forced disappearances which are carried out in a widespread or systematic fashion directed against any civilian population – and, in Geneina, Darfur, potentially genocide. These international obligations and standards binding on Sudan and various non-state armed actors are complemented by Sudan's national law. The latter incorporates some of these standards, including by criminalising war crimes, crimes against humanity and genocide, albeit in an incomplete and deficient manner. While its application would allow for some accountability, it would need to be reformed to provide a suitable legal and institutional framework to ensure accountability and justice in relation to the violations committed during the armed conflict.

The multiplicity of legal regimes creates different avenues to seek justice based on several, including parallel, forms of responsibility. The most readily available avenue is, however, not necessarily the most effective one and does not open a direct way to criminal accountability. Individuals, victim groups or NGOs alleging that Sudan has violated its obligations under the African Charter on Human and Peoples' Rights (African Charter) can bring cases before the African Commission on Human and Peoples' Rights. However, proceedings tend to take long, will focus on State responsibility only – so do not cover the RSF – and are unlikely to be fully complied with. The same applies in prin-

principle to lodging a request for provisional measures with the aim of making Sudan comply with its obligations under the African Charter. Yet, the African Commission heeding such a request would carry some symbolic weight. The International Court of Justice may also issue provisional measures requesting Sudan to take measures to prevent the commission of genocidal acts, as it has done in the case of *The Gambia v Myanmar* concerning the treatment of the Rohingya. However, such an order can only be requested by another State. It is also questionable how effective it would be, as the latter would depend on the extent to which Sudan as a State can take effective measures against those accused of being responsible for genocidal acts in Darfur.

The Human Rights Council is a body composed of 47 State representatives. Its main role in a situation such as that prevailing in Sudan is to deliberate and take measures with a view to holding the perpetrators to account, providing justice to victims, and, first and foremost, to preventing further violations. The Council operates in a difficult international environment where several of its States are thwarting human rights mechanisms or are at best lukewarm about human rights protection. It has, albeit after some significant delay, adopted resolution A/HRC/RES/54/2 on 11th October 2023 to establish an independent international fact-finding mission. The mission, which was not operational by mid-December 2023, has a far-reaching mandate. It is tasked with investigating violations and abuses of international human rights law and international humanitarian law by all sides and with collecting and preserving evidence, so as to identify responsibility and for use in legal proceedings. Significantly, it is also mandated to address the root causes of violations as part of its work to end impunity. The fact-finding mission holds considerable potential to generate momentum towards accountability. If it does not achieve this in the short term, it should at least provide the means, eventually, to activate proceedings in national contexts, be it in Sudan or elsewhere. The fact-finding mission is also tasked to cooperate with national actors; its findings, based on credible evidential standards, could be used as a body of evidence to inform and support future transitional justice processes in post conflict Sudan.

It will be recalled that the findings of the UN International Commission of Inquiry on Darfur in 2005 were so persuasive as to lead the UN Security Council to refer the situation in Darfur to the Prosecutor of the International Criminal Court (ICC). There is next to no chance of anything similar happening nowadays given that the Security Council is split and Russia and China, and in general terms also the US, are opposed to ICC referrals. This matters, as the ICC presently only has jurisdiction over crimes committed in Darfur, as emphasised recently by the ICC prosecutor. Good arguments have been put forward urging the prosecutor to interpret the Darfur nexus more expansively

to include the current armed conflict in terms of the jurisdiction over the crimes committed outside Darfur but this looks unlikely to happen. The ICC has also faced many difficulties that have limited its effectiveness in investigating and prosecuting crimes in Darfur. These factors have undermined the deterrent effect it might have otherwise had after 20 years have passed since international crimes began to be committed in Darfur. Nonetheless, there is still scope for it to provide at least some measure of justice, in terms of both criminal liability and reparation, for the victims of crimes that are subject to prosecution before the ICC.

The exercise of universal jurisdiction in countries other than Sudan has been probed recurrently. It promises an alternative avenue to hold perpetrators who come to countries such as the UK accountable. In practice, however, the presence requirement, the difficulty of obtaining timely evidence and the challenges faced by national authorities to investigate and prosecute such crimes mean that there are considerable obstacles. Successful prosecutions will therefore likely remain the exception. National legal systems outside Sudan can play other roles though. This applies particularly to prosecuting individuals who commit hate crimes online, such as spreading Islamist propaganda, ethnic hatred, inciting the commission of genocide, or otherwise contributing to violations in Sudan in a way that constitutes a criminal offence.

The US, UK and EU have imposed sanctions against specific individuals and entities in Sudan affiliated to the SAF and the RSF, although not the two main individual actors for ostensibly diplomatic reasons. Such sanctions express a level of political condemnation of violations of international humanitarian law and human rights law, and create some pressure. While they entail some disadvantages for those sanctioned, in terms of access to countries, assets, economic resources, business opportunities and arms, sanctions are based on political calculus, rather than a process underpinned by the evaluation of evidence, a judicial determination and the involvement of victims. The US announcement of 6th December 2023 that atrocity crimes have been committed in Sudan is a noteworthy development that may reinforce sanctions and efforts towards greater accountability but it remains to be seen what if any concrete measures it will entail.

The review of available legal avenues points to both the scope for and limitations of regional and international avenues for accountability and justice. Ultimately, whatever steps are taken, it will be for Sudan, and the Sudanese collectively, to devise (additional) appropriate justice mechanisms to this end once the war is over and circumstances become conducive. The failure to develop and expedite the implementation of a suitable transitional justice framework, including effective security sector reform, during the 2019-2022

transition serves as a lesson and warning, to prioritise this task from the very outset. The civic movement must therefore be ready to propose and advocate effectively for their transitional justice models or options. Accountability, both in terms of the process adopted and its outcome, is integral to the 2018 Sudanese revolution slogans of freedom, peace and justice. It is not a purely legal or technical exercise but a deeply political and social undertaking in bringing about change including through establishing suitable processes to provide (transformative) reparation for past violations. This change seeks to redress and reverse deep seated power asymmetries, domination, subordination, marginalisation, discrimination and exclusion that have affected people in Sudan differentially and the Sudanese people as a whole. Considering these dynamics and consequences, it is high time that the beneficiaries of decades of violent and harmful acts are made to answer for their conduct, and eradicate the cancer at the heart of Sudan's body politic.

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