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**DEFENDING INTERNATIONAL  
LAW IN SUDAN**

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## Introduction

Since gaining independence in 1956 from Britain and Egypt, Sudan has seen multiple revolutions and civil wars. Many violations of international law took place during these conflicts. It is worth examining the measures which the International Criminal Court (ICC) took to hold individuals accountable during the Bashir era of Sudan's recent history. During this era, Sudan was the location of extreme violations of international law, including genocide and crimes against humanity (ICC). Following protests in 2019, Bashir was removed from power and replaced by a temporary power-sharing agreement with the purpose of transitioning to democracy. In 2023, internal fighting began between the Rapid Support Forces and the Sudanese Armed Forces (Pollock and Symon, 2023, §4). The Sudanese Armed Forces have relied on air support and artillery which has caused significant civilian casualties (Pollock and Symon 2023, para. 4). The ICC has long been monitoring the crimes which took place during Bashir's administration. However, some of the most serious international crimes have been committed in countries which are protected from the jurisdiction of international courts and tribunals. Courts and tribunals have significant merits in the role they serve. Although other means are required to address international crimes where courts do not have jurisdiction, such as evidentiary mechanisms. This paper will explore how this tool can hold individuals to account for violations against international law and why it is being implemented in Sudan.

## The International Criminal Court

International criminal courts and tribunals usually prosecute individuals for the most serious international crimes which are genocide, crimes against humanity, and war crimes. An example of a permanent court is the International Criminal Court established by the Rome Statute ((2002 art. 4(1) and art. 4(2)). The ICC has jurisdiction over these serious international crimes: genocide, crimes against humanity, war crimes, and crimes of aggression (2002, art. 5). The ICC has the right to open courts and tribunals in the 123 states (ICC, 2023a), which have signed the Rome Statute (2002, art. 12), to investigate and prosecute individuals who are responsible for these crimes. However, not all states have signed the Rome Statute which limits the Court's jurisdiction of these international crimes to specific countries. To extend this jurisdiction, situations can be referred to the ICC by the United Nations Security Council (UNSC) (2002, art. 12), even in states which have not signed the Rome Statute. This would allow the ICC to establish a court or tribunal which has jurisdiction over international crimes committed in that state. However, states which have alliances or shared interests with a permanent member of the UNSC have historically been able to avoid the jurisdiction of the ICC. This is because the permanent members of the UNSC can vote against a resolution to refer countries to the ICC. If international crimes were being committed in a state which had not signed the Rome Statute and was protected by a permanent member of the UNSC, then criminals in this state would have impunity. This is a significant issue, meaning that international courts and tribunals cannot be relied upon to prosecute individuals and tackle impunity. Some of the most serious international crimes have been committed in countries which are protected from the jurisdiction of international courts and tribunals.

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In 2005 the situation in Sudan, specifically Darfur, was referred to the ICC by the UNSC (ICC, 2023b). This allowed the ICC to conduct criminal trials for the individuals responsible for serious violations of international law. Overall, seven warrants for arrest were released, with one individual in custody and four individuals at large (ICC, 2023b). One of the individuals who is currently at large is former President Bashir who was ousted from power in Sudan. The ICC issued an arrest warrant for him on the 4th of March 2009 and the 12th of July 2010 (ICC, 2023b). He is charged with five counts of crimes against humanity, two counts of war crimes, intentionally attacking civilians and three counts of genocide (ICC, 2023b). Despite the fact he is at large, it is still possible for him to face justice for the crimes he is accused of. However, critics would argue that international law has not been powerful enough to hold Bashir and others to account for their crimes in Sudan. This perception could be damaging to the current situation in Sudan. Individuals involved in the conflict may be more willing to violate international law knowing that many individuals from Bashir's era did so without being held to account. It could be this reason why an evidentiary mechanism is being used in response to the current conflict in Sudan.

## **Evidentiary Mechanisms**

Sudan is facing a new wave of conflict in 2023 between Rapid Support Forces and the Sudanese Armed Forces (Pollock and Symon, 2023, §4). It is understandable why the international community are advocating for options to address violations of international law, such as evidentiary mechanisms. Many non-governmental organisations and Human Rights charities have called for the establishment of an investigative mechanism. In April, the Global Centre for the Responsibility to Protect wrote to the United Nations Human Rights Council that "States have a responsibility to act by convening a special session and establishing an investigative and accountability mechanism addressing all alleged human rights violations and abuses in Sudan" (2023, §2). Other organisations such as Human Rights Watch and REDRESS have released similar appeals to UNHRC calling for similar mechanisms to be established (Human Rights Watch, 2023 & Lloyd, 2023).

On the 11th of May, the Council adopted resolution S-36/1 [2], which expands the mandate of the UN High Commissioner for Human Rights expert on Sudan. The resolution enhanced the "monitoring and documentation" of human rights violations and abuses between October 2021 and the current conflict (Human Rights Watch, 2023, §2). The new Independent International Fact-Finding Mission will "investigate the facts circumstances and root causes of all alleged violation" (Lloyd, 2023, §7). They will collect, consolidate, analyse, and verify evidence before identifying those responsible for violations (Lloyd, 2023, §8, 9).

Mechanisms like these were first established to address international crimes where international courts and tribunals do not have jurisdiction, in countries like Syria, Iraq and Myanmar. On 19 January 2017, The United Nations General Assembly (UNGA) passed the resolution A/71/L.48 (UN 2016 Doc A/71/L.48), establishing the "International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011".

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This was the first evidentiary mechanism established by the UNGA. Subsequently, the UNGA also established the “Independent Investigative Mechanism for Myanmar” (UN, 2018, Doc. A/HRC/RES/39/2). The United Nations Security Council (UNSC) was responsible for establishing an evidentiary mechanism in Iraq, the “Investigative Team to Promote Accountability for Crimes Committed by Da’esh/ISIL” (UNSC, 2021, Res. 2937). These mechanisms have been established in the aforementioned countries to collect, preserve, and analyse evidence of crimes against international law. The purpose of the mechanisms is to share evidence and aid criminal tribunals when they are established, which will then allow the prosecution of international criminals.

This may also be a useful tool in Sudan where state infrastructure is unable to hold all individuals to account for serious international crimes. Criminals of international law will now consider the possibility that they will be tried by a court or tribunal which has retrospective jurisdiction. Furthermore, criminals will be aware that evidence is being collected and stored by evidentiary mechanisms to assist in their prosecution. This prosecution may be possible if their government’s regime fails, and the new government allows the ICC to establish a court or a tribunal. Individuals will therefore be less likely to commit international crimes, such as air strikes on civilian areas (Pollock and Symon, 2023, §4), knowing that they may one day face prosecution. Therefore, whilst the UN evidentiary mechanism does not end impunity, it does weaken the perception of impunity which fuels violence (Clooney, 2021) and international crimes. The collection and storing of evidence by UN evidentiary mechanisms allows international crimes to be investigated and eventually held to account via a prosecution. Other evidence-finding operations, such as the UN Joint Investigative Mechanism (JIM), have had success in fact-finding and identifying individuals most responsible for international crimes (Elliott, 2018, p.244). For example, the JIM has identified those responsible for four chemical weapons attacks between 2014 and 2017 in Syria (Elliott, 2018, p.244). This is a significant accomplishment, although there has been no intention to establish a prosecution or judicial mechanism (Elliott, 2018, p.244).

A symbolic merit that UN evidentiary mechanisms are providing is an acknowledgement to the victims of genocide and crimes against humanity. As a court or a tribunal has not been established in the aftermath of some of these conflicts, the victims are left without justice or recognition of their suffering. For example, the establishment of the mechanism in Syria and the Myanmar mechanism have not provided justice for these victims or helped to provide accountability to international criminals. However, it has offered recognition to the victims of these crimes. In Iraq, UNITAD (UNSC, 2021, Res 2937) have described the crimes committed by ISIS as a genocide. While this does not bear the same legal weight as a court or a tribunal, this matters to victims (Clooney, 2021). Furthermore, conducting interviews with victims of international crimes also acknowledges the suffering they have experienced. Victims of serious international crimes in Sudan over the previous decades may feel that they have not received justice as most of the individuals pursued by the ICC have not been arrested. Therefore, the establishment of an evidentiary mechanism may provide a more direct form of acknowledgement to victims in Sudan in the wake of the current conflict.

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## Conclusion

It is hoped that by providing individual criminal accountability, the culture of impunity which has existed in Sudan for decades will discourage current and future violations (Lloyd, 2023, para.9). It is also possible, that the renewed interest in providing accountability for violations of international law will support the trials conducted by the ICC against Bashir and his associates. By addressing the culture of impunity in this country, these individuals may be indirectly brought to justice by the ICC. Furthermore, the establishment of evidentiary mechanisms has the potential to recognise the suffering of victims when holding individuals to account was not possible.

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## Bibliography

Amnesty International. 2017, April 17. Why former Sudan president Omar al-Bashir must not escape justice. Amnesty International. Retrieved from: <https://www.amnesty.org/en/latest/press-release/2019/04/why-former-sudan-president-omar-al-bashir-must-not-escape-justice/#:~:text=The%20charges%20against%20al%20Bashir&text=These%20groups%20were%20perceived%20to,counts%20of%20genocide%20in%20Darfur..>

Clooney, A. 2021, May 12. UN Web TV. Retrieved from: <https://media.un.org/en/asset/k1t/k1tu76ghjd>.

Elliott, I. 2017. A meaningful step towards accountability?: A view from the Field on the United Nations International, Impartial and Independent Mechanism for Syria. *Journal of International Criminal Justice*, 15(2), 239-256.

Global Centre for the Responsibility to Protect. 2023, April 26. Sudan: Urgently convene a special session and establish an investigative mechanism, available at: <https://www.globalr2p.org/publications/sudan-urgently-convene-a-special-session-and-establish-an-investigative-mechanism/>.

Human Rights Watch. 2023, September 1. Sudan: Joint Letter Calling for Independent UN Mechanism To Advance Accountability For International Crimes. HRW. Retrieved from: <https://www.hrw.org/news/2023/09/01/sudan-joint-letter-calling-independent-un-mechanism-advance-accountability>.

International Criminal Court. 2023a. The States Parties to the Rome Statute. ICC. Retrieved from: [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx).

International Criminal Court. 2023b. Al Bashir Case. ICC. Retrieved from: <https://www.icc-cpi.int/darfur/albashir>.

Lloyd, C. 2023, October 11. New International Mechanism Will at Last Investigate Human Rights Violations in Sudan. Retrieved from: <https://redress.org/news/new-international-mechanism-will-at-last-investigate-human-rights-violations-in-sudan/>.

Pollock, J and Symon, D. 2023, September 29. How Sudan's forgotten war is being fought. Chatham House. Retrieved from: <https://www.chathamhouse.org/publications/the-world-today/2023-10/how-sudans-forgotten-war-being-fought>.

United Nations General Assembly. 2016, December 19. UN Doc A/71/L.48

United Nations General Assembly. 2018, October 3. Res 39/2 UN Doc A/HRC/RES/39/2.