


PILPG
A Global Pro Bono Law Firm

Rapid
Response
Analysis



PROSECUTING LEADERS IN SUDAN UNDER COMMAND RESPONSIBILITY FOR ATROCITY CRIMES COMMITTED BY THEIR SUBORDINATES

*Prepared by
The Public International Law & Policy Group
& Orrick, Herrington & Sutcliffe
July, 2023*

Executive Summary

This Rapid Response Analysis evaluates the possibility of prosecuting leaders in Sudan in command of forces that have committed crimes against humanity and war crimes by applying command responsibility as the mode of criminal liability. The scale of violence and other crimes committed by members of both the Sudanese Armed Forces and the Rapid Support Forces since the outbreak of conflict on April 15, 2023, is highly likely to reach the severity thresholds of war crimes and crimes against humanity. This Rapid Response Analysis focuses on these crimes, and finds that although domestic law in Sudan does not provide for command responsibility, several avenues exist that may enable the retroactive application of command responsibility to hold leaders of the Sudanese Armed Forces and the Rapid Support Forces accountable for such crimes committed by their subordinates. When peace negotiations take place, it will therefore be imperative that participants in the negotiations are aware that they may be negotiating with individuals, such as General Abdel Fattah al-Burhan and General Mohammed Hamdan Dagalo, who could potentially be held liable for war crimes and crimes against humanity under command responsibility.

Although this Rapid Response Analysis focuses primarily on crimes committed since the eruption of conflict in April 2023, the same legal analysis would apply to prior, recent crimes that constitute war crimes or crimes against humanity – for instance, any such crimes committed at the time of the October 2021 coup. This further underscores the potential importance of command responsibility as a mode of criminal liability from the perspective of the people of Sudan, who are yet to have recourse to effective accountability mechanisms for atrocities committed, either directly or indirectly, by those in power.

The Rapid Response Analysis begins by examining the scope of crimes that have allegedly been committed by both the Sudanese Armed Forces and the Rapid Support Forces since April 2023, focusing on those that are likely to constitute crimes against humanity, war crimes, or both. This strengthens the argument that it is possible to hold the leaders of the Sudanese Armed Forces and the Rapid Support Forces liable under command responsibility for crimes committed by their subordinates; a mode of liability generally reserved for the most serious human rights violations. Second, it proceeds to examine the requisite command responsibility element of *de jure* and/or *de facto* leadership, finding that (i) command responsibility applies to both international and non-international armed conflicts; (ii) command responsibility applies to both military and paramilitary

structures; and, accordingly (iii) General Abdel Fattah al-Burhan and General Mohammed Hamdan Dagalo can be considered, respectively, a “commander” or “superior”.

Third, the Rapid Response Analysis evaluates the possibility of re-characterizing modes of criminal liability under domestic law, such as criminal conspiracy and abetment, with respect to these atrocities. Although the Analysis finds precedent for this practice, it concludes that re-characterization of modes of liability that are not sufficiently analogous to command responsibility may lead to contravening core principles of fairness and legality, which may ultimately be rejected by the international community.

Fourth, the Rapid Response Analysis examines the development of command responsibility as a rule of customary international law. It finds that command responsibility is well-established as a rule of customary international law applicable to both international and non-international armed conflicts. The Analysis additionally identifies significant evidence suggesting that this rule of customary international law extends to crimes against humanity, and is not just limited to war crimes. On this basis, the Analysis concludes that it may be possible for an international tribunal or internationalized Sudanese tribunal to apply command responsibility to the Sudan context, despite the fact that Sudan does not explicitly provide for command responsibility in domestic legislation.

Lastly, the Rapid Response Analysis examines three methods by which a judicial institution could apply command responsibility retroactively, focusing on (i) the Rome Statute, (ii) reform of domestic law, and (iii) the establishment of an ad hoc tribunal. It concludes that the Rome Statute framework provides the clearest paths by which to retroactively apply command responsibility on the basis of both the Rome Statute provisions and customary international law. This could be effected through an ad hoc declaration submitted by Sudan, state referrals, or a UN Security Council (UNSC) resolution. However, the Analysis notes that this latter option is subject to veto by any of the permanent five members of the UNSC, and for this reason may not be a reliable option. The continuing mandate of UNSC Resolution 1593, which covers Rome Statute crimes allegedly committed in Darfur since July 1, 2002, also provides a viable avenue, as the Resolution is not subject to a further vote. Under Resolution 1593, the ICC Prosecutor would be able to examine new atrocities in the Darfur region as an extension of the initial Darfur investigation – this action was taken on July 13, 2023. The reform of domestic law and the establishment of an ad hoc tribunal are also identified as options for the

application of command responsibility. However, reforming domestic provisions would necessarily entail the re-characterization of modes of criminal liability, which may incur the same difficulties as mentioned above – namely that it may contravene principles of fairness and legality. Furthermore, the existence of immunity provisions in domestic law may also impede this process. Establishing an ad hoc tribunal is also identified as a viable option, finding strong precedent in customary international law and the statutes of the international criminal tribunals for the Former Yugoslavia and Rwanda for the (retroactive) application of command responsibility.

This Analysis concludes that customary international law would play a crucial role in enabling the prosecution of leaders in Sudan for crimes committed by their subordinates despite no provision in domestic law providing for this mode of liability. Specifically, the fact that command responsibility is clearly established as a rule of customary international law applicable to both international and non-international armed conflicts, as well as its emerging application to crimes against humanity (in addition to war crimes), provides a strong legal basis for its application to the Sudan context.

PROSECUTING LEADERS IN SUDAN UNDER COMMAND RESPONSIBILITY

Table of Contents

Statement of Purpose	1
Introduction	1
Context: Recent Crimes Committed by Forces in Sudan	2
Leadership under Command Responsibility	7
<i>Application to Sudan Context</i>	9
<i>Conclusion</i>	10
Recharacterization of Crimes for Retroactive Application	10
<i>Potential Challenges</i>	11
Recharacterization of Elements Essential for Criminal Liability	11
Recharacterization of Penalties	11
Recharacterization of Procedural Rules	12
Recharacterization of Labels	12
<i>Recharacterization of Crimes: Potential Examples from Sudanese Legislation</i>	12
Sudan's Criminal Act 1991 (Amended 2009)	13
Sudan's Armed Forces Act of 2007	13
International Treaties and Covenants	14
<i>Application and Likelihood of Success</i>	15
<i>Conclusion</i>	15
Development as a Rule of Customary International Law	16
<i>Elements of Customary International Law</i>	16
<i>Command Responsibility as a Rule of Customary International Law</i>	17
Sudan: State Practice	19
<i>Emerging Practice: Application to Crimes Against Humanity</i>	21
<i>Conclusion</i>	22
Retroactive Application of Command Responsibility	23
<i>The Rome Statute</i>	23
<i>Reform of Sudanese Law</i>	26
<i>Ad Hoc Tribunals</i>	26
<i>Conclusion</i>	27
Overall Conclusion	27
Context for Negotiations	28

PROSECUTING LEADERS IN SUDAN UNDER COMMAND RESPONSIBILITY FOR ATROCITY CRIMES COMMITTED BY THEIR SUBORDINATES

Statement of Purpose

This Rapid Response Analysis evaluates the possibility of prosecuting leaders in Sudan in command of forces that have committed crimes against humanity and war crimes by applying command responsibility as the mode of criminal liability.

Introduction

Command responsibility is a mode of criminal liability whereby a commander can be held accountable for crimes committed by their subordinates, either by (i) directing the subordinates to commit those crimes; or (ii) by failing to take reasonable measures to prevent or punish them, even when there is no causal relationship between the commander's failure to prevent and a subordinate committing a crime. Under international law, the most serious crimes for which command responsibility can be employed are war crimes, crimes against humanity, genocide, and other serious violations of international humanitarian law. In Sudan, there are ample, credible reports that both the Sudanese Armed Forces (SAF) and the Rapid Support Forces (RSF) have been committing such crimes on a significant scale since the conflict erupted on April 15, 2023. These crimes include murder, deportation or forcible transfer, grave forms of sexual violence, persecution, and other violations of humanitarian law. Against this background, on May 11, 2023, the SAF and RSF signed the Jeddah Declaration.¹ This Declaration acknowledges the responsibilities and commitments of both parties under international humanitarian and human rights law.

The Rome Statute establishing the International Criminal Court provides for criminal liability under international law through both individual and command responsibility.² However, Sudan has not yet completed accession to the Rome Statute, and command responsibility as a mode of liability under international law

¹ Ateba, Simon, UN Security Council Condemns Attacks on Civilians in Sudan, Today News Africa (June 2, 2023) <https://todaynewsafrika.com/un-security-council-condemns-attacks-on-civilians-in-sudan/>, U.S. Department of State, *Jeddah Declaration of Commitment to Protect the Civilians of Sudan*, Bureau of African Affairs (May 11, 2023), <https://www.state.gov/jeddah-declaration-of-commitment-to-protect-the-civilians-of-sudan/>.

² The Rome Statute of the International Criminal Court, Article 28, July 17, 1998, United Nations, Treaty Series, vol. 2187, No. 38544, (as amended by United Nations resolution RC/Res.6 of June 11, 2010) (the "Rome Statute").

has not become part of Sudan's legal obligations. In addition, command responsibility does not exist in Sudanese domestic law. Accordingly, prosecuting individuals in Sudan under command responsibility would require (i) the adoption of Sudanese laws that would allow this mode of criminal liability, and (ii) the retroactive application of such laws to events that took place before they entered into force. However, a retroactive application of those laws to such prior events could be contravened by the overarching principle of non-retroactivity in criminal law.

This Rapid Response Analysis first assesses what crimes in Sudan have been committed, finding that there are multiple possible crimes that could trigger the application of command responsibility.

Second, it evaluates whether General Abdel Fattah al-Burhan and Mohammed Hamdan Dagalo fall into the category of leaders to whom command responsibility may apply.

Third, it addresses whether, in view of the overarching principle of non-retroactivity, command responsibility could nonetheless be retroactively applied through domestic Sudanese legislation.

Fourth, it examines the development of command responsibility as a rule of customary international law.

Fifth, it discusses the ways in which certain individuals in Sudan may be prosecuted by virtue of another route besides domestic legislation: utilizing the status of command responsibility as a rule of customary international law to apply it retroactively.

Lastly, this Rapid Response Analysis addresses the context of eventual peace negotiations, in particular the potential importance at the negotiations of command responsibility as a mode of criminal liability.

Context: Recent Crimes Committed by Forces in Sudan

Reporting across several news outlets indicates that the Sudanese Armed Forces (SAF) and the Rapid Support Forces (RSF) have committed numerous crimes against humanity and other crimes to which command responsibility may apply. The following assessment identifies crimes that may fall under both Article

7 (crimes against humanity) and 8 (war crimes) of the Rome Statute. There are also fears that ethnically-motivated killings may put members of non-Arab populations in Darfur, especially the Masalit ethnic group, at risk of genocide, covered under Article 6 of the Rome Statute. Amendments to Sudan's Criminal Act 1991 in 2019 explicitly codified these crimes into domestic law.³ Although this section refers to crimes committed since the eruption of conflict on April 15, 2023, the legal analysis in the following sections could apply to all prior, recent crimes that constitute war crimes and crimes against humanity; subject to any jurisdictional limits identified in the analysis. This could include, for instance, crimes committed in the period that followed the October 2021 coup.

Murder

Many events that have taken place since the beginning of the conflict are either alleged to amount to murder or appear to rise to that level. In one particular instance, eyewitnesses recount how a woman was shot when she was unable to pay the RSF fighters money they demanded to cross a checkpoint.⁴ The witnesses cited suggest this practice has become commonplace.⁵ Other reports suggest that community leaders, doctors, and other professionals within the Masalit community have been intentionally targeted and killed.⁶ Perhaps most notably, multiple sources claim that the RSF killed West Darfur governor Khamis Abbaker, although the RSF has denied responsibility.⁷ Hundreds of civilians have been killed and thousands injured since the fighting began.⁸

Deportation or Forcible Transfer of Population

³ Criminal Law (Amendment) 2019, Section 18, adding Articles 186, 188-192.

⁴ Nima Elbagir et al, *Kill, terrorize, expel: Testimonies detail atrocities by Wagner-backed militia in Sudan*, CNN (June 17, 2023), <https://www.cnn.com/2023/06/16/africa/darfur-sudan-wagner-conflict-cmd-intl/index.html>.

⁵ Nima Elbagir et al, *Kill, terrorize, expel: Testimonies detail atrocities by Wagner-backed militia in Sudan*, CNN (June 17, 2023), <https://www.cnn.com/2023/06/16/africa/darfur-sudan-wagner-conflict-cmd-intl/index.html>.

⁶ Celine Alkhalidi et al, *New killings reported in Darfur on second day of Sudan ceasefire*, CNN (June 19, 2023), <https://www.cnn.com/2023/06/19/africa/sudan-ceasefire-darfur-killings-intl-hnk/index.html>.

⁷ Behram Abdelmunim, *Un 'deeply shocked' by killing of West Darfur Governor*, AA (June 15, 2023), <https://www.aa.com.tr/en/africa/un-deeply-shocked-by-killing-of-west-darfur-governor/2923703>; Zeinab Mohammed Salih, *Sudan: paramilitary forces blamed for assassination of West Darfur Governor*, Guardian (June 15, 2023)

<https://www.theguardian.com/world/2023/jun/15/sudan-paramilitary-forces-blamed-assassination-khamis-abdallah-bbakar-government-official>.

⁸ Press Release, *Civilians bear devastating brunt of fighting in Sudan: UN Experts*, United Nations Human Rights Office of the High Commissioner (May 11, 2023),

<https://www.ohchr.org/en/press-releases/2023/05/civilians-bear-devastating-brunt-fighting-sudan-un-experts>

More than a million people have been displaced, including populations already displaced from previous conflicts.⁹ Many have been forced to flee because of wide-scale attacks, reportedly against specific ethnic communities.¹⁰ Hundreds of thousands of civilians have left for other parts of Sudan or neighboring countries, including Egypt, Chad, South Sudan, and the Central African Republic.¹¹

Grave Forms of Sexual Violence

Civilians of all ages have been subjected to sexual assault and gender-based violence.¹² Multiple accounts of rape by the paramilitary RSF have been documented across Sudan, with the highest figures reported in Khartoum and al-Geneina.¹³ In South Darfur, 24 women were kidnapped and raped in the Otash IDP camp, and in South Khartoum there were 30 cases of rape reported.¹⁴ Women have also been reportedly raped while trying to flee the fighting in Darfur.¹⁵

Enforced Disappearances

The UN Office of the High Commissioner for Human Rights in Sudan has estimated that in Khartoum state alone, there have been at least 451 documented cases of civilians who have been forcibly disappeared since April 15, 2023.¹⁶ There is little public knowledge of the places of detention, although there is some evidence to suggest that the SAF is using the Wadi Seidna military airbase, and that the RSF is using its bases in Kafouri and Sports City, and civilian buildings in the neighborhoods of Riyadh, Al Nasser, and Bahri.¹⁷ The African Centre for Justice

⁹ Oscar Rickett, *Sudan: Dozens killed as RSF attacks North Darfur's Kutum*, Middle East Eye (June 5, 2023), <https://www.middleeasteye.net/news/sudan-kutum-darfur-civilians-killed-rsf-attacks>; *UNITAMS head: Ethnically based attacks against Darfur civilians could be crimes against humanity*, Dabang Sudan (June 14, 2023), <https://www.dabangasudan.org/en/all-news/article/unitams-head-ethnically-based-attacks-against-darfur-civilians-could-be-crimes-against-humanity>.

¹⁰ *Sudan: Explosive Weapons Harming Civilians*, Human Rights Watch (May 4, 2023); *UNITAMS head: Ethnically based attacks against Darfur civilians could be crimes against humanity*, Dabang Sudan (June 14, 2023); Zeinab Mohammed Salih & Ruth Michaelson, *Civilians attacked in Darfur region as Sudan fighting escalates*, Guardian (Apr. 30, 2023), <https://www.theguardian.com/world/2023/apr/30/civilians-darfur-region-sudan-fighting-escalates>.

¹¹ *Sudan: Explosive Weapons Harming Civilians*, Human Rights Watch (May 4, 2023).

¹² Press Release, *Civilians bear devastating brunt of fighting in Sudan: UN Experts, United Nations Human Rights Office of the High Commissioner* (May 11, 2023), *UNITAMS head: Ethnically based attacks against Darfur civilians could be crimes against humanity*, Dabang Sudan (June 14, 2023).

¹³ *Women speak out about sexual violence in Sudan fighting*, AlJazeera (May 16, 2023), <https://www.aljazeera.com/news/2023/5/16/women-speak-out-online-about-reports-of-sexual-violence-in-sudan>.

¹⁴ *Women speak out about sexual violence in Sudan fighting*, AlJazeera (May 16, 2023).

¹⁵ Magdy, Amy, *Sudanese official urges investigation into violence in Darfur; saying it's a return to past genocide*, AP News (June 20, 2023),

<https://apnews.com/article/sudan-war-military-rsf-darfur-6e13139742d52564e47847cb9bd4d2a5>.

¹⁶ Marc Español, *In the chaos of war, a desperate search for Sudan's missing*, The New Arab (July 13, 2023).

¹⁷ Marc Español, *In the chaos of war, a desperate search for Sudan's missing*, The New Arab (July 13, 2023).

and Peace Studies has also expressed deep concern about the increasing number of missing persons across Sudan since the armed conflict erupted,¹⁸ having obtained names of 91 persons forcibly disappeared in Khartoum. The figures are assumed to be much higher, and the targeting of journalists and human rights defenders has hindered accurate and consistent reporting.¹⁹

Persecution and Risk of Genocide

Targeted attacks by both Arab militias and the RSF have been committed against civilians based on their ethnic identities and ties to the main parties to the conflict.²⁰ There is significant evidence mounting that indicates largely Arab militias are targeting and killing non-Arab African groups,²¹ and both leaders and members of the Masalit community have been specifically targeted and killed.²² On June 22, 2023, it was estimated that since the latest conflict erupted, at least 1,100 people, predominantly from the Masalit ethnic group, have been killed by the RSF and affiliated Arab militias in El Geneina.²³ In the same area, others report figures of up to 5,000 killed and 8,000 injured.²⁴ Numerous UN officials have raised alarm about the ethnic dimensions of this conflict, especially in West Darfur,²⁵ and British members of parliament have warned against “systematic ethnic cleansing” at the hands of the RSF and affiliated militias.²⁶

¹⁸ The African Centre for Justice and Peace Studies, *Urgent call to Sudanese authorities, RSF and SAF to account for thousands of citizens who have gone missing since the armed conflict erupted* (June 29, 2023) available at <https://www.acjps.org/urgent-call-to-sudanese-authorities-rsf-and-saf-to-account-for-thousands-of-citizens-who-have-gone-missing-since-the-armed-conflict-erupted/>.

¹⁹ Press Release, *Civilians bear devastating brunt of fighting in Sudan: UN Experts*, United Nations Human Rights Office of the High Commissioner (May 11, 2023).

²⁰ *Sudan: Attacks based on ethnicity may amount to war crimes*, United Nations (June 13, 2023) <https://news.un.org/en/story/2023/06/1137647>.

²¹ Nima Elbagir et al, *Kill, terrorize, expel: Testimonies detail atrocities by Wagner-backed militia in Sudan*, CNN (June 17, 2023).

²² Celine Alkhalidi et al, *New killings reported in Darfur on second day of Sudan ceasefire*, CNN (June 19, 2023), Magdy, Amy, *Sudanese official urges investigation into violence in Darfur, saying it's a return to past genocide*, AP News (June 20, 2023).

²³ Atrocity Alert No. 352: Sudan, Afghanistan and International Day for Countering Hate Speech (June 22, 2023), available at <https://reliefweb.int/report/sudan/atrocity-alert-no-352-sudan-afghanistan-and-international-day-countering-hate-speech>.

²⁴ Estimate provided by Dr Ahmed Abbas, the vice-president of the Sudan Doctors Union. See Kaamil Ahmed, *Calls for sanctions against Sudan amid genocide warnings in Darfur*, The Guardian (June 30, 2023).

²⁵ U.N. Press Release, Statement by Alice Wairimu Nderitu, United Nations Special Adviser on the Prevention of Genocide, on the conflict in Sudan (June 13, 2023) available at https://www.un.org/en/genocideprevention/documents/USG_and_Special_Adviser%20Nderitu_Sudan_13_June_2023.pdf.

²⁶ Kaamil Ahmed, *Calls for sanctions against Sudan amid genocide warnings in Darfur*, The Guardian (June 30, 2023).

Other War Crimes and Violations of International Humanitarian Law

Attacks on hospitals, clinics, schools, camps for the displaced, and other public buildings have been devastating. The two parties to the conflict have both repeatedly used explosive weapons to destroy essential civilian infrastructure.²⁷ In al-Geneina, it was reported there were no hospitals or clinics that were currently functioning due to the fighting.²⁸ As of May 2, 2023, it is reported that over two-thirds of hospitals and numerous dialysis centers are no longer functional due to the conflict.²⁹ Multiple reports suggest that ambulances, hospitals, and healthcare workers are being intentionally targeted.³⁰ According to one source, nearly 80% of Khartoum's hospitals have been shut down or cannot fully function, and doctors face death threats from the military.³¹ The World Health Organization has "estimate[d] that one quarter of the lives lost so far could have been saved with access to basic hemorrhage control. But paramedics, nurses, and doctors are unable to access injured civilians, and civilians are unable to access services."³²

The fighting has forced many civilians in Khartoum to remain in their homes with water and power shortages and a lack of access to proper medical care.³³ Parts of Bahri were cut off from water after fighting caused a fire that shut down

²⁷ *Sudan: Explosive Weapons Harming Civilians*, Human Rights Watch (May 4, 2023), Press Release, *Civilians bear devastating brunt of fighting in Sudan: UN Experts*, United Nations Human Rights Office of the High Commissioner (May 11, 2023).

²⁸ *Sudan: Explosive Weapons Harming Civilians*, Human Rights Watch (May 4, 2023).

²⁹ *Sudan: Explosive Weapons Harming Civilians*, Human Rights Watch (May 4, 2023), Press Release, *Sudan's Warring Factions Must End Attacks on Hospitals, Protect Civilians: Joint Statement*, Physicians for Human Rights (Apr. 26, 2023).

³⁰ Harriet Barber, *Hospitals looted and ambulances hijacked during Sudan's fierce fighting*, Telegraph (Apr. 19, 2023), <https://www.telegraph.co.uk/global-health/terror-and-security/sudan-fighting-khartoum-world-health-organisation-hospitals/>; Zeinab Mohammed Salih, *Sudan medical volunteers detained after being seized from ambulance*, Guardian (May 8, 2023),

<https://www.theguardian.com/world/2023/may/08/sudan-medical-volunteers-detained-after-being-seized-from-ambulance>; Press Release, *Sudan's Warring Factions Must End Attacks on Hospitals, Protect Civilians: Joint Statement*, Physicians for Human Rights (Apr. 26, 2023),

<https://phr.org/news/sudans-warring-factions-must-end-attacks-on-hospitals-protect-civilians-joint-statement/>.

³¹ Zeinab Mohammed Salih, *Sudan medical volunteers detained after being seized from ambulance*, Guardian (May 8, 2023),

<https://www.theguardian.com/world/2023/may/08/sudan-medical-volunteers-detained-after-being-seized-from-ambulance>.

³² *WHO fears more deaths in Sudan due to outbreaks, collapse of services*, Reuters (Apr. 26, 2023),

<https://www.reuters.com/world/africa/who-fears-more-deaths-sudan-due-outbreaks-collapse-services-2023-04-26/>.

³³ *Sudan: Explosive Weapons Harming Civilians*, Human Rights Watch (May 4, 2023), Press Release, *Civilians bear devastating brunt of fighting in Sudan: UN Experts*, United Nations Human Rights Office of the High Commissioner (May 11, 2023).

the water treatment plant in the area.³⁴ In Nyala, Darfur, armed forces looted and burned a medical storage facility.³⁵ A shelter for girls with disabilities in Khartoum was shelled.³⁶ It has also been reported that non-uniformed Arab militias attacked the Kassab camp, which houses people internally displaced from the Darfur conflict.³⁷ Extortion has become widespread in many regions, with checkpoints along various routes where both parties to the conflict demand money for safe passage.³⁸

Conclusion

The scale of violence and other crimes committed by members of both the Sudanese Army and the Rapid Support Forces are highly likely to amount to war crimes and crimes against humanity. This may provide avenues for the prosecution of leadership under command responsibility as the mode of liability.

Leadership under Command Responsibility

Fundamental to the principle of command responsibility under international law is the determination of who is considered a “commander” in the context of a conflict. Two historical questions in this regard that are salient to the current Sudan crisis are (i) whether command responsibility applies to non-international conflicts; and (ii) whether command responsibility applies solely to formal military command structures and governmental officials, or also to informal and non-state actors, such as guerilla groups, militia, or paramilitary forces. The following analysis demonstrates how current international law is broadly applicable to non-international armed conflicts and that command responsibility is applicable by virtue of a superior’s practical authority over armed subordinates, rather than by their official status. This analysis is then applied to the current Sudan conflict.

Early treaties addressed the issue of command responsibility, including the Hague Regulations 1899 and 1907 and the 1949 Geneva Conventions. These documents established principles for outlining the rights of belligerents on (among other factors) the basis that forces are subject to their commanders, and making commanders responsible for implementing and carrying out the obligations of the

³⁴ *Sudan: Explosive Weapons Harming Civilians*, Human Rights Watch (May 4, 2023).

³⁵ *Sudan: Explosive Weapons Harming Civilians*, Human Rights Watch (May 4, 2023).

³⁶ Press Release, *Civilians bear devastating brunt of fighting in Sudan: UN Experts*, United Nations Human Rights Office of the High Commissioner (May 11, 2023).

³⁷ Oscar Rickett, *Sudan: Dozens killed as RSF attacks North Darfur’s Kutum*, Middle East Eye (June 5, 2023).

³⁸ Nima Elbagir et al, *Kill, terrorize, expel: Testimonies detail atrocities by Wagner-backed militia in Sudan*, CNN (June 17, 2023).

treaties.³⁹ Indeed, the 1907 Hague Regulations stipulate that they apply “not only to armies, but also to militia and volunteer corps.” The statutes for the special tribunals of the Former Yugoslavia, Rwanda, Sierra Leone, and East Timor all clearly state that the official position of an accused person does not relieve or mitigate punishment for crimes or command responsibility. The statutes refer to the general terms “subordinate” and “superior” when detailing command responsibility, which they apply to all crimes that fall within the jurisdiction of the courts, without distinguishing between international and non-international crimes.⁴⁰

The jurisprudence developed under these tribunals established that command responsibility, under the tribunal statutes and as a matter of customary international law, applies to both international and non-international armed conflict.⁴¹ Additionally, the judgment in the ICTY *Celebici* case, the first elucidation of the concept of command responsibility by an international judicial body since the World War II tribunals, stated that command responsibility applies to “not only military commanders, but also civilians holding positions of authority (...)”, and “not only persons in de jure positions but also those in such position *de facto*...”.⁴² Article 28 of the Rome Statute uses even broader language by referring not only to “military commanders” but also persons “effectively acting as a military commander” in respect of “forces under his or her effective command and control, or effective authority and control as the case may be.”⁴³ This demonstrates how well before the outbreak of conflict in Sudan in 2023, it had already been established under international law that command responsibility applies to (i) non-international armed conflicts; and (ii) to commanders or superiors by virtue of their de facto control of armed forces, rather than their official or de jure status.

³⁹ Regulations concerning the Laws and Customs of War on Land, annexed to Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899, Article 1(1); Regulations concerning the Laws and Customs of War on Land, annexed to Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, Article 1(1); Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929, Article 26.

⁴⁰ Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, Art.7(3); Statute of the International Tribunal for Rwanda, Art.6(3); Statute of the Special Court for Sierra Leone, Art.6(3); United Nations Transitional Administration in East Timor Regulation No. 2000/15, Art. 16.

⁴¹ *Prosecutor v. Hadzihasanovic et al.*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (“*Hadzihasanovic Decision*”) 16 July 2003, Appeals Chamber, para. 26. See also: *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (“*Tadic Jurisdiction Decision*”) 2 October 1995, Appeals Chamber, para. 134.

⁴² *Celebici Case: The Judgement of the Trial Chamber Press Release: “Celebici case: the Judgement of the Trial Chamber. Zejnir Delalic acquitted, Zdravko Mucic sentenced to 7 years in prison, Hazim Delic sentenced to 20 years in prison, Esad Landzo sentenced to 15 years in prison”, The Hague, 16 November 1998, CC/PIU/364-E.*

⁴³ The Rome Statute of the International Criminal Court, Article 28, July 17, 1998, United Nations, Treaty Series, vol. 2187, No. 38544, (as amended by United Nations resolution RC/Res.6 of June 11, 2010) (the “Rome Statute”).

Application to Sudan Context

The two major parties to the current conflict are the Sudanese Armed Forces (SAF) under the command of General Abdel Fattah al-Burhan and the Rapid Support Forces (RSF) under the command of Mohammed Hamdan Dagalo. Following the ousting of Omar al-Bashir, former president of Sudan, General Abdel Fattah al-Burhan, in addition to his command role within the SAF, has held various de facto governing positions, including defense minister and chairman of the (now disbanded) Sovereignty Council. At the heart of the current conflict are challenges to al-Burhan's political power, although he has continued to retain and exercise authority over the SAF. Al-Burhan therefore falls within the meaning of a "superior" for the purposes of command responsibility, and on this basis could be held responsible for the actions of his subordinates if it is proved that he (i) had constructive knowledge of the actions of his subordinates, and (ii) failed to take reasonable measures to prevent or punish such actions.

General Mohamed Hamdan Dagalo holds command of the RSF, a paramilitary force created by the government of Sudan in 2013 and formed of Janjaweed militias who fought on behalf of the government in the Darfur conflict. Since the outbreak of conflict between the SAF and RSF in 2023 (during which the RSF has been designated a rebel group by the SAF), the status of the RSF has been disputed. However, as an organized paramilitary force over which General Hamdan has clear de facto command, it is highly likely that General Hamdan would be considered a "commander" for the purposes of command responsibility under international law.

Although the SAF and the RSF have been the primary parties to the conflict, there are many other Sudanese armed groups that are active in Sudan and have participated in the conflict. Moreover, the Wagner Group, a foreign armed group, has been active in Sudan, and the Wagner Group has reportedly allied with General Hamdan and the RSF. Crimes allegedly committed by members of these groups may also raise the issue of command responsibility; not just in relation to their internal authority structures, but potentially also in relation to their ties to other parties to the conflict. For example, if it could be proved that a purportedly independent Sudanese or foreign armed group were (1) effectively (if not formally) under the control of General Hamdan or General al-Burhan (the Generals); (2) carried out crimes of which the Generals had constructive knowledge; and (3) the Generals could have but failed to take reasonable measures to prevent or punish

such crimes; it is possible that the Generals could be held responsible under command responsibility liability.

Conclusion

This Analysis has established that the broad scope of command responsibility, which extends beyond de jure attribution of leadership, can reasonably be held to apply to both General Abdel Fattah al-Burhan and General Mohamed Hamdan Dagalo. Under this doctrine, General Abdel Fattah al-Burhan can be considered a “superior”, and General Mohamed Hamdan Dagalo can be considered a “commander”.

Recharacterization of Crimes for Retroactive Application

Recharacterization (or reclassification) of crimes “occurs whenever the legal basis for criminalization and/or punishment differs from the substantive law governing the charges, conviction, and sentencing.”⁴⁴ Under retroactive recharacterization, “the rules of criminal law binding on the accused at the time of the conduct are retroactively replaced by a similar set of rules that were not previously applicable to them and are found in a different source or system of law.”⁴⁵ One example is recharacterizing murder under domestic law as genocide or crimes against humanity.

In order for retroactive recharacterization to be valid, the accused must have had “notice of the ‘essence’ of the crime.”⁴⁶ The term used to describe this notice is known as “fair labeling.”⁴⁷ Fair labeling “requires that criminal labels accurately reflect the accused’s moral blameworthiness.”⁴⁸ Further, fair labeling “overlaps with the principle of legality to the extent that both are concerned with providing notice of the consequences of criminal wrongdoing, as well as ensuring that such consequences are fair and proportionate to the degree of culpability.”⁴⁹

⁴⁴ Talita de Souza Dias, *Retroactive Recharacterization of Crimes and the Principles of Legality and Fair Labeling in International Criminal Law*, (2019) (D.Phil Thesis, Balliol College, University of Oxford) at 3.

⁴⁵ Talita de Souza Dias, *Retroactive Recharacterization of Crimes and the Principles of Legality and Fair Labeling in International Criminal Law*, (2019) (D.Phil Thesis, Balliol College, University of Oxford) at 3.

⁴⁶ Talita de Souza Dias, *Retroactive Recharacterization of Crimes and the Principles of Legality and Fair Labeling in International Criminal Law*, (2019) (D.Phil Thesis, Balliol College, University of Oxford) at 15.

⁴⁷ Talita de Souza Dias, *Retroactive Recharacterization of Crimes and the Principles of Legality and Fair Labeling in International Criminal Law*, (2019) (D.Phil Thesis, Balliol College, University of Oxford) at 67.

⁴⁸ Talita de Souza Dias, *Retroactive Recharacterization of Crimes and the Principles of Legality and Fair Labeling in International Criminal Law*, (2019) (D.Phil Thesis, Balliol College, University of Oxford) at 67.

⁴⁹ Talita de Souza Dias, *Retroactive Recharacterization of Crimes and the Principles of Legality and Fair Labeling in International Criminal Law*, (2019) (D.Phil Thesis, Balliol College, University of Oxford) at 67.

Potential Challenges

If not done properly, retroactive recharacterization may “alter essential aspects of criminal law, including: the material or mental elements of the crime; general principles of liability, including modes of liability, general standards of *mens rea* and defenses, penalties, conditions of prosecution and punishment (i.e. the ‘prosecutability’ and ‘punishability’ of the individual), and criminal labels.”⁵⁰ This means that in some cases, relevant conduct may go “from being innocent to criminal.”⁵¹ The following identifies potential issues associated with recharacterization.

Recharacterization of Elements Essential for Criminal Liability

An additional challenge that arises is the risk that the retroactive recharacterization of crimes “may ‘alter elements which are essential for individual criminal liability to arise...includ[ing] the material (*actus reus*) and mental (*mens rea*) elements of the crime.’”⁵² For example, “[i]f the change in question results in narrowing down the scope of the applicable law...then it will not likely lead to retroactive criminalization or another detrimental effect on the accused.”⁵³ Furthermore, if the recharacterization “results in an expanded scope of application...then it will likely lead to the retroactive criminalization of conduct that was innocent when done.”⁵⁴

Recharacterization of Penalties

In some cases, retroactive recharacterization may result in a change in the “nature or extent of the penalties which were previously attached to the crime

⁵⁰ Talita de Souza Dias, *Retroactive Recharacterization of Crimes and the Principles of Legality and Fair Labeling in International Criminal Law*, (2019) (D.Phil Thesis, Balliol College, University of Oxford) at 12.

⁵¹ Talita de Souza Dias, *Retroactive Recharacterization of Crimes and the Principles of Legality and Fair Labeling in International Criminal Law*, (2019) (D.Phil Thesis, Balliol College, University of Oxford) at 19.

⁵² Talita de Souza Dias, *Retroactive Recharacterization of Crimes and the Principles of Legality and Fair Labeling in International Criminal Law*, (2019) (D.Phil Thesis, Balliol College, University of Oxford) at 18.

⁵³ Talita de Souza Dias, *Retroactive Recharacterization of Crimes and the Principles of Legality and Fair Labeling in International Criminal Law*, (2019) (D.Phil Thesis, Balliol College, University of Oxford) at 18.

⁵⁴ Talita de Souza Dias, *Retroactive Recharacterization of Crimes and the Principles of Legality and Fair Labeling in International Criminal Law*, (2019) (D.Phil Thesis, Balliol College, University of Oxford) at 19.

under the applicable law.”⁵⁵ This may result in penalties that are not proportionate (i.e. more or less severe) to those that would be imposed under domestic law.⁵⁶

Recharacterization of Procedural Rules

Recharacterization of procedural rules may indirectly affect the prosecution or punishment of an individual by either creating the ability to prosecute retroactively or increasing the severity of the punishment.⁵⁷ Examples of procedural rules that may be retroactively recharacterized include amnesties, pardons, statutes of limitations, and immunities.⁵⁸

Recharacterization of Labels

Retroactive recharacterization of crimes may also “take the form of a detrimental change in the label or classification of the crime or the mode of liability.”⁵⁹ Recharacterization of labels can lead to recharacterization of elements, as the label may remove or add elements and thus change prosecution or punishment.⁶⁰ An example of this is being convicted of genocide rather than murder.

Recharacterization of Crimes: Potential Examples from Sudanese Legislation

Both the Constitutional Charter 2019 and the Sudanese Bar Association’s Interim Constitution 2022 recognize certain fundamental human rights, and Sudan’s Criminal Act 1991 (as amended in 2009) penalizes certain war crimes and crimes against humanity, almost mirroring those outlined in the Rome Statute. However, Sudan’s domestic law does not provide for criminal liability on the basis of command responsibility.⁶¹ As such, retroactive application of Sudanese

⁵⁵ Talita de Souza Dias, *Retroactive Recharacterization of Crimes and the Principles of Legality and Fair Labeling in International Criminal Law*, (2019) (D.Phil Thesis, Balliol College, University of Oxford) at 22.

⁵⁶ Talita de Souza Dias, *Retroactive Recharacterization of Crimes and the Principles of Legality and Fair Labeling in International Criminal Law*, (2019) (D.Phil Thesis, Balliol College, University of Oxford) at 22-23.

⁵⁷ Talita de Souza Dias, *Retroactive Recharacterization of Crimes and the Principles of Legality and Fair Labeling in International Criminal Law*, (2019) (D.Phil Thesis, Balliol College, University of Oxford) at 24.

⁵⁸ Talita de Souza Dias, *Retroactive Recharacterization of Crimes and the Principles of Legality and Fair Labeling in International Criminal Law*, (2019) (D.Phil Thesis, Balliol College, University of Oxford) at 24-25.

⁵⁹ Talita de Souza Dias, *Retroactive Recharacterization of Crimes and the Principles of Legality and Fair Labeling in International Criminal Law*, (2019) (D.Phil Thesis, Balliol College, University of Oxford) at 25.

⁶⁰ Talita de Souza Dias, *Retroactive Recharacterization of Crimes and the Principles of Legality and Fair Labeling in International Criminal Law*, (2019) (D.Phil Thesis, Balliol College, University of Oxford) at 26.

⁶¹ Transitional Constitutional Document (2019), Chapter 14, The Bill of Rights and Freedoms; Sudan’s Criminal Act of 1991(Amended 2009), Chapter 18; Human Rights Watch, Q&A: Justice for Serious International Crimes

domestic law may not provide adequate recourse.⁶² Nonetheless, other laws, including both domestic and international treaties to which Sudan is party, can be considered.

Sudan's Criminal Act 1991 (Amended 2009)

Sudan's Criminal Act of 1991 (the "Act") does not incorporate the concept of command responsibility, but other modes of criminal liability described by the Act could serve as the basis for recharacterization. For instance, Chapter II of the Act provides for various types of criminal conspiracy. Article 23 of the Act stipulates that offenses committed by multiple individuals pursuant to a criminal conspiracy "shall be responsible for that offense in the same manner as if it is committed by him alone[.]"⁶³ Article 25 of the Act also establishes abetment as a mode of criminal liability, defined as "the inducement of one person by another to commit an offense, or the ordering of any mature person under his control to commit it".

However, Sudanese law also provides security service members and government officials with extensive immunities through Articles 34 and 42(2) of the Armed Forces Act 2007, Article 45(1) of the Police Act 2008, Article 21 of the 2019 Constitutional Charter,⁶⁴ and Article 55(1) of the Sudanese Bar Association's Draft Interim Constitution. Accordingly, some officials are protected from prosecution without higher ranking approval.⁶⁵ However, under international law and customary international law, those who commit atrocity crimes do not enjoy immunity.

Sudan's Armed Forces Act of 2007

The Armed Forces Act of 2007 established a military criminal justice system within Sudan⁶⁶ and stipulates as a general principle that personnel of the Armed Forces are required to comply with the Constitution's Human Rights Bill.⁶⁷ The

Committed in Sudan (June 22, 2020),

https://www.hrw.org/news/2020/06/22/qa-justice-serious-international-crimes-committed-sudan#_What_are_the_3.

⁶² Human Rights Watch, Q&A: Justice for Serious International Crimes Committed in Sudan (June 22, 2020).

⁶³ Sudan's Criminal Act of 1991.

⁶⁴ Human Rights Watch, Q&A: Justice for Serious International Crimes Committed in Sudan (June 22, 2020).

⁶⁵ Human Rights Watch, Q&A: Justice for Serious International Crimes Committed in Sudan (June 22, 2020).

⁶⁶ Sudan's Armed Forces Act of 2007; ICRC, International Humanitarian Law Databases, Armed Forces Act, 2007 (May 5, 2007),

<https://ihl-databases.icrc.org/en/national-practice/armed-forces-act-2007#:~:text=The%20Act%20provides%20for%20the,the%20alleged%20perpetrator%20in%20Sudan>.

⁶⁷ Sudan's Armed Forces Act of 2007, para. 7(1).

Armed Forces Act also criminalizes several offenses which may be conducted during the course of a military operation, including “direct attacks against civilian population...who do not directly participate in war business” and “direct attacks against civilian targets...with his/her knowledge that such attack will result in consequential casualties, or losses in lives, unless such targets are used for military purposes.”⁶⁸ Notably, Sudanese military courts retain jurisdiction over these crimes, and liability is subject to the immunity provisions described above.⁶⁹

International Treaties and Covenants

Sudan is a state party to the International Covenant on Civil and Political Rights (“ICCPR”), the Convention against Torture (“UNCAT”), and the International Convention for the Protection of All Persons from Enforced Disappearances (“CED”). The ICCPR enshrines fundamental human rights, including the right to life; freedom of speech, assembly, and association; religious freedom; freedom from torture and degrading treatment; and freedom to take part in the conduct of public affairs.⁷⁰ States parties must ensure that individuals whose rights have been violated are provided access to an adequate remedy, even where the violation has been “committed by persons acting in an official capacity.”⁷¹

Under the UNCAT, Article 1 defines torture as severe pain or suffering, intentionally inflicted on a person for a specific purpose, “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Article 2 requires states parties to take effective legislative, administrative, judicial or other measures to prevent acts of torture; and Article 4 obliges states to criminalize acts of torture, including acts amounting to complicity or participation in torture or other acts of cruel and degrading treatment. Although the UNCAT does not establish a specific mode of criminal liability, it does make clear that indirect acts of persons acting in an official capacity must be dealt with in the same way as acts directly perpetrated by other (subordinate) individuals.

Similarly, Article 6(b)(i) of the CED also captures the conduct of superiors who knew or should have known that their subordinates were committing or about to commit the crime of enforced disappearance. Article 6(b)(ii)-(iii) requires states parties to hold those superiors criminally responsible if they also exercised

⁶⁸ Sudan’s Armed Forces Act of 2007, para. 155.

⁶⁹ ICRC, Armed Forces Act, 2007; Human Rights Watch, Q&A: Justice for Serious International Crimes Committed in Sudan (June 22, 2020).

⁷⁰ ICCPR, Part III.

⁷¹ ICCPR, Part II, Art. 2.3(a)

effective responsibility for, and control over, the activities concerned with the enforced disappearance; and if they failed to take reasonable measures to prevent, repress, or submit for investigation the commission of a disappearance.

Application and Likelihood of Success

Domestic and international laws expressly applicable to Sudan do not offer a clear path to retroactive recharacterization, and as such the likelihood of success of such attempts remains unclear. While crimes involving conspiracy could form the initial basis for such charges, they do not offer a perfect analogy to command responsibility. Although abetment may offer a better foundation; the criminal elements do not map neatly to those of command responsibility, as they fundamentally differ from an analysis of whether a superior failed to prevent or punish subordinates under the principle of command responsibility. Attempts to recharacterize these modes of liability may therefore be condemned as violating the principles of legality and fair labeling. Moreover, it appears that Sudanese laws may exempt military officials from such claims.

The Armed Forces Act of 2007 similarly seems unlikely to provide recourse, given the military's jurisdiction and the immunities granted under the Act. Furthermore, the Act does not appear to include any modes of criminal liability that contain elements analogous to those of command responsibility. Despite this, the prohibition on direct attacks and the mandate to protect the human rights set forth in the Constitution may suggest that the persons to whom the Act applies are aware of these obligations.

Conclusion

Retroactive recharacterization of crimes to establish the existence of command responsibility in Sudan does not appear to provide a clear path to prosecution. Given the lack of domestic laws in Sudan sufficiently analogous to command responsibility, other avenues, including the applicability of command responsibility under customary international law, warrant more consideration.

Development as a Rule of Customary International Law

Elements of Customary International Law

Customary International law (“CIL”) is a framework of binding international norms that are identified through “a general practice accepted as law” and exist independent of treaty law.⁷² In 2018, the International Law Commission (“ILC”)⁷³ proposed draft articles on the identification of CIL. It concluded that in order “[t]o determine the existence and content of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).”⁷⁴ The ILC stipulates that treaties may reflect rules of CIL if it is established that the treaty rule: (i) codified a rule of customary international law existing at the time when the treaty was concluded; (ii) has led to the crystallization of a rule of customary international law, which had already started to emerge prior to the conclusion of the treaty; or (iii) has given rise to a general practice that is accepted as law, thereby generating a new rule of customary international law. The ILC also provides that the decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are an additional means for the determination of such rules. The ILC defines “general practice” as “the practice of states that contributes to the formation, or expression, of rules of customary international law,” and highlights that the practice of international organizations may also contribute to the formation or expression of CIL.⁷⁵ The ILC provides the following as a non-exhaustive list of the forms state practice can take: “diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct ‘on the ground’; legislative and administrative acts; and decisions of national courts.”⁷⁶

The second element of CIL is *opinio juris*, which means that the general practice outlined above is undertaken with a sense of legal right or obligation and

⁷² International Committee of the Red Cross, Definitions.

⁷³ a body established by the United Nations General Assembly (“UNGA”) in 1947 to “initiate studies and make recommendations” for the purpose of ensuring the development and codification of international law

⁷⁴ UNGA, International Law Commission, Seventieth Session, “Identification of Customary International Law” 17 May 2018, Conclusion 2; See also Conclusion 11(1).

⁷⁵ UNGA, International Law Commission, Seventieth Session, “Identification of Customary International Law” 17 May 2018, Conclusions 4(1)-(2).

⁷⁶ UNGA, International Law Commission, Seventieth Session, “Identification of Customary International Law” 17 May 2018, Conclusion 6(2).

can be distinguished from mere usage or habit.⁷⁷ Examples of evidence that can be used to demonstrate *opinio juris* include: “public statements made on behalf of states, official publications, government legal opinions, diplomatic correspondence, decisions of national courts, treaty provisions, and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.”⁷⁸ Notably, the ICJ has also held that when a state fails to ratify the first international instrument codifying a norm of CIL, that norm cannot be enforced against that state.⁷⁹ Furthermore, even if *opinio juris* is established and a norm of CIL is recognized, if an individual state continually objects to that norm of CIL while the rule is in the process of formation, the state may be considered a persistent objector. However, the status of persistent objector does not apply to peremptory norms of general international law (*jus cogens*). These apply to all states.⁸⁰

Command Responsibility as a Rule of Customary International Law

Command responsibility is a mode of liability that allows for commanders to be held criminally liable for crimes committed by their subordinates.⁸¹ There are two types of command responsibility: (i) direct, which consists of positive acts by the superior or commander;⁸² and (ii) indirect, where a commander fails to prevent or repress unlawful conduct.⁸³

Command responsibility was first internationally recognized in connection with the responsibility of states to ensure compliance with the laws of war⁸⁴ in the

⁷⁷ UNGA, International Law Commission, Seventieth Session, “Identification of Customary International Law” 17 May 2018, Conclusion 9.

⁷⁸ UNGA, International Law Commission, Seventieth Session, “Identification of Customary International Law” 17 May 2018, Conclusion 10(2).

⁷⁹ ICJ, *Colombia v. Peru*, 1950 (“*But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum*”).

⁸⁰ ICJ, *Colombia v. Peru*, 1950, Conclusion 15(3).

⁸¹ European Center for Constitutional and Human Rights, Definitions.

⁸² See, e.g., ICTY: Prosecutor v. Delalić et al. (Čelebići case), Judgement, Case No. IT-96-21-T, T. Ch. IIqtr, 16 November 1998.

⁸³ See, e.g., ICTY: Prosecutor v. Delalić et al. (Čelebići case), Judgement, Case No. IT-96-21-T, T. Ch. II qtr, 16 November 1998).

⁸⁴ Halilovic Judgment, ICTY, para. 42.

Hague Conventions of 1899 and 1907,⁸⁵ the Geneva Convention of 1949,⁸⁶ and the Additional Protocol of 1977.⁸⁷ It is now explicitly codified as a rule of customary international law in the ICRC's International Humanitarian Law Database on Customary International Law under Rule 153. However, neither the Geneva Conventions nor its Additional Protocol make any explicit mention of criminal responsibility on the part of superiors for breaches committed by their subordinates during a non-international armed conflict.⁸⁸

Despite this, the commentary to the Rule 153 indicates that applying command responsibility to non-international armed conflicts is “uncontroversial”. In particular, the commentary refers to numerous instances of national case law in which domestic judiciaries have applied command responsibility to situations that fall outside international armed conflicts. With regard to international bodies, the commentary notes that the UN Commission on Truth for El Salvador pointed out in 1993 that the judicial authorities failed to take steps to determine the criminal liability of superiors responsible for individuals guilty of arbitrary killings. In addition, in the judgment of *Milankovic v Croatia*, the European Court of Human Rights (ECtHR) stated:

Practice with respect to non-international armed conflicts is less extensive and more recent. However, the practice that does exist indicates that it is uncontroversial that this rule also applies to war crimes committed in non-international armed conflicts.⁸⁹

Milankovic further provides examples of how this has been applied, citing the case of *Hadžihasanović and Others*, as well as several cases considered by the International Criminal Tribunal for Rwanda. The commentary to Rule 153 also highlights that during the negotiations for the Rome Statute, the inclusion of

⁸⁵ Regulations concerning the Laws and Customs of War on Land, annexed to Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899, Article 1(1); Regulations concerning the Laws and Customs of War on Land, annexed to Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, Article 1(1).

⁸⁶ Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929, Article 26.

⁸⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977, Article 86(2). Article 86 was adopted by consensus. CDDH, Official Records, Vol. VI, CDDH/SR.45, 30 May 1977, p. 307, (this was one of the first codifications of indirect command responsibility).

⁸⁸ ICRC: Rule 153 – Command Responsibility and the Failure to Act

⁸⁹ ECtHR, *Milanković v. Croatia* (Application No. 33351/20, January 22, 2022).

command responsibility to non-international armed conflicts did not trigger any controversy.⁹⁰

In recent years, command responsibility has been codified in numerous international criminal law instruments in the context of individual criminal liability, including the statutes of the International Criminal Court and the ad hoc tribunals established for Rwanda, Sierra Leone, and the former Yugoslavia.⁹¹ These tribunals were formed by the Security Council of the UN under its Chapter VII powers, and their respective statutes were drafted by experts from across the world, appointed by the Secretary General of the UN and reviewed by representatives from numerous states, indicating that command responsibility as a mode of liability may amount to an international norm. Several ad hoc tribunals have also opined on the status of command responsibility as a rule of customary international law. For instance, in the Trial Chamber Judgement of the *Čelebići* case, the International Criminal Tribunal for the Former Yugoslavia⁹² held that it is a “well-established norm of customary and conventional international law” that “military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates [...]”.⁹³

Based on the above, it appears that the principle of command responsibility has been a norm of customary international law applicable to both international and non-international armed conflicts since *at least* 1998. However, command responsibility has not necessarily been attributed *jus cogens* status, meaning that it may not apply to states that have persistently objected to its formation as a rule of CIL. Accordingly, Sudan may be exempt from its application if Sudan had attained the status of a persistent objector while the norm was emerging.

Sudan: State Practice

To determine whether a state is a persistent objector, it is necessary to analyze the state’s behavior prior to the establishment of a rule of CIL. The ILC

⁹⁰ ICRC IHL Databases, Rule 153, Commentary. Available at <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule153>.

⁹¹ Updated Statute of the International Criminal Tribunal for The Former Yugoslavia, Article 7(3); Statute of the International Criminal Tribunal for Rwanda, U.N. Doc S/RES/955 (1994), Annex, Article 6(3); Statute of the Special Court of Serra Leone, Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Annex, Article 6(3).

⁹² International Criminal Tribunal for the former Yugoslavia.

⁹³ ICTY: Prosecutor v. Delalić et al. (*Čelebići* case), Judgement, Case No. IT-96-21-T, T. Ch. II qtr, 16 November 1998), para. 333.

commentary also explains that a state's objections must be unambiguous, expressed to others in the international community,⁹⁴ and maintained.⁹⁵

Sudanese law does not provide for criminal liability on the basis of command responsibility.⁹⁶ As noted in the prior section, it also has “far-reaching immunities for members of the security services.”⁹⁷ However, according to the ILC's Draft Articles, in order to obtain the status of persistent objector, Sudan must have repeatedly made clear its intention not to be bound by the international customary legal norm of command responsibility while this norm was being formed. Failure to codify command responsibility as a mode of liability is unlikely to rise to the level of “unambiguous” objection.

Despite the unlikelihood that Sudan's actions prior to 1998 were sufficient to categorize it as a persistent objector to command responsibility, the ICJ has previously held that a state may become a persistent objector by failing to ratify the international instrument which *first* codifies the norm.⁹⁸ It is therefore possible that the lack of ratification of the Rome Statute, which is the first codification of the principle of command responsibility generally applicable to the international community in the context of individual criminal responsibility since Sudan achieved statehood in 1956, might be viewed as an objection to this norm becoming CIL.⁹⁹ However, without other means of expressing objection or reservation, it is unlikely to be enough to secure persistent objector status for Sudan. Two further points also discredit the requisite elements of “persistence” and “unambiguity”: (1) in 2021, after refusing to comply with arrest warrants for former President Omar Al-Bashir issued by the ICC, the Sudanese Cabinet stated that it will now turn Al-Bashir over to the International Criminal Court, signaling a departure from the rejection of the Court's authority previously demonstrated by Sudan; and (2) on August 3, 2021, the former transitional civilian government unanimously passed a bill to join the Rome Statute (although accession was not completed before the military coup on October 25, 2021).

⁹⁴ Commentary to the ILC Draft Articles on Identification of CIL, Conclusion 15.

⁹⁵ Commentary to the ILC Draft Articles on Identification of CIL, Conclusion 15.

⁹⁶ Human Rights Watch, Q&A: Justice for Serious International Crimes Committed in Sudan.

⁹⁷ Human Rights Watch, Q&A: Justice for Serious International Crimes Committed in Sudan.

⁹⁸ See ICJ, *Asylum*, 1950.

⁹⁹ See ICJ, *Asylum*, 1950.

Emerging Practice: Application to Crimes Against Humanity

Although Rule 153 refers only to war crimes, practice is emerging that suggests it is increasingly common for superiors to be held liable under command responsibility for crimes against humanity committed by their subordinates. The ECtHR in *Milanković*, for example, cited both *United States v. Friedrich Flick* and the *Roechling* cases as instances in which the accused, who were civilian superiors, were charged with both war crimes and crimes against humanity.¹⁰⁰ This was also identified in the case of *Prosecutor v Krnojelac*, who was charged with and convicted for “crimes against humanity and violations of the laws and customs of war”, including torture, murder, persecution, imprisonment, and enslavement.¹⁰¹ Specifically, he was found, *inter alia*, “guilty of ...murder as a crime against humanity and murder as a violation of the laws or customs of war” pursuant to Article 7(3) of the Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, and “guilty of ... torture as a crime against humanity and a violation of the laws or customs of war” pursuant to art 7(3).¹⁰² He was found guilty by virtue of command responsibility.¹⁰³

In addition, in the Decision on Joint Challenge to Jurisdiction of *Hadžihasanović and Others*, the Trial Chamber of the ICTY made the following preliminary findings with regard to the doctrine of command responsibility prior to the jurisdiction of the ICTY taking effect:

- (i) the doctrine has its roots in *inter alia* the principle of “responsible command and fundamental tenets of military law”;

- (ii) the doctrine has been applied in a manner whereby commanders or superiors have incurred individual criminal responsibility based on their failure to carry out their duty to either prevent their subordinates from committing violations of international law or for punishing them thereafter;
[...]

¹⁰⁰ ECtHR, *Milanković v. Croatia* (Application No. 33351/20, January 22, 2022) (page 16).

¹⁰¹ *Prosecutor v Krnojelac* (Third Amended Indictment) (ICTY, Case No IT-27-95-I, 25 June 2001).

¹⁰² Part VI of the *Krnojelac* judgment: *Prosecutor v Krnojelac* (Judgment) (ICTY, Appeals Chamber, Case No IT-97-25-A, 17 September 2003) [108]–[498].

¹⁰³ See further: Darryl Robinson, *How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution*, University of Melbourne, https://law.unimelb.edu.au/_data/assets/pdf_file/0003/1687242/Robinson.pdf.

(iv) the primary purpose of the doctrine is to ensure compliance with the laws and customs of war and international humanitarian law generally; [and]

(v) the doctrine has been recognized as applying to offenses committed either within or in the absence of an armed conflict.¹⁰⁴

This emerging practice can also be identified in national case law. For instance, in the case of *Prosecutor v Abilio Soares* before the Ad Hoc Human Rights Tribunal at the Human Rights Court of Justice of Central Jakarta, Indonesia, the defendant – the former governor of East Timor – was held criminally responsible under command responsibility for crimes against humanity committed by his subordinates. Specifically, he was held liable for acts of murder/assault and persecution in relation to events during which anti-independence militias committed massacres.¹⁰⁵

Furthermore, as noted above, Article 28 of the Rome Statute establishing the International Criminal Court provides for command responsibility “for crimes within the jurisdiction of the Court.” Article 5 stipulates that the Court has jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression. The provisions of the Rome Statute are generally understood to reflect customary international law.

Conclusion

Command responsibility is well-established as a rule of customary international law, applicable to both international and non-international armed conflicts. Additionally, there is significant evidence to suggest that this rule is developing to encompass the application of command responsibility to crimes against humanity. The threshold to be considered a persistent objector to the formation of a rule of CIL is high, and it seems unlikely that Sudan has met it. On this basis, it may be possible for an international or internationalized tribunal to apply command responsibility to the Sudan context, despite the fact that Sudan does not explicitly provide for command responsibility in domestic legislation.

¹⁰⁴ ICTY, *Hadžihasanović and Others*, Decision on Joint Challenge to Jurisdiction, Paragraph 93.

¹⁰⁵ The Ad Hoc Human Rights Tribunal at the Human Rights Court of Justice of Central Jakarta, case number 01/PID.HAM/AD.Hoc/2002/ph.JKT.PST.

Retroactive Application of Command Responsibility

This section discusses the following three approaches for how judicial institutions could potentially retroactively apply command responsibility to impose criminal liability on leadership for human rights violations committed during the ongoing conflict in Sudan: (i) application of the Rome Statute, (ii) reform of Sudan's domestic law to conform with customary international law, and (iii) the establishment of an international ad hoc tribunal.

In discussing each option, it is assumed that command responsibility was already established as a rule of customary international law by the time of the coup on October 25, 2021.¹⁰⁶ This assumption is critically important because, as noted above, international law prohibits retroactive criminalization and prosecution for “conduct that was lawful at the time of its commission” (*nullum crimen sine lege*).¹⁰⁷

The Rome Statute

The Rome Statute is likely the simplest avenue for prosecutors to potentially charge commanders in Sudan, because it imposes command and control liability on civilian and military leaders and provides a process by which to retroactively impose those provisions.¹⁰⁸ That the Rome Statute also codifies the *nullum crimen* principle to prohibit retroactive application¹⁰⁹ does not necessarily mean the statute can never be later applied, particularly as a jurisdictional hook.¹¹⁰ Indeed, the statute provides three retroactive application mechanisms: first, Sudan could make an *ad hoc* declaration granting the ICC jurisdiction;¹¹¹ second, Sudan (or another United Nations member state) could refer the situation to the ICC; and third, the

¹⁰⁶ However, a court could disagree and rule that command and control liability was not enshrined in international law by the time of the 2021 coup. In that case, retroactive application becomes much more difficult and less likely.

¹⁰⁷ Juratowitch, Ben, *Retroactive Criminal Liability and International Human Rights Law*, The British Yearbook of International Law; Oxford Vol. 75, Issue 1, 337-362, 337 (2005).

¹⁰⁸ The Rome Statute of the International Criminal Court, Article 28, July 17, 1998, United Nations, Treaty Series, vol. 2187, No. 38544, (as amended by United Nations resolution RC/Res.6 of June 11, 2010).

¹⁰⁹ The Rome Statute of the International Criminal Court, Article 28, July 17, 1998, United Nations, Treaty Series, vol. 2187, No. 38544, (as amended by United Nations resolution RC/Res.6 of June 11, 2010) at Article 22(1) (“A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”).

¹¹⁰ See Talita de Souza Dias, *The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad hoc Declarations: An Appraisal of the Existing Solutions to an Under-discussed Problem*, Journal of International Criminal Justice, Vol. 16, Issue 1, p. 67 (2018)

¹¹¹ See The Rome statute, Article 11. To cover crimes committed before potential adoption, Sudan would likely need an *ad hoc* declaration or UNSC referral to the ICC.

United Nations Security Council (“UNSC”) could refer a situation to the ICC through a resolution. However, this third option is subject to a veto by one of the permanent five members of the UNSC.

By making an ad hoc declaration under Article 12(3), non-signatory states like Sudan can accept ICC jurisdiction, covering any event after July 1, 2002 (the date the Rome Statute entered into force), including events before the *ad hoc* declaration.¹¹² Therefore, for crimes that pre-date the *ad hoc* declaration, the ICC is enabled to exercise retrospective jurisdiction over them.¹¹³ Ad hoc declarations are, however, limited to covering one factual situation a time.¹¹⁴ One recent example comprises the ad hoc declarations submitted by Ukraine on April 9, 2014 and September 8, 2015, to investigate, respectively, crimes committed from November 21, 2013 to February 22, 2014, and then onwards from February 20, 2014.

As to the second mechanism, a referral to the ICC by another member state could also grant the ICC jurisdiction over the situation.¹¹⁵ One recent example of this mechanism being utilized can be seen in Ukraine, when on March 2, 2022, the ICC Prosecutor announced he was opening an investigation into the situation in Ukraine following a referral from Lithuania on March 1, 2022, as well as a coordinated referral from numerous states on March 2.

As to the third mechanism, a UNSC referral may also grant the ICC jurisdiction over the situation in Sudan.¹¹⁶ According to Dias, “Article 21(1) seems to require, at least on its face, that primacy be given to the provisions of Rome Statute across all situations that come within the Court’s jurisdiction, regardless of the jurisdictional pre-condition or trigger mechanism.”¹¹⁷ The situation in Sudan is already partly under the ICC’s jurisdiction by virtue of the continuing mandate of UNSC Resolution 1593, which covers Rome Statute crimes allegedly committed in

¹¹² The Rome statute, Article 12(3), 11(1).

¹¹³ Talita de Souza Dias, *Retroactive Recharacterization of Crimes and the Principles of Legality and Fair Labeling in International Criminal Law*, p. 153, doctoral thesis, University of Oxford (2019) (hereinafter “Principles of Legality”).

¹¹⁴ The Rome Statute, Article 12(3).

¹¹⁵ The Rome Statute, Article 13 (“The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if . . . A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations[.]”).

¹¹⁶ See Dias, *Principles of Legality* at 151-56 (discussing scholars’ general agreement that ad hoc declarations confer jurisdiction and substantive legal prohibitions).

¹¹⁷ Dias, *Principles of Legality* at 151-56 (discussing scholars’ general agreement that ad hoc declarations confer jurisdiction and substantive legal prohibitions), at 175.

Darfur since July 1, 2002.¹¹⁸ This means that the ICC Prosecutor is able to examine the commission of new atrocities in the Darfur region as an extension of the initial investigation under that mandate. On July 13, 2023, the ICC Prosecutor announced his office was taking this action.¹¹⁹ However, that mandate does not apply to other areas, such as Khartoum. Opening a new investigation into other areas of Sudan under this avenue would require a new UNSC referral, which, as indicated above, is subject to the veto power conferred upon the five permanent members of the Security Council. Given the current geopolitical climate, it is possible that a permanent member, such as Russia, may exercise its veto to prevent a referral by the UNSC.

To address retroactivity concerns that the Rome Statute was not binding in Sudan during, for instance, the 2021 coup and the conflict that erupted in April 2023; note that the content of the Rome Statute (including command responsibility as a mode of liability) is already reflective of customary international law. As customary international law is binding on all states, and as the previous analysis has established, Sudan would not be considered a persistent objector; it was thus applicable to Sudan both in 2021 and in 2023 when the most recent conflict broke out. Therefore, applying the substance of the Rome Statute would not violate the principle of non-retroactivity.

Alternatively, if the ICC determined that the substantive provisions of the Rome Statute should not apply (for example, in the context of a UNSC referral, or if doing so is deemed to violate the Article 21(3) non-retroactivity principle), it could directly apply customary international law (or other applicable sources of international law) on the basis that such law was binding at all times with respect to the underlying conduct at all relevant times.¹²⁰

¹¹⁸ UNSC Resolution 1593 (2005), U.N. Doc S/RES/1593 (Mar. 31, 2005).

¹¹⁹ Statement of ICC Prosecutor, Karim A. A. Khan KC, to the United Nations Security Council on the situation in Darfur, pursuant to Resolution 1593 (2005) *available at* <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-khan-kc-united-nations-security-council-situation-darfur-0>.

¹²⁰ Dias, *Principles of Legality* at 151-56 (discussing scholars' general agreement that ad hoc declarations confer jurisdiction and substantive legal prohibitions), at 87, where the author takes the position that CIL should apply in cases of UNSC referrals (and not the substantive provisions of the Rome Statute), and 89, where the author argues that in cases of UNSC referrals or retrospective ad hoc declarations, "the substantive law could be any applicable source of *international* [sic] law, such as treaties, CIL, or general principles of law.

Reform of Sudanese Law

Sudan could potentially amend its existing domestic law to expressly provide for command responsibility with respect to war crimes and crimes against humanity committed by subordinates. Alongside the general obligation to observe the *nullum crimen* principle under customary international law,¹²¹ Article 52(4) of the 2019 Constitutional Charter (replicated in Article 16(5) of the 2022 Sudanese Bar Association’s Interim Constitution) provides that “charges may not be brought against any person because of an act or failure to act if such act or failure to act did not constitute a crime at the time of its occurrence.” A Sudanese court would need to determine whether command responsibility, war crimes, and crimes against humanity - codified customary international law - rendered certain prior acts to “constitute a crime”, even if command responsibility was not yet part of domestic law. It seems likely that a Sudanese court would struggle to use customary international law as a way to find that prior acts constituted a crime under the domestic laws of Sudan. Further, as noted in the sections above, broad immunities for leadership under the domestic laws of Sudan are likely to complicate this path.

Ad Hoc Tribunals

In situations where a national sovereign state is unwilling or unable to investigate and prosecute human rights violations, the United Nations has established *ad hoc* tribunals – most notably the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).¹²² The statutes that established these tribunals adopted command responsibility as a mode of liability using nearly identical language to the language now contained in the Rome Statute.¹²³ These tribunals are, by their nature, retroactive, because they are established after the occurrence of the human rights violations on which they are predicated. The accompanying statutes are expressly retroactive too; for example, Article 1 of the ICTY Statute (first adopted in 1993) gives the tribunal power to prosecute persons responsible for serious violations of

¹²¹ See Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press 2009).

¹²² Other examples include the Special Court for Sierra Leone (SCSL) and the United Nations Transitional Administration in East Timor (UNTAET).

¹²³ “[T]he fact that any of the [prohibited acts] of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.” Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, Art.7(3), retrieved from UNITED (icty.org).

international humanitarian law committed in the territory of the former Yugoslavia since 1991.¹²⁴

The statutes and tribunals were set up after the date of many or all of the potential crimes in question. However, they are not intended to criminalize conduct that had previously been lawful;¹²⁵ but rather to provide the definitions, standards, procedures, and jurisdictional basis for prosecuting conduct that was prohibited by customary international law.¹²⁶ Accordingly, any such tribunal with respect to the recent events in Sudan would likely need to rely on customary international law to impose criminal liability on commanders and superiors through command responsibility.

Conclusion

Prosecutors in certain legal proceedings, including at the ICC and other international tribunals, may be able to leverage command responsibility (as a rule of customary international law) to seek criminal charges against those who were in command of forces that have committed war crimes and crimes against humanity in Sudan. The Rome Statute's clear structure and processes likely provide the clearest path. Alternatively, the UN could step in and establish an *ad hoc* tribunal. It appears that the retroactive application of amendments to domestic laws in Sudan holds the least potential for success.

Overall Conclusion

This Rapid Response Analysis concludes that the crimes committed by forces in Sudan may amount to war crimes, crimes against humanity, or both, and therefore may trigger command responsibility liability. The Analysis also concludes that the roles of both General Abdel Fattah al-Burhan and Mohammed Hamdan Dagalo fall into the category of commanders under the requirements of command responsibility.

This Analysis has also found that (i) it would be difficult to recharacterize crimes to conclude that the principle of command responsibility existed in Sudan at

¹²⁴ Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 1, retrieved from UNITED (icty.org).

¹²⁵ See *Hadzihasanovic* Decision on Interlocutory Appeal before the Appeals Chamber of the ICTY (Case: IT-01-47-AR72), 16 July 2003, upholding conviction for command responsibility in part on the basis that command responsibility had at all relevant times been established under customary international law.

¹²⁶ Humphrey, Michael, "International intervention, justice and national reconciliation: the role of the ICTY and ICTR in Bosnia and Rwanda," *Journal of Human Rights*, Vol. 2, No. 4 (December 2003), 495-505.

the time of the 2021 coup, its aftermath, and events since the April 2023 outbreak of conflict; (ii) however, there are solid grounds for a court or tribunal to find that command responsibility was already a rule of customary international law at the time of such events; (iii) this rule of customary international law extends to non-international armed conflicts, which is the category under which the current Sudan context falls; (iv) this rule of customary international law appears to be extending its application beyond war crimes to crimes against humanity; (v) accordingly, the ICC, by virtue of its provisions reflecting customary international law, may be able to prosecute leadership without contravening core principles of fairness and legality that would otherwise prevent retroactive application; and (vi) similarly, an ad hoc tribunal may also be able to rely on customary international law to prosecute leadership without contravening principles of fairness and legality.

Context for Negotiations

It is difficult to predict the timing for the start of peace negotiations in Sudan, and it is also too early to tell exactly which Sudanese actors will participate in the negotiations. However, it is likely that accountability will be a priority in the negotiations, as well as remain a highly divisive topic. When these negotiations do take place, it will be imperative that participants are aware that they may be negotiating with individuals who could potentially be held liable for war crimes and crimes against humanity under command responsibility. There is significant evidence that such crimes have been committed by both main parties to the current conflict, and justice will inevitably be central to the overall objectives of civilian stakeholders. This is exacerbated by the scale of violations suffered by the people of Sudan, and the fact that they are yet to have recourse to effective accountability mechanisms.