



PEACE NEGOTIATIONS
POST-CONFLICT CONSTITUTIONS
WAR CRIMES PROSECUTION

CONDITIONS AND LIMITATIONS ON THE USE OF FORCE BY SECURITY SECTOR AGENCIES IN SUDAN

Legal Memorandum

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Executive Summary

The purpose of this memorandum is to analyze the conditions for and the limitations on the use of force by Sudanese security sector agencies, including the armed forces, in Sudan. A crucial aspect of peace negotiations to end the conflict in Sudan will be clarity on this issue and, in particular, the internal use of force by Sudanese security sector agencies against other agencies or against the public.

How the current war principally between the Rapid Support Forces (RSF) and the Sudanese Armed Forces (SAF) will come to an end is difficult to predict. When peace negotiations occur, there is a significant likelihood that the security sector reform (SSR) measures in new draft documents for negotiations will differ in important ways from those found in the five Key Documents that were created during Sudan's 2022-2023 peace and political processes before the outbreak of armed conflict in April 2023. However, in formulating their new positions, the negotiating parties may find it useful to refer back to the 2019-23 Key Documents, to re-acquaint themselves with those documents' provisions relating to SSR. This memorandum considers what the 2019-23 Key Documents as well as international best practices provide on the conditions for and limitations on the use of force, including constitutive limitations regarding the functions of the security sector agencies, limitations on the authorization of the use of force, and civilian oversight and direction.

Constitutive Limitations: Functions of Security Sector Agencies

The first and crucial limitation on the use of force is to establish the State's monopoly on the legitimate use of force. Within the State, it is essential to define and delineate the functions of the State's security sector agencies. In general, the armed forces protect against external threats; the police focus on internal law enforcement and maintaining order, internally; and the intelligence agencies gather information and assess threats.

The 2019-23 Key Documents provide for the definitions and delineation of the functions of the State's security sector agencies, but there are ambiguities and potential overlaps that may be misused. In particular, it is essential to carefully define and clarify the function of the armed forces and to avoid an overlap in function between the armed forces and the police.

Authorization of the Use of Force

The core condition for the use of force by the armed forces is civilian authorization in all instances. External use of force by the armed forces ought to

be conditioned on a declaration of war. Internal use of force by the armed forces ought to be strictly constrained to narrowly-defined circumstances, such as states of emergency.

The 2019-23 Key Documents broadly implement these principles, but the state of emergency mechanism in particular is too broad and too vulnerable to misuse. It would be important to further limit it.

Civilian Oversight and Direction

Another core limitation on the use of force by the security sector agencies is the establishment of civilian oversight and direction. While the command structures of military and other institutions require civilian oversight, it is also important to avoid partisan misuse in this context. There is therefore a need both for clear chains of command and for multiple layers of civilian authority.

The 2019-23 Key Documents are not consistent, either internally or compared to each other, in their descriptions of the command structure for the SAF and other security institutions, creating significant potential confusion. It would be important first to clarify the lines of commands and functions of the civilian oversight institutions before adding civilian lines of authority to minimize the risk of partisan misuse.

International Best Practices and Policy Options

While security sector reform is context-specific, Sudanese stakeholders may refer to international best practices to inform policy options. Clearly defining and delineating the functions of the security sector agencies and avoiding any overlap in functions, providing for a requirement of civilian authorization before any use of force by the armed forces and narrowly limiting the state of emergency mechanism, and building effective civilian oversight mechanisms for security sector agencies are key strategies for successful security sector reform.

Sudanese stakeholders can anticipate additional challenges if they attempt to implement best practices to limit or condition the use of force by security sector agencies. These include the following: ensuring disarmament, demobilization, and reintegration of armed struggle movements as well as the RSF; limiting the role of the armed forces in internal affairs while maintaining peace and security; asserting strong civilian control and oversight over the armed forces, while at the same time avoiding partisan misuse; and securing Sudan's constitutional and legal framework.

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CONDITIONS AND LIMITATIONS ON THE USE OF FORCE BY SECURITY SECTOR AGENCIES IN SUDAN

Statement of Purpose

The purpose of this memorandum is to analyze the conditions for and the limitations on the use of force by Sudanese security sector agencies, including the armed forces, in Sudan.

Introduction

The ongoing violent conflict between the Sudanese Armed Forces (SAF) and the Rapid Support Forces (RSF) underscores the need for a security sector reform (SSR) process in Sudan. A crucial aspect of SSR in transitioning states is clarity as to the conditions for and the limitations on the use of force—and in particular the internal use of force—by security sector agencies, whether against other agencies or against the public.

This memorandum addresses this topic, considering both what the five Key Documents from Sudan's 2019-2023 political processes provide and what best practices suggest. These five Key Documents are: the 2019 Interim Constitution,¹ the Juba Peace Agreement,² the 2022 Draft Transitional Constitution,³ the 2022 Framework Agreement,⁴ and the 2023 Draft Final Political Agreement.⁵

How the current war principally between the RSF and the SAF will come to an end is difficult to predict. When peace negotiations occur, there is a significant

¹ The 2019 Interim Constitution was the constitutional charter for the 2019 transitional period, as signed by the Transitional Military Council and the Forces for Freedom and Change.

² The Juba Agreement for Peace in Sudan was signed by Sudan's Transitional Government and representatives from armed struggle movements and other opposition groups in October 2020.

³ The Draft Transitional Constitution was produced under the auspices of the Sudanese Bar Association in September 2022.

⁴ The Phase I Framework Agreement was entered into in December 2022 between the 2021 military coup's de facto authorities and certain civilian actors — principally the Forces of Freedom and Change (Central Council).

⁵ The Draft Final Political Agreement was drafted in early 2023 by a committee consisting of representatives of the civilian signatories to the 2022 Framework Agreement which did not include resistance committees and representatives of the military establishment including SAF and the RSF, to, upon its signing, supersede the Framework Agreement. It was finalized in March 2023, but its planned signing in April 2023 failed to materialize upon the outbreak of violence in Sudan.

likelihood that the SSR arrangements in new draft documents for negotiations will differ in important ways from those found in the 2019-23 Key Documents. However, in formulating their new positions, it may be very useful for the negotiating parties to refer back to the Key Documents to re-acquaint themselves with those documents' provisions relating to SSR. The Key Documents, as well as international best practices, are important background for determining the appropriate conditions for and limitations on the use of force by security sector agencies during a post-conflict transition in Sudan.

The memorandum begins by addressing constitutive limitations on the use of force, through the definition of the functions of the State's "regular bodies."⁶ The memorandum then analyzes the question of authorization of the use of force, both externally (outside of Sudan) and internally (inside Sudan). Next, it considers limitations on the use of force through civilian oversight and direction. Lastly, the memorandum describes international best practices and offers policy options to limit or place conditions on the use of force, and addresses potential challenges in implementing those policy options for a post-conflict transition and in the longer term.

Constitutive Limitations: Functions of Security Agencies

Constitutive limitations on the use of force in democratic States reflect two core principles: (i) the State has a monopoly on the legitimate use of force, and (ii) the functions of the State institutions that may use force are precisely and narrowly defined.

Ensuring a Monopoly on the Legitimate Use of Force

A defining characteristic of the modern democratic State is that it holds a monopoly on the legitimate use of force. In other words, private citizens cannot take the law into their own hands, and the first limitation on the use of force in a democracy is that, as a general matter and subject to narrow exceptions, only defined State agencies are entitled to lawfully and legitimately use force.

For States emerging from conflict, there are often numerous non-State actors that exercised force—whether against the State, other armed forces, or against civilians—while conflict was ongoing. The integration of those actors into the State is therefore required to ensure the State's monopoly on the legitimate use of

⁶ *Framework Agreement* ch. 3 para. 3 (Sudan, 2022).

force.⁷ At a high level of generality, integration will result in a single professional army,⁸ and, as a corollary, a prohibition on the establishment or continuation of non-State-sanctioned militias.⁹

In Sudan, this integration process will be complex, not least because of the number of non-State militias currently operating in Sudan. These include State-sanctioned militias, also known as armed struggle movements, such as: the Sudan Liberation Movement / Army, the Justice and Equality Movement, the Sudan Liberation Forces Alliance, the Sudan Liberation Movement (Transitional Council), and the Sudanese Alliance, which are presently party to the Darfur Agreement in the Juba Peace Agreement.¹⁰ The estimated size of the armed struggle movements varies but numbers at least several thousands of fighters. Non-State militia in Sudan also include less formally organized non-State armed groups, which may proliferate during the current conflict.

An additional key difficulty in the Sudanese context is the integration of the RSF.¹¹ The RSF had partnered with the Sudanese Armed Forces during the October 2021 military coup, but that partnership proved to be short-lived. The 2019-23 Key Documents all contemplate the integration of the RSF into the SAF.¹²

Defining the Functions of the “Regular Bodies”

A further important limitation on the State’s use of force is a clear definition and separation between the roles of (i) a (single) military—protecting against external threats; (ii) the police—maintaining internal law and order; and (iii)

⁷ Geneva Centre for Security Sector Governance, *Building the Foundations and Start of Transition Processes in the Security Sector* (2022), p. 12-16, available at https://www.dcaf.ch/sites/default/files/imce/SSAD/SSR_LessonsLearnedPolicyPaper_EN.pdf.

⁸ As identified in, e.g., *Framework Agreement* ch.1 para. 10 (Sudan, 2022); *Draft Transitional Constitution* art. 69(6) (Sudan, 2022); *Juba Peace Agreement* title 2, ch. 8, art. 26 (Sudan, 2020); *Juba Peace Agreement* title 3, ch. 4, art. 66 (Sudan, 2020).

⁹ See, e.g., *Framework Agreement* ch. 4 para. 5 (Sudan, 2022).

¹⁰ See *Juba Peace Agreement* title 2, ch. 8, art. 8 (Sudan, 2020).

¹¹ *Who are Sudan’s RSF and their commander Hemeti?*, ALJAZEERA (Jun.6, 2019), available at <https://www.aljazeera.com/news/2019/6/6/who-are-sudans-rsf-and-their-commander-hemeti>.

¹² See, *2019 Interim Constitution* art. 35 (Sudan, 2019); *Juba Peace Agreement* title 2, ch. 8, art. 9.12 (Sudan, 2020); *Framework Agreement* sec. 4 (Sudan, 2022); *2023 Draft Political Agreement* sec. 4, The Armed Forces (Sudan, 2023). Note that the only reference to the Rapid Support Forces in the Draft Transitional Constitution is at art. 69(7)(c), which notes that the Rapid Support Forces shall be integrated into the Armed Forces.

intelligence agencies—gathering information of State interest and assessing internal and external security threats.¹³

The 2019-23 Key Documents seek to define and separate the functions of the various State agencies that form the Sudanese security sector—referred to as the “Regular Bodies”:

- The SAF¹⁴ are tasked with protecting Sudan’s homeland, unity, sovereignty, security, territorial integrity, and borders. This is a very broadly worded function, potentially including both external and internal use of force. Notably, Article 69(5) of the Draft Transitional Constitution provides that the Armed Forces are not to “be used against the Sudanese people and their revolution.” The RSF¹⁵ are said to be “affiliated” with the SAF and shall be integrated.
- The Police Forces¹⁶ work on law enforcement. This is a narrowly-defined function, unless certain political crimes or crimes against the State are defined so broadly that the scope of “law enforcement” is significantly expanded.
- The General Intelligence Service¹⁷ is competent with national security and its functions shall be limited to information gathering and analysis. This again is a narrowly-defined function.

¹³ Sumit Bisarya and Sujit Choudhry, *Security Sector Reform in Constitutional Transitions*, INTERNATIONAL IDEA (Oct. 5, 2020), p.19, available at <https://www.idea.int/publications/catalogue/security-sector-reform-constitutional-transitions>.

¹⁴ *2019 Interim Constitution* art. 35 (Sudan, 2019); *Juba Peace Agreement* title 2, ch. 8, art. 9.12 (Sudan, 2020); *the Draft Transitional Constitution* art. 69 (Sudan, 2022); *Framework Agreement* sec. 4 (Sudan, 2022); *2023 Draft Political Agreement* ch. 4, Transitional Council of Ministers, Armed Forces (Sudan, 2023).

¹⁵ *2019 Interim Constitution* art. 35 (Sudan, 2019); *Juba Peace Agreement* title 2, ch. 8, art. 9.12 (Sudan, 2020); *Framework Agreement* sec. 4 (Sudan, 2022); *2023 Draft Political Agreement* ch. 4, Transitional Council of Ministers, Rapid Support Forces (Sudan, 2023). Note that the only reference to the Rapid Support Forces in the Draft Transitional Constitution is at art. 69(7)(c), which notes that the Rapid Support Forces shall be integrated into the Armed Forces.

¹⁶ *2019 Interim Constitution* art. 36 (Sudan, 2019); *Juba Peace Agreement* title 2, ch. 8, art. 27.13 and title 3, ch. 4, art. 89 (Sudan 2020); *Draft Transitional Constitution* art. 70 (Sudan, 2022); *Framework Agreement*, sec. 4 (Sudan, 2022); *2023 Draft Political Agreement* ch. 4, Transitional Council of Ministers, Police Force (Sudan, 2023).

¹⁷ *2019 Interim Constitution* art. 37 (Sudan, 2019); *Draft Transitional Constitution* art. 71 (Sudan, 2022); *Framework Agreement* sec. 4 (Sudan, 2022); *2023 Draft Political Agreement* ch. 4, Transitional Council of Ministers, General Intelligence Service (Sudan, 2023).

Although there are minor inconsistencies among the 2019-23 Key Documents as to how the functions of these “Regular Bodies” are defined, the definitions are largely consistent.

There are, however, potentially significant ambiguities in these definitions. In particular, the definition of the function of the SAF does not explicitly distinguish between external and internal use of force. And, there is potential overlap between the function of the SAF and the function of the police, blurring the boundary between law enforcement and armed conflict.¹⁸ As noted above, a broad definition of certain political crimes or crimes against the State could significantly expand the function of the police.

Authorization of the Use of Force

A core condition on the use of force by the military is that civilian authorization is required for any significant use of force. In this respect, a fundamental distinction is needed between (i) the use of external force, on the basis of a declaration of war and (ii) the use of internal force, only in narrowly-defined circumstances such as a state of emergency.

The 2019-23 Key Documents generally provide for these two mechanisms.

The Draft Transitional Constitution has a clear set of requirements for declaring war. The Sovereignty Council may issue a declaration once duly recommended by the Council of Ministers, provided that it secures a two-thirds approval by the Legislative Council.¹⁹ The critical trigger is a determination that Sudan is under “foreign aggression.”²⁰

With regard to the state of emergency, both the Draft Transitional Constitution and the 2019 Interim Constitution provide for the Sovereignty Council

¹⁸ For instance, under the Framework Agreement, the Armed Forces are charged with “protecting the homeland, its unity and sovereignty,” and “maintaining its security, territorial integrity, and borders.” The Police Forces are similarly responsible for “maintaining security, and safety of the community.” See *Framework Agreement* sec. 4 (Sudan, 2022). The Draft Transitional Constitution further provides that the Police Forces “have jurisdiction to protect and serve citizens and their freedom” and to “maintain security and safety of society”, see *Draft Transitional Constitution* art. 70(1) (Sudan, 2022).

¹⁹ *Draft Transitional Constitution* arts. 45(7) and 75 (Sudan, 2022). The 2019 Interim Constitution similarly provides that the Sovereignty Council can declare war, based on a recommendation by the Security and Defense Council, provided it is ratified by the Transitional Legislative Council. However, it does not currently establish that the declaration is subject to a ‘foreign aggression’ trigger. See *2019 Interim Constitution* art. 12(1)(j) (Sudan, 2019).

²⁰ *Draft Transitional Constitution* art. 75 (Sudan, 2022).

to declare a state of emergency, which the Draft Transitional Constitution specifies may be in response to “aggression” threatening Sudan’s unity (or any part thereof).²¹

Such provisions are important. In extreme and grave situations, the army may be deployed against internal threats. There is, however, the potential for misuse. An actor could use such a mechanism to abrogate normal constitutional arrangements and prolong a state of emergency beyond true necessity.

Critically in this regard, neither the Draft Transitional Constitution nor the 2019 Interim Constitution provides for time limits or any other mechanism by which a declaration of a state of emergency will automatically expire. This means that a declaration (and any other “laws, orders and measures issued thereunder”) remain in force unless specifically revoked.²²

The 2023 Draft Final Political Agreement, comprised of four primary sections and five draft protocols, provides in Draft Protocol No. 5 on “Principles and Foundations of Military and Security Sector Reform” that “[d]eclaring war and a state of emergency is within the jurisdiction of the Council of Ministers, and the Security and Defense Council’s mission is limited to the recommendation to the Council of Ministers.”²³ However, again, the document does not shed any further light on the expiration of a state of emergency.

It is also unclear whether the two use of force authorization processes in the 2019-23 Key Documents (declaration of war and state of emergency) form an exhaustive list or whether the military may use force in other circumstances that are not specifically enumerated in those Key Documents.

Civilian Oversight and Direction

Another important limitation on the use of force is the establishment of clear lines of civilian direction and oversight over the military.

The 2019-23 Key Documents are inconsistent in their descriptions of the command structure both for the SAF and for other security institutions forming

²¹ *Draft Transitional Constitution* art. 74 (Sudan, 2022); *2019 Interim Constitution* art. 12(1)(k) (Sudan, 2019).

²² This is accomplished by a two-thirds vote of the Legislative Council. See *Draft Transitional Constitution* art. 74(3) (Sudan, 2022).

²³ *2023 Draft Final Political Agreement*, Draft Protocol No. 5, para. 31 (Sudan, 2023).

part of the Regular Bodies.²⁴ There are not only inconsistencies across the documents, but within individual documents themselves.

The 2019 Interim Constitution provides that the SAF and the RSF “are subordinated to the General Commander” and are “subject to the sovereign authority.”²⁵ The document also provides that the police forces are “subject to the policies and decisions of the executive authority,”²⁶ and the General Intelligence Service is “subject to the sovereign and executive authorities.”²⁷ The distinctions between sovereign and executive authorities, however, are unclear.

In the same document, the Sovereignty Council is described as “the head of state, the symbol of its sovereignty and unity, and the Supreme Commander of the Armed Forces, the Rapid Support Forces, and other uniformed forces.”²⁸ As mentioned above, the Sovereignty Council is also given the authority to declare war, based on a recommendation of the Security and Defense Council, and to declare a state of emergency, at the request of the Cabinet.²⁹

The 2022 Draft Constitution is similar to the 2019 Interim Constitution in that it addresses the Sovereignty Council as the “head of state, the symbol of its sovereignty and unity, and the Supreme Commander of the Armed Forces,”³⁰ and provides it with the authority to declare war and declare a state of emergency.³¹

This, however, is undermined elsewhere in the 2022 Draft Constitution. Article 69 subordinates the Armed Forces to “the Commander-in-Chief,”³² a term that appears nowhere else in the document and that seems to conflict with the “Supreme Commander” authority of the Sovereignty Council.

Meanwhile, the 2022 Draft Constitution contemplates a significant role for the Prime Minister, who will “[o]versee security and defense affairs,” “[c]hair the Security and Defense Council,” and “[o]versee the General Intelligence and the

²⁴ See, e.g., *Framework Agreement* sec. 4 (Sudan, 2022).

²⁵ *2019 Interim Constitution* art. 35(1) (Sudan, 2019).

²⁶ *2019 Interim Constitution* art. 36(1) (Sudan, 2019).

²⁷ *2019 Interim Constitution* art. 37 (Sudan, 2019).

²⁸ *2019 Interim Constitution* art. 11(1) (Sudan, 2019).

²⁹ *2019 Interim Constitution* arts. 12(1)(j) and 12(1)(k) (Sudan, 2019).

³⁰ *Draft Transitional Constitution* art. 44(1) (Sudan, 2022).

³¹ *Draft Transitional Constitution* arts. 45(6) and 45(7) (Sudan, 2022).

³² *Draft Transitional Constitution* art. 69(2) (Sudan, 2022).

Police.”³³ This is true, too, for the Council of Ministers, which “may resort to involve the Armed Forces in non-military tasks,”³⁴ and which governs the police forces through its “policies and decisions.”³⁵

The 2022 Framework Agreement introduces yet additional command terms, with reference to a “sovereign level” that shall “represent the head of the state, a symbol of sovereignty and the High Commander of the regular bodies.”³⁶ The sovereign level is also responsible for selecting a Transitional Prime Minister.³⁷

The 2022 Framework Agreement contains language similar to that in the 2022 Draft Constitution regarding the ability of the Council of Ministers to engage the military³⁸ and to direct the police forces.³⁹ With respect to the military, however, the 2022 Framework Agreement contemplates the “Command of the Armed Forces”⁴⁰ separately from the “High Commander of the Rapid Support Forces,” which is also the “Head of State.”⁴¹ Meanwhile, the “Prime Minister” is charged with overseeing the General Intelligence Service.⁴²

The 2023 Draft Final Political Agreement, intended to supersede the 2022 Framework Agreement upon its signing, maintains several of the complications in the 2022 Framework Agreement. For instance, in Chapter Three, the “Head of State” and the “Sovereignty Council” are referred to as the same entity, as are the “Head of State” and a singular “Member of the Transitional Sovereignty Council.”⁴³ Chapter Four further specifies that the “head of state is the supreme commander of the armed forces.”⁴⁴

³³ *Draft Transitional Constitution* arts. 49(5)-49(7) (Sudan, 2022).

³⁴ *Draft Transitional Constitution* art. 69(4) (Sudan, 2022).

³⁵ *Draft Transitional Constitution* art. 70(1) (Sudan, 2022).

³⁶ *Framework Agreement* sec. 3 para. 3 (Sudan, 2022).

³⁷ *Framework Agreement* sec. 3 para. 4 (Sudan, 2022).

³⁸ *Framework Agreement* sec. 4, Armed Forces para. 3 (Sudan, 2022).

³⁹ *Framework Agreement* sec. 4, Police Forces para. 31 (Sudan, 2022).

⁴⁰ *Framework Agreement* sec. 4, Armed Forces para. 7 (Sudan, 2022).

⁴¹ *Framework Agreement* sec. 4, Rapid Support Forces para. 1 (Sudan, 2022).

⁴² *Framework Agreement* sec. 4, General Intelligence Service para. 3 (Sudan, 2022).

⁴³ *2023 Draft Final Political Agreement* ch. 3, The Transitional Sovereign Authority (Sudan, 2023).

⁴⁴ *2023 Draft Final Political Agreement* ch. 4, Transitional Council of Ministers, The Armed Forces para. 2 (Sudan, 2023).

Meanwhile, Draft Protocol No. 5 lists separately as part of the makeup of the Security and Defense Council the “Prime Minister,” the “Commander-in-Chief of the Sudanese Armed Forces,” and the “Commander of the Rapid Support Forces.”⁴⁵ Draft Protocol No. 5 further specifies distinct “Commanders” of the Police Force and the General Intelligence Service, which are not referenced elsewhere and appear to overlap in function with “Director General[s]” of the respective forces, as referenced in a preceding section.⁴⁶

Draft Protocol No. 5 further provides that an “independent commission” shall undertake reintegration efforts of the RSF into the SAF, and sets out the goal of integrating back into civil life any RSF forces “whose services have been dispensed with.”⁴⁷

Overall, while the 2019-23 Key Documents do provide for civilian oversight and direction of the SAF and other security institutions, the actual command structure is not coherent within the respective documents, much less consistent across them. Of key concern is the interchangeability of distinct terms within and between the documents, creating significant ambiguities.

International Best Practices and Options for Policies

SSR is context-specific and each situation is unique. However, established practices from States that have been through similar processes can help guide Sudan’s reform. This Part describes best practices and provides policy options.

Constitutive Limitations: Functions of Security Sector Agencies

Separating the functions of security sector agencies “is a determinant of successful reform.”⁴⁸ Security sector agencies can be structured in a way that draws independent lines between the armed forces, the police, and the intelligence services. In democracies, except in rare, narrowly-defined circumstances, the role of the armed forces is limited to protecting the State against foreign and external threats. The police maintain law and order with regard to internal threats, whereas

⁴⁵ 2023 Draft Final Political Agreement, Draft Protocol No. 5 (Sudan, 2023).

⁴⁶ 2023 Draft Final Political Agreement, sec. 4, Security and Defense Council; 2023 Draft Political Agreement, Draft Protocol No. 5 (Sudan, 2023).

⁴⁷ 2023 Draft Final Political Agreement, Draft Protocol No. 5 para. 8 (Sudan, 2023).

⁴⁸ Zoltan Barany et al., *Introduction: Leverage, Sequencing, Design, and Separation—Considerations in Security Sector Reform during Constitutional Transition*, in SECURITY SECTOR REFORM IN CONSTITUTIONAL TRANSITION 1, 11 (Zoltan Barany et al., eds., 2019).

the intelligence services gather and assess information on internal and external threats.⁴⁹

The separation of the function of each security institution requires explicit delineation in both the constitution and in legislation.⁵⁰ A strong legal framework explicitly defining the function of each security sector agency helps to remove the security services from politics and to ensure that the security forces cannot be misused by political actors to protect partisan interests.

Failing to explicitly define and delineate the functions of the security sector agencies could hamper a democratic transition.⁵¹ That said, broad definitions of the agencies' functions could also cause issues: it may lead to confusion regarding the proper purview of each institution and, more importantly, may lead to competition between institutions over their respective powers.⁵²

The 2019-23 Key Documents do define the functions of the State security sector agencies and delineate them. In this regard, those Key Documents are largely in line with international best practices: in Sudan, the military protects

⁴⁹ Zoltan Barany et al., *Introduction: Leverage, Sequencing, Design, and Separation—Considerations in Security Sector Reform during Constitutional Transition*, in SECURITY SECTOR REFORM IN CONSTITUTIONAL TRANSITION 1, 10 (Zoltan Barany et al., eds., 2019); Gonzalo Garcia Pino, *The Slow Change in Chile: Long-term Security Sector Reform Alongside Constitutional Transition*, in SECURITY SECTOR REFORM IN CONSTITUTIONAL TRANSITION 39, 63 (Zoltan Barany et al. eds., 2019); Sumit Bisarya and Sujit Choudhry, *Security Sector Reform in Constitutional Transitions*, INTERNATIONAL IDEA, 8 (Oct. 5, 2020), available at <https://www.idea.int/publications/catalogue/security-sector-reform-constitutional-transitions>.

⁵⁰ Gonzalo Garcia Pino, *The Slow Change in Chile: Long-term Security Sector Reform Alongside Constitutional Transition*, in SECURITY SECTOR REFORM IN CONSTITUTIONAL TRANSITION 39, 64 (Zoltan Barany et al. eds., 2019) (“Establishing effective civilian control over the security sector involves a clear articulation of the mission and mandate of each branch of the security sector. Without such a clear statement of mission and mandate, or where as in Chile’s case a broad mandate is shared between all the branches of the security sector, it will likely prove difficult for a civilian government to exercise effective control or oversight over the activities of the security sector.”).

⁵¹ Zoltan Barany et al., *Introduction: Leverage, Sequencing, Design, and Separation—Considerations in Security Sector Reform during Constitutional Transition*, in SECURITY SECTOR REFORM IN CONSTITUTIONAL TRANSITION 1, 12 (Zoltan Barany et al. eds., 2019) (for instance, “in Indonesia, there is no legal instrument restricting the military to an external role. Accordingly, the military is frequently called upon to respond to internal instability, opening the door to suppression of legitimate political or civil society activity.”)

⁵² Zoltan Barany et al., *Introduction: Leverage, Sequencing, Design, and Separation—Considerations in Security Sector Reform during Constitutional Transition*, in SECURITY SECTOR REFORM IN CONSTITUTIONAL TRANSITION 1, 11-12 (Zoltan Barany et al. eds., 2019) (In Kenya, “the constitutional separation of the powers and functions of the security services has been significantly undermined by the proliferation of specialized police forces. The constitutional reform process was unsuccessful in fully merging” the preexisting police forces, “allowing competition and tension to grow between two services responsible for essentially similar functions.”).

against external threats; the police investigate and prevent crimes; and the intelligence services assess threats to State security.

However, as noted above, there are significant ambiguities. In particular, there is a lack of clear distinction between external and internal use of force by the SAF, and potential overlap in functions between the police and the SAF.

When Sudan begins to transition to democracy, it is important for Sudanese leaders to address the ambiguities that currently exist in the transitional documents regarding the roles and functions of the security sector agencies. One way to do this is to ensure that the legal framework explicitly and adequately delineates the role of each security institution through “a clear constitutional or statutory statement of the powers, functions, and mission of each of the security services.”⁵³ For instance, in Argentina, the first SSR legislation passed after the return to democracy established clear distinctions between defense of the State (from external threats) and internal security, and expressly prohibited the military from acting in internal security affairs.⁵⁴ The Internal Security Law, passed four years later, cemented this separation of roles.⁵⁵ Similar constitutional and legislative delineation would empower Sudan’s regular bodies to fulfill their respective mandates, and their mandates only.

Authorization of the Use of Force

As a general matter, a core best practice on the use of force is that there be no significant use of force without civilian authorization. Along with explicitly defined roles for the security sector agencies, democratic constitutions generally place decision-making power over the armed forces in a civilian authority. In normal circumstances, external deployment of force needs to be specifically authorized by the executive and/or the legislature.

Modern democratic constitutions also include emergency provisions that provide for a temporary departure from normal constitutional provisions, such as emergency internal deployment of armed forces. This internal deployment is limited to exceptional circumstances of grave internal threats, where the executive and/or legislature has declared a state of emergency in order to meet that threat or

⁵³ Gonzalo Garcia Pino, *The Slow Change in Chile: Long-term Security Sector Reform Alongside Constitutional Transition*, in *SECURITY SECTOR REFORM IN CONSTITUTIONAL TRANSITION* 39, 64 (Zoltan Barany et al. eds., 2019).

⁵⁴ See *National Defense Law* no. 23,554 (Argentina, 1988).

⁵⁵ See *Domestic Security Law* no. 24,059 (Argentina, 1992).

circumstance. The roles of the security forces may also be blurred when facing circumstances where internal actors threaten the nation, such as cases of terrorism or armed rebellion.

Constitutional and statutory frameworks regulating such exceptional use of force require cautious drafting. Sudan's core transitional instruments are not inconsistent with this framework, although they leave significant room for interpretation and debate.

It is important for Sudan to ensure that such state of emergency mechanisms be strictly and narrowly defined, with important procedural protections. Potential protections to consider include: specifying the limited grounds for which emergencies may be declared; providing a substantive role for the legislature in approving, extending, and exercising oversight of a state of emergency; setting forth a set of rights that may not be derogated from even in cases of emergency;⁵⁶ clear statutory terms of engagement for the armed forces when acting internally during states of emergencies;⁵⁷ and statutory provisions dictating the mechanisms by which the state of emergency expires after a certain amount of time has passed, unless specifically extended by the executive or the legislature.⁵⁸

Civilian Oversight and Direction

In democratic societies, civilian oversight over the security sector means that civilian institutions have authority over decisions concerning the State's security sector agencies. This is a key function in establishing an independent and accountable security sector.

However, civilian democratic oversight of the security sector exposes an inherent tension between the need for subordination of the armed forces to civilian control, and the need to protect the armed forces from partisan misuse and manipulation by civilian forces. There ought to be a clear chain of command that ends with civilian leaders. There also ought to be multiple lines or layers of

⁵⁶ Sumit Bisarya and Sujit Choudhry, *Security Sector Reform in Constitutional Transitions*, INTERNATIONAL IDEA, 20 (Oct. 5, 2020), available at <https://www.idea.int/publications/catalogue/security-sector-reform-constitutional-transitions>.

⁵⁷ Sumit Bisarya and Sujit Choudhry, *Security Sector Reform in Constitutional Transitions*, INTERNATIONAL IDEA, 20 (Oct. 5, 2020), available at <https://www.idea.int/publications/catalogue/security-sector-reform-constitutional-transitions>.

⁵⁸ Elliot Bulmer, *Emergency Powers: International IDEA Constitution-Building Primer 18*, INTERNATIONAL IDEA, 18-19, (May. 30, 2018), available at <https://www.idea.int/publications/catalogue/emergency-powers>.

civilian authority—e.g., professional experts between the armed forces and the political leaders, potentially retired military leaders—who can allay the risk of partisan manipulation.

There are several ways of establishing such oversight.

One approach is by creating separate civilian ministries to be in charge of the non-operational administration of security sector agencies to protect the security services from undue partisan misuse.⁵⁹ This places a civilian in the decision-making seat of each agency and makes the agency ultimately accountable to a civilian. It also serves as a barrier between the security sector and the head of government.

The legislature can also play a role in civilian oversight of the security sector. Legislative committees exercise this function by “debating security-related legislation, exercising oversight in the form of oral hearings and receiving reports, playing a role in decisions to deploy armed forces, and exerting control over the budget and expenditure of security sector agencies.”⁶⁰ Security sector agencies can be required to provide reports to the legislature on a regular basis.⁶¹

Civilian oversight can also be realized through the establishment of independent oversight agencies.⁶²

In Sudan, the command structure and ultimate authorities of the respective security institutions remain unclear under the 2019-23 Key Documents. Along with greater precision and delineation of the command structures, a key concern moving forward is defining the powers of the various governmental entities charged with oversight of the security institutions, and including layers of civilian authority to alleviate the risk of partisan manipulation.

⁵⁹ Sumit Bisarya and Sujit Choudhry, *Security Sector Reform in Constitutional Transitions*, INTERNATIONAL IDEA, 17 (Oct. 5, 2020), available at <https://www.idea.int/publications/catalogue/security-sector-reform-constitutional-transitions>.

⁶⁰ Sumit Bisarya and Sujit Choudhry, *Security Sector Reform in Constitutional Transitions*, INTERNATIONAL IDEA, 17 (Oct. 5, 2020), available at <https://www.idea.int/publications/catalogue/security-sector-reform-constitutional-transitions>.

⁶¹ See e.g., *the Constitution of South Africa* sec. 207(5) (South Africa, 1996) (requiring police commissioners to provide an annual report to the legislature).

⁶² See e.g., *the Constitution of Kenya*, sec. 246 (Kenya, 2010) (creating an independent oversight body for the police); *Constitution of South Africa*, section 210(b) (establishing an independent civilian inspector to monitor the intelligence services).

To ensure its effectiveness, civilian oversight can be built into the institutional structure of the security services themselves, and in the legal framework.⁶³ For instance, the South African constitution designates separate members of the cabinet responsible for both the armed forces and the police, as well as distinct civilian secretariats for both agencies.⁶⁴ Other mechanisms to consider include the definition of strong oversight powers for the legislature, and the creation of independent oversight entities.

Transition Challenges

Best practices and policy options aim at long-term goals for Sudan. Another related question is what other challenges may stand in the way of getting from a situation like the one in Sudan—with its tragic violence—to the ultimate desired goals.

Ending the current violence is only the first step in any transition process. Sudanese civilian stakeholders can anticipate the following challenges ahead when they attempt to implement best practices to limit or place conditions on the use of forces by Sudanese security institutions:

First, ensuring integration as well as disarmament, demobilization, and reintegration (“DDR”). The goal is a single professional State army. The challenge will be to integrate and/or include in any DDR mechanism the armed struggle movements, the RSF, and other armed groups that continue to proliferate.

Second, limiting the role of the armed forces in internal matters, while at the same time maintaining peace and security during the transition period. The challenge is that significant involvement of the armed forces in internal matters may be necessary in the short term to preserve peace and security.

⁶³ Sandra Elena and Julia Pomares, *Argentina’s Security Sector Reform: Democratization before Constitutional Transition*, in SECURITY SECTOR REFORM IN CONSTITUTIONAL TRANSITION 71, 75 (Zoltan Barany et al. eds., 2019) (In Argentina, although the President is commander-in-chief of the armed forces, the administrative control of the armed forces rests with the Ministry of Defense, which marks a change from the “military regime where the armed forces themselves administered their own affairs.” As an additional oversight mechanism, Argentina restrained defense and security spending, “ensuring that these budget items were subject to civilian political control and oversight,” and subjecting the military to budget cuts as driven by civilian political will. The legislature provides even further oversight through its Bicameral Committee for Internal Security Forces Oversight by “monitor[ing] security bodies so that they behave within the limits set by the legal framework.”).

⁶⁴ *Constitution of South Africa*, secs. 202(1), 204, 206(1), and 208 (South Africa, 1996).

Third, asserting strong civilian control and oversight over the armed forces, while at the same time avoiding partisan misuse. One challenge is that the need to find a civilian institution strong enough to assert control over the armed forces may lead to centralization of civilian power and to the risk of partisan misuse.

Fourth, securing Sudan's legal framework. The 2019-23 Key Documents, on which this memorandum focuses, are transitional in nature and address a reality on the ground that has since changed significantly. As Sudan undertakes its transition, it will likely be necessary to negotiate, agree on, and implement a new legal framework for post-conflict transition as well as for the long term.

SSR is a long-term process, which interacts with other complex processes such as democratization, constitutional-reform, transitional justice, and DDR. It is ideal for the core principles of SSR to be first established in the constitution, while implementation is left to subsequent legislation. The question of the precise sequencing of reforms is another major topic, highly fact-specific, and beyond the scope of this memorandum.

Conclusion

Security sector reform is of critical importance to peace negotiations as Sudan continues to suffer from the armed conflict principally between the RSF and the SAF. While the five Key Documents from 2019-23 once laid the possible foundation for a transitional government, inconsistencies and ambiguities within and across the documents, if relied upon in future negotiations, may complicate efforts to establish a cohesive and civilian-led security sector in Sudan. Clear constitutive limitations on security agencies, strong provisions on the authorization of the use of force, and effective civilian oversight mechanisms are essential to reforming the security sector in Sudan, and more generally to ensuring a successful transition process post-conflict.