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Transitional Justice in Sudan:

Setting the Course for a National Transitional Justice Process

by Patrick Schneider

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Transitional Justice in Sudan: Setting the Course for a National Transitional Justice Process

Following the September 2018 revolution, Sudan is in a period of transition. A Constitutional Charter in force since August 2019 has established the mechanisms of a transitional government for a period of 39 months. At the end of this period, a permanent constitution is supposed to be in place. Chapter 2 Art. 6 (2) & 7 (1) prioritise peace negotiations with the aim of “achieving a just and comprehensive peace, ending the war by addressing the roots of the Sudanese problem (...)”. Following a year-long series of negotiations in Juba, representatives of the transitional government signed a comprehensive peace agreement with the majority of armed opposition groups in Juba on 31 August 2020¹, and on 3 September 2020 a subsequent agreement with the Sudan People Liberation Movement-North (Al Hilu). One of the crucial issues for the foreseeable future and part of both, peace agreement and Constitutional Charter, will be the question of how to bring justice for large scale crimes and human rights violations of the past whilst at the same establishing and maintaining peace. Or, in other words, how to put in place a system of transitional justice which takes into account and wisely balances both aspects of a sustainable and peaceful future Sudan.

The term of Transitional Justice is mentioned in four different provisions of the Constitutional Charter:

a) Preamble:

“Striving to implement measures to achieve transitional justice (...), deepen the values of tolerance and reconciliation between the components of the Sudanese people and rebuild trust between all the people of Sudan;”

b) Chapter 12, 35. 5 (f)

“Transitional Justice Commission”

c) Chapter 15, article 67 (g):

“Start implementing transitional justice and accountability measures for crimes against humanity and war crimes, and present the accused to national and international courts, in application of the no-impunity principle; “

d) Chapter 15, article 68 (l):

*“The essential issues for peace negotiations include the following:
(....)*

1. Transitional justice, reconciliation and restitution of victims;”

¹ The following agreements constitute the 31 August 2020 peace agreement between the Sudanese Transitional Gvt. and the (former) armed opposition: 1.) Darfur Agreement (signed on the former armed opposition side by JEM, SLM/Minnawi, SLM/Transitional Council, Sudan Liberation Forces Alliance, Sudan Alliance; 2.) Agreement on the Two Areas, SPLM-N / Revolutionary Front; 3.) Agreement on National Issues, Sudan Revolutionary Front, 4.) “Masar Al Wassat”, Sudan Revolutionary Front; 5.) Protocol on Internally Displaced Persons and Refugees, Sudan Liberation Forces Alliance

Somewhat ironically, the Transitional Justice Commission has not been created yet, but the parties to the peace negotiations and final agreement have since the beginning of 2020 already taken far reaching steps that may to a good extent determine and anticipate a future transitional justice system.

In a January 2020 agreement preceding the final August 2020 peace agreement, the Sudanese government and (former) armed opposition groups (Sudan Revolutionary Front) agreed to establish a Special Court for Darfur prosecuting and trying war crimes and crimes against humanity. As a historical reminder, a court with a similar name, the Special National Criminal Court on the Events in Darfur (SNCCED) was established by a decree of the Chief Justice and President of the Supreme Court on 07 June 2005. Both, timing and legacy of this court suggest that it had been established simply to evade jurisdiction of the International Criminal Court (ICC) without addressing the conflict's full criminal dimension in earnest. The SNCCED was decreed one day after the ICC announced to open investigations into the situation in Darfur. Its prosecutions overwhelmingly focused on crimes of smaller dimensions (theft, robbery, individual acts of killings and torture) committed by lower ranking army and security officers². The new court to be formed based on the January 2020 and the subsequent August 2020 agreements, however, will come into existence under profoundly changed political circumstances so that a sincere approach towards meaningful proceedings can be hoped for, notwithstanding all expected technical, legal, logistical, and political difficulties.

The August agreements and transitional justice:

The Agreement on National Issues³ includes some of the essential transitional justice terms spelled out in the Charter. In section 1:22, the Agreement mentions "justice and accountability, reconciliation and transitional justice" as "requirements to ensure sustainable peace and security", making explicit reference to "ratified international human rights agreements" and "international humanitarian law including mechanisms deriving from the customs, culture, and the heritage of the Sudanese peoples". Further, in section 1:24 the Agreement lists "the fight against impunity and the victims' need for redress so as to be able to build national reconciliation and healing (...)". Remarkably, before section 17.1 declares the government's obligation to issue a general amnesty "for political leaders and members of armed movements because of their membership therein"⁴, section 1:31 anticipates that a general amnesty for war crimes, crimes against humanity and genocide, crimes involving sexual violence and the use of child soldiers as well as other gross violations of international humanitarian law cannot be part of such amnesty.

The Darfur Agreement confirms these principles in its part on justice and reconciliation. Section 9 thereunder specifies the application of international human rights and international humanitarian law in particular with regard to "national courts, or the ICC, or the Special Court on War Crimes in Darfur". Section 20 of the same part

² Human Rights Watch Background Briefing, <https://www.hrw.org/legacy/backgrounder/ij/sudan0606/2.htm>
Author's own observations in Al Fasher (N Darfur) 2005 / 2006

³ In the absence of an official English translation at the time of writing, this article is based on the author's personal translation

⁴ With apparent reference to Art.6 s.5 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict (...)"

is titled “National Judicial System” and again mentions “the ICC, the Darfur Court and the national judiciary” in line with its legal competencies as well as a Truth and Reconciliation Commission. Subsequent sections (22et seq) spell out these instruments in greater detail with essentials as follows: A Truth and Reconciliation Commission is to be established within 60 days following the signing of the agreement. The mandate period is 10 years from the day taking up its work, comprising 11 members, five of which are to be selected by each of the two parties and one member serving as chairperson to be agreed on by both sides. The commission’s mandate is broad, aiming to establish the reasons for the conflict in Darfur, examining the whole range of human rights violation as well as the economic, cultural, and social dimension of the conflict since June 1989. In line with the provisions of the Agreement on National Issues the commission does not have the power to grant amnesties for any crime or violation committed. Section 23 provides for elements of traditional justice, explicitly for events and crimes “outside the particular competencies of the ICC, the Special Court for Darfur, the Sudanese judiciary and the Truth and Reconciliation Commission”. Traditional justice mechanisms are particularly to be applied in the context of tribal and inter-tribal affairs. Under section 24 the agreement confirms full cooperation with the ICC with reference to UNSC 1593 in view of those persons for whom arrest warrants have been issued. Section 25 elaborates on the Special Court for Crimes in Darfur, agreeing it to be established within 90 days as of signing the agreement for a period of ten years. Its mandate foresees the investigation of allegations of the crimes of genocide, crimes against humanity and war crimes in the area of Darfur since 2002. Remarkably, international assistance is explicitly and only requested from the African Union (AU). The parties agreed to invite a team of AU experts so as to ensure that proceedings are conducted in line with principles of justice and international law. As to substantive and procedural law, the legal basis for the proceedings will be “Sudanese criminal law and international criminal law”.

The above elements show two objectives: to bring justice and to work towards reconciliation. In light of the United Nation’s definition of transitional justice⁵, both elements are not mutually exclusive, but represent different sides of the same coin, which is to come to terms with large scale abuses and to prevent future repetition. In this context, criminal justice plays a dominant role⁶. In the recent past often administered by international actors, it is in theory first and foremost duty and privilege of the state concerned to adjudicate past injustices. Yet, it is also a matter of fact that states in conflict and post-conflict situations have rarely produced convincing results measured against prevailing international standards. As opposed to this, international and hybrid criminal tribunals have achieved much in the past to set a signal against impunity and to further develop the principles of international criminal law for future application. Most prominent in setting such standards feature the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) plus the related International Residual Mechanism for Criminal Tribunals. Current and former mixed / hybrid tribunals include the Extraordinary Courts in the Chambers of Cambodia, the Special Tribunal for Lebanon, the (Residual) Special Court for Sierra Leone, and the Special Panels for Serious Crimes (East Timor). Yet, whilst criminal proceedings under international participation, often: domination, represent a strong signal of the

⁵*“For the United Nations, transitional justice is the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation”.*

Guidance-Note of the Secretary General, United Nations Approach to Transitional Justice
https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf

⁶ *Ibid*, B: “Transitional justice consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, facilitating initiatives in respect of the right to truth, delivering reparations, institutional reform and national consultations”.

international community's commitment to bringing justice, they also had to endure setbacks and face a permanent dilemma. Justice brought by international actors has a tendency to be seen as ignoring local ownership as well as to be perceived as biased and therefore procedurally flawed. True or not, this notion is one that has to be taken into account since it follows the simple, yet politically powerful truth that "perception is reality". As a consequence, international criminal jurisdiction over national conflict scenarios tends to carry the inherent danger of driving societies further away from the other objectives of transitional justice, namely peace and reconciliation. Applying these considerations to the situation in Sudan, it appears that the August peace agreement has taken these concerns into account. International adjudication has been restricted to the ICC with cooperation limited to existing cases, namely to those four individuals for whom arrest warrants have been issued, and the one individual held in custody in The Hague, respectively⁷. As a matter of fact, the ICC has been part of transitional justice scenarios in Sudan ever since the UN Security Council in its resolution 1593 referred the situation in Darfur to the Court on 31 March 2005. Based on this, the ICC may exercise its jurisdiction over crimes listed in the Rome Statute committed on the territory of Darfur from 1 July 2002 onwards. In February this year, the head of the Sovereignty Council Al Burhan reassured publicly that Sudan will fully cooperate with the ICC. Whilst most observers were wondering if the proof of this turnaround in Sudan's position will ever be delivered, the above quoted agreements have put decisive commitments in writing. At the same time, the now agreed limitation to the above-mentioned individuals means that further investigations and trials are to remain in Sudanese hands. This indeed is a rather distinct and decisive step representing a compromise between the interests of the different parties to the agreement, which in the question of ICC cooperation are diametrically opposed. Whilst victims of the conflict and members of the (former) armed opposition tend to speak out in favour of international and ICC prosecutions, members of the military faction of the Transitional Government had to make sure to protect themselves and their politically next of kin from international criminal prosecution. Sudanese civil society has been split over this crucial question as well. Some focus on the dictate of justice for victims which in the eyes of not only a few is served best with international prosecutions, or at least prosecution and trials under international participation. At the same time, an unwilling coalition ranging from former governmental, military, security, and intelligence circles to civil society opt in favour of domestic Sudanese proceedings, obviously for different reasons. Whilst former members of the National Congress Party and the Popular Congress Party and others close to the former establishment oppose international justice for the above stated reasons of self-protection as well as national sovereignty, also progressive civil society organisations close to the former opposition object international involvement based on sovereignty considerations. The INSAF Campaign for Transitional Justice, for example, emphasizes "*complete Sudanese sovereignty over all judicial processes. Thus, it does not advise the creation of an international or mixed court*"⁸. At the same time, national proceedings alone do not guarantee a successful process of transitional justice either. Colombia, e.g., within the context of its November 2016 peace agreement had devised an elaborate "Comprehensive System for Truth, Justice, Reparations and Non-Recurrence, including the Special Jurisdiction for Peace"⁹, yet has gone through a series of setbacks owed to complex political reasons as well as to the agreement's implementation in practice. Nevertheless, the outline as such shows a well-conceived and comprehensive national approach to post-conflict peace and justice and may well deserve to be studied in more detail in relation to the situation in Sudan.

⁷ International Criminal Court, <https://www.icc-cpi.int/darfur>, accessed on 21 September 2020

⁸ Insaf Campaign for Transitional Justice Project September 2019; document not accessible online, yet the organization maintains a Facebook page, <https://www.facebook.com/INSAF2018/>

⁹ Edinburgh University, Peace Agreement Database, Final Agreement to end the armed conflict and build a stable lasting peace, <https://www.peaceagreements.org/viewmasterdocument/1845>;

Be it as it may, prior to any broader national consultation the foundations for a future transitional justice system in Sudan have been laid. It will now depend how these will be filled with life. On the international side it will be the ICC to determine if Sudan's efforts are sufficient to demonstrate its willingness and ability¹⁰ to avert further ICC jurisdiction. At the same time, the ICC itself is certainly well aware that it will not be able to prosecute a serious proportion of crimes committed in Darfur, even if limiting its efforts to the most serious violations of international criminal law. One possible scenario could be, similar to a past agreement between the ICTY and the authorities of Bosnia and Herzegovina¹¹, that ICC prosecutors review the Court's available evidence and share prosecution files with the Sudanese judiciary. The Sudanese Attorney General uttered words of caution. Instead of trials run by Sudanese, he mentioned the possibility of ICC trials to be conducted inside Sudan, which however requires "a functioning legal system and international cooperation"¹².

Other than that, the parties to the Darfur agreement have made it rather clear that Sudan is adamant to determine whose international assistance it wishes to accept. By requesting expert support explicitly from the African Union, one cannot but read this as a clear signal of an aspired regional emancipation vis a vis a perceived dominance of other international actors from geographical hemispheres other than the African continent.

Apart from the formal judicial component, it is also foreseen to employ traditional justice mechanisms in tribal and inter-tribal conflict. This type of conflict resolution by traditional means has a long history in Darfur¹³. In the context of past large-scale human rights violations this may trigger concerns that victims may be victimised yet again during reconciliation procedures that put the pursuit of peace above the rights and the interests of the victim¹⁴. However, the Darfur agreement in this context makes clear that such traditional mechanisms are to find their place outside the mandate of the criminal justice system. Both, the National and the Darfur Agreement exclude the possibility of amnesties for major crimes. Integrating this differentiated approach into a peace agreement demonstrates legal and political awareness and takes into account the principles of international law¹⁵ as well as the United Nation's Approach to Transitional Justice. Naturally there is no guarantee that far away from New York, Geneva, and Khartoum these provisions will be implemented on the ground according to the letter. However, the same can arguably be said about any constitution and legislation formulating ambitious principles. What begins on paper will in the end require sincere efforts from both, state and society, to transfer at least some of the ideals into reality. Last but not least and on a more critical note, whilst the August

¹⁰ Article 1 of the Rome Statute of the ICC introduces the principle of complementarity, i.e. for reasons of national sovereignty, efficiency and other principles of international law the ICC jurisdiction "shall be complementary to national criminal jurisdiction". Art. 17 (Admissibility) s.1(a) provides that the Court shall determine that the case is inadmissible "where a case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution";

¹¹ From 1996 until 2004, ICTY prosecutors reviewed and approved war-crime case files for further investigation and prosecution by the Bosnian national authorities, see <https://www.icty.org/en/about/office-of-the-prosecutor/history>;

¹² Dabanga, 16 June 2020, <https://www.dabangasudan.org/en/all-news/article/ag-icc-suspects-could-be-tried-in-sudan>;

¹³ On the Jaudiya / Ajaweed system applied to solve conflicts over land, water, grazing rights, personal conflicts see Zuhair Abdalla Imam, Search For Transitional Justice In Darfur: The Role of the Traditional Mechanisms, <https://repository.qhumanrights.org/bitstream/handle/20.500.11825/598/Imam.pdf?sequence=1&isAllowed=y>; Broader: Cherry Leonardi, Musa Abdul Jalil, Traditional Authority, Local Government and Justice in: The Sudan Handbook, Rift Valley Institute 2012;

¹⁴ Instructive and comprehensive on this: Office of the High Commissioner for Human Rights, Human Rights and Traditional Justice Systems in Africa (2016), https://www.ohchr.org/Documents/Publications/HR_PUB_16_2_HR_and_Traditional_Justice_Systems_in_Africa.pdf;

¹⁵ In detail on questions of amnesties and int. law incl. the interpretation of Art. 6 s.5 Protocol Additional to the Geneva Convention see Yasmin Naqvi, Amnesty for war crimes: Defining the limits of international recognition, International Review of the Red Cross, September 2003, Volume 85, p. 583; <https://www.corteidh.or.cr/tablas/r27221.pdf>

peace agreement certainly contains a range of positive steps towards achieving transitional justice, the Sudanese civil society has not had any role and say yet in devising any means and measures of transitional justice. As a recent study concludes, however, “*any action on transitional justice must result from transparent and inclusive consultation with the Sudanese people*”¹⁶.

All in all, Sudan has embarked on a path which, with all its uncertainties, instils hope. The August agreements suggest that a country accepts responsibility for past crimes by utilising its national sovereignty to adjudicate international crimes and launching accompanying traditional means and methods to achieve both, peace and justice. Will it be perfect? Certainly not, too many are the hurdles and obstacles, both legal, economic, political, and actual, and more than one actor will presumably be eager to throw a spanner in the works of Sudan’s national efforts. At the same time and with all its presumed imperfections, it is an inevitable and historical process that many may draw on in the future.

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¹⁶National Perception Study of Transitional Justice in Sudan, Saraya International / United States Agency for International Development, 10 September 2020, online not available at the time of writing.