

# SUDAN: MAPPING TRANSITIONAL JUSTICE STRATEGIES FOR EFFECTIVE DEMOCRATIC TRANSITION

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## INTRODUCTION: NEW MANEUVEURS TOWARD SUDANESE PEACE

On 28 October 2019, a delegation of the Sudan Liberation Movement, an armed group that forms part of the broader Sudan Revolutionary Front (SRF), was welcomed in Khartoum by representatives of the new Sudanese government and the Forces for Freedom and Change (FFC), the de facto political opposition that helped the protests against former President Omar al-Bashir and are expected to support the Sudanese transition towards civilian rule. For the FFC, the return of the delegation represents a step towards national peace, while government member Mohamed El Taayshi was quoted as saying that the meeting is part of the new government's wish "to address the causes of political instability, and start a political cycle in which no sound of war is heard that promotes hatred among the Sudanese people"<sup>1</sup>.

### AT A GLANCE

- *As Sudan continues its path toward transition, the question of a successful transitional justice process is now being explored.*
- *While there are different conceptions of transitional justice, and different notions for implementation, what is best for Sudan will need to be particularly sensitive to context and be supported with the help of the international community.*
- *This will ensure the process both recognizes victims, and ensures that the political transition to democracy continues to strengthen.*

The meeting comes as Sudan's new administration, under the direction of Prime Minister Hamdok, has begun a series of meetings with various rebel groups in order to map out a path towards stability and peace. In the South Sudanese capital Juba on 18 October <sup>2</sup>,

<sup>1</sup> <https://www.dabangasudan.org/en/all-news/article/rebel-delegation-welcomed-in-sudan-capital>

<sup>2</sup> <https://www.voanews.com/africa/sudan-peace-talks-rebels-begin-juba>

government representatives met rebel leaders from the SPLM-North, another armed group distinct from the SRF operating in the Nuba Mountains, and agreed to discuss several issues including political, humanitarian and security. These talks with both the SPLM-North and SRF have been sponsored by South Sudan and are expected to last two months.

However, the success of peace talks is not guaranteed. In fact, the African Union has been attempting to organize such peace talks between rebel groups in Sudan and the previous government for over ten years with little success<sup>3</sup>. There is also an added challenge of fragility of the new government in Sudan, with the potential for a relapse to military rule potentially high due to the presence of spoilers in the form of powerful figures in the military, and general instability related to implementing a brand new democratic institutional framework in a country<sup>4</sup>. Also too is the underlying devastating economic situation as a result of crippling international debt, in part due to the US designation of Sudan as a state sponsor of terrorism impeding international economic investment. These issues and more will be crucial in the coming months. However, for now this article asks a different question: given the start of peace talks, and the related underlying issues affecting the new Sudanese government, what would a successful process of transitional justice look like?

## TRANSITIONAL JUSTICE: RETRIBUTIVE vs UTILITARIAN STRATEGIES

To begin, what is transitional justice (TJ)? The International Center for Transitional Justice (ICTJ)<sup>5</sup> defines TJ as follows: "Transitional justice refers to the ways countries emerging from periods of conflict and repression address large-scale or systematic human rights violations so numerous and so serious that the normal

justice system will not be able to provide an adequate response." Noting the key concept of accountability and justice for victims, the ICTJ goes further stating: "'The aims of transitional justice will vary depending on the context but these features are constant: the recognition of the dignity of individuals, the redress and acknowledgment of violations; and the aim to prevent them happening again.'"

This latter point is not clear cut. The ICTJ<sup>6</sup> argues that "without justice there can be no enduring peace", and as such TJ is principally a method to achieve redress for victims. The prevention of abuses happening again, is framed in terms of preventing more crimes and more victims. We can call the ICTJ conception of TJ as *Retributive*. However, for many TJ is a necessity as part of a peaceful transition from violence insofar as it preserves that transition. For Olsen, Payne and Reiter<sup>7</sup> for example, successful processes of TJ are those that improve long term human rights and democracy in that country. A measure of such improvement would include political participation and representation rates such as those provided by the Freedom House Project<sup>8</sup>, or the Political Terror Scale<sup>9</sup> index that measures how protected individuals are from persecution in the form of wrongful imprisonment or torture. Success of TJ is therefore something measurable, and something that is for the good of society. Thus, we can call this conception of TJ *Utilitarian*.

For this broad distinction between conceptualizing the goals of TJ, there are differing types of strategies. Naturally, the Retributive conception has focused on trials, and as such has placed an emphasis on the workings of the International Criminal Court. For instance, the International Criminal Tribunal for the former Yugoslavia that began in 1993 was a landmark case in prosecuting war crimes, and documenting crimes against humanity in during the war that surrounded the breakup of the former Yugoslavia. However, one of the biggest

<sup>3</sup> Ibid.

<sup>4</sup> See the authors prior articles on Sudan for more context: Lowings, B. (2019) *Sudan: Military and Economy in the Fall of Bashir*. [Online] Available at: <https://www.bic-rhr.com/research/sudan-economy-and-military-fall-bashir>; Lowings, B. (2019) *Sudan: Relating Identity Politics and Cyclical Violence*. [Online] Available at <https://www.bic-rhr.com/research/sudan-relating-identity-politics-and-cyclical-violence>

<sup>5</sup> <https://www.ictj.org/about/transitional-justice>

<sup>6</sup> <https://www.ictj.org/our-work/transitional-justice-issues>

<sup>7</sup> Olsen, T. Payne, L. & Reiter, A. (2010) 'The Justice Balance: When Transitional Justice Improves Human Rights and Democracy'. *Human Rights Quarterly*. 32:4. 980-1007.

<sup>8</sup> <https://freedomhouse.org/reports>

<sup>9</sup> <http://www.politicalterrorscale.org/>

criticisms<sup>10</sup> of that trial reveals another key element of Retributive conceptions of justice, that being truth. The Yugoslavia trial was accused, most notably by some Serbians, as being biased, or at the very least imposed under conceptions from outsiders, the international community, rather than by those domestic actors present. What was questionable was the truth of the accusations; what really happened, who was responsible and how can we know being some important questions to consider. This led to some advocates of Retributive TJ looking towards truth commissions as a necessary part of TJ<sup>11</sup>. These commissions are designed to catalogue the narratives of victims of violence for as close a conception of truth being reached as possible, whilst giving victims a voice within the process.

There are, however, problems with truth commissions. To begin with is that they are still imperfect at getting to the truth of what happened in conflict zones. Evidence suggests that narratives are often exaggerated in hindsight, or that there are occasional collective misremembrances of events when a new false conception becomes more popular<sup>12</sup>. Meanwhile, for some Utilitarian conceptions of TJ, truth commissions are negligible in securing, for them, a positive outcome. Olsen, Payne and Reiter<sup>13</sup> show that by their measurable indicators of sustainable transition, truth commissions only work in conjunction with other mechanisms of TJ and that by themselves they can have a negative impact on transition. This may be due to their time taken to be effective, their cost to setup, or that a truth commission needs further legislative support in order to accomplish anything long term.

Olsen, Payne and Reiter's<sup>14</sup> study indicates that sustainable societal development in human rights and democracy through TJ is best achieved with a combination of trials and amnesties. The latter method is sometimes neglected in traditional Retributive TJ approaches for being too permissible towards atrocities, and for attempting to forget the past rather than confront it. The pragmatic Utilitarian approach instead views them as sometimes necessary in the short term

in order to ensure a level of stability and security for the new regime, to effectively give those new governments time to set up new democratic institutions and to prevent relapse into former militaristic or dictatorship regimes. Meanwhile trials, though sometimes disruptive by potentially implicating figures of the prior regimes still in power such as generals that retain their positions in the new regime, are still necessary for the Utilitarian as they show the strong consequences of committing crimes and deter others from ever thinking of doing something similar. However, in this conception of TJ, it becomes clear that victims are not the focus of Utilitarian TJ, and their personal vindication is merely a byproduct of improving society.

## SUDAN'S CASE : CONTEXTUAL APPLICATION

So which conception of TJ, and which method, should be employed in the case of Sudan? Well firstly it should be noted that one concept does not exclude the other, after all truth commissions did not appear to negatively affect measurable levels of societal development so long as they were accompanied by trials and amnesties<sup>15</sup>. But at the same time, this does not mean everything should then be applied without contextual sensitivity and planning. What is the benefit of an amnesty? Temporary stability in order to give time for a new regime to establish itself and that marginalized groups within society can begin to coexist again. What is the benefit of a truth commission? It provides a structured, official means for victims to be heard and documented, and ensures that their words and experiences are not pushed aside. What are the benefits of trials? They provide both vindication and justice for victims, while providing a deterrence against further atrocities in society to ensure that the crimes are not repeated.

In Sudan's case, there is cause and strong arguments to be made for all three approaches. A conditional

<sup>10</sup> Fischer, M. (2011) 'Transitional Justice and Reconciliation: Theory and Practice'. in *Advancing Conflict Transformation: The Berghof Handbook II*. (eds.) B. Austin, M. Fischer, & H. J. Giessmann. Barbara Budrich Publishers: Opladen/Framington Hills. 406-430.

<sup>11</sup> <https://www.ictj.org/our-work/transitional-justice-issues/truth-and-memory>; See also: International Crisis Group (ICG). (2019)

*Safeguarding Sudan's Revolution*. Report No 281.

<sup>12</sup> Fischer. (2011) 'Transitional Justice and Reconciliation'.

<sup>13</sup> Olsen, Payne & Reiter. (2010) 'The Justice Balance'.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

amnesty for armed groups, dependent upon a strong rigorous DDR program, could be a way to integrate rebel fighters from the SRF and SPLM-North. Meanwhile, though in agreement with the International Crisis Group's<sup>16</sup> position of repealing the permissible laws preventing prosecution of members of the military, there should be scope for the normalization of the non-official Rapid Support Forces (RSF), for example, and a way for them to be reorganized within the regular military apparatus.

A truth commission to document abuses during Bashir's time in power should be carried out, with the express goal of victim recognition and space for those victims to have a voice<sup>17</sup>. This should be handled carefully to ensure there are no reprisals against those who speak out. And though domestic witness protections should be put into place, including confidentiality mechanisms and legal protections, as Sudan's case would include accusations against people in positions of power and authority, witness protections should be offered from regional and international bodies too<sup>18</sup>. For instance, the African Court of Justice and Human Rights, or the International Criminal Court, could both have roles here for external monitoring and protection.

Finally, trials will eventually need to be carried out against the main perpetrators of documented atrocities. And while witness protections like those suggested for truth commissions would also be necessary here, due to the existence of serious spoilers, there are even more acute risks to consider. It is a well-known fact that the leader of the RSF, Mohamed Hamdan 'Hemedti' Dagalo, one of the most powerful members of the Sudanese military and a key figure in the military side of the transitional government, was in charge of

the RSF in its former iteration, the Janjaweed, while that former iteration carried out some of the most serious crimes in Darfur in the early 2000s<sup>19</sup>. Can the transitional government seek to prosecute Hemedti, and should it? This is a difficult question, for pursuing charges against such an established figure could instead lead to reprisals and an attempt by the military to seize control of the government once more. For now, the build-up to trials should be handled as a long-term goal whilst the other methods are established as preliminary methods of TJ. The government must establish itself and be aware of its own capabilities and fragility before seeking such a prominent scalp. In the meantime, there may be a better chance for former President Bashir himself to be tried in court with less of an impact to the new government's stability. This is especially true as the International Criminal Court already has a pre-existing warrant for his arrest<sup>20</sup>.

Ultimately, this exploration of TJ, and differing approaches to TJ, serves a broader purpose. There is no given method of TJ for all circumstances. Each method that exists has differing strengths and weaknesses. However, in order to elevate the strengths of the differing approaches, whilst mitigating weakness, it is imperative for policymakers to be clear about why such an approach is chosen and for what purpose. There may be a necessity for strengthening immediate stability of a new regime, therefore an amnesty may help to calm immediate tensions. In other cases, there may be a lack of victim-recognition, for which a truth commission may help. By being more sensitive to the purposes and consequences of differing methods of TJ, then a greater outcome, in whatever conception it is framed, is far more feasible and realistic.

<sup>16</sup> ICG. (2019) *Safeguarding Sudan's Revolution*.

<sup>17</sup> This was implied in the prior article: Lowings, B. (2019) *Sudan: Relating Identity Politics and Cyclical Violence*.

<sup>18</sup> The types of mechanisms and their effectiveness as discussed in more detail in: REDRESS. (2009) *Ending Threats and Reprisals Against Victims of Torture and Related International Crimes: A Call*

to Action.

<sup>19</sup> Lowings, B. (2019) *Sudan: Relating Identity Politics and Cyclical Violence*; Lowings, B. (2019) *Sudan: Economy and Military in the Fall of Bashir*.

<sup>20</sup> <https://www.icc-cpi.int/darfur/albashir>

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