

OPTIONS TO FORM A TRANSITIONAL GOVERNMENT IN WARTIME IN SUDAN



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EXECUTIVE SUMMARY

Following the outbreak of conflict in Sudan on 15 April 2023, a proposal was circulated to establish an emergency government to address the urgent and vital roles crucial to citizens and to the resumption of regular government functions. Public services in Sudan had been totally disrupted, including security, health, education and banking services. Markets were closed, local trade halted, and both import and export activities were suspended. Moreover, government institutions in the capital and across states ceased operating. Employees were displaced from their workplaces, public services were disrupted, public utilities faltered, and citizens' rights and freedoms were violated. Under those circumstances, one month after the outbreak of the war, calls emerged from civil society organizations, political activists and even government officials to form an emergency government.

In the absence of a competent executive power capable of delivering public services, politicians naturally search for the most suitable constitutional mechanisms to establish an executive power to fill the political void and temporarily assume the responsibilities of the executive power until restoring the normal constitutional situation. An analytical study conducted by the University of Khartoum's Peace Research Institute and International IDEA, on 15 civilian initiatives focusing on peacebuilding and political reform, revealed that all these initiatives advocated the establishment of a time-bound transitional government with limited competencies for the war phase. The study concluded that 13 of these initiatives explicitly recommended the consensual establishment of a transitional government, an emergency government or a civilian-led government during the crisis

(Abdul Jalil and Kameir 2023). Thus, a substantial portion of society thinks there is a power vacuum that needs to be urgently addressed.

The change in government functions and the restructuring of ministries in response to shifting priorities during wartime is common and natural given the political priorities imposed by war circumstances. Political cohesion reaches its peak when a nation is engaged in a conflict with a foreign enemy, while the opposite happens in civil wars, which take place among a country's own political and societal components. As the country's wartime goals change, one of the goals is to maintain the country's political cohesion, which is more difficult during internal conflicts. Forming a civilian-led transitional government that achieves the country's objectives and enjoys citizens' acceptance and support requires a level of legal and political discussions encompassing the war circumstances and the nature of political relations arising in wartime as well as the nature of the relationship between citizens and the ruling class at the relevant historical moment.

A critical concern when forming a transitional government during wartime is the constitutional basis of that government. Discussing such a constitutional basis aims, among other important objectives, to identify the power authorized to form the government and the bodies tasked with monitoring and holding the government accountable. This is important because establishing a transitional government amid conditions of war and political division involves entrusting a societal and political group with power, all while competing factions engage in armed conflict, towards the same goal. Thus, it is very difficult to form a government capable of achieving unity and cohesion and contributing to peacebuilding and political stability.

It is difficult, during the ongoing armed conflict in Sudan, to form a competent, independent civilian government that works to build peace and to prepare the conditions for democratic transition. Additionally, there are well-founded concerns that endeavours to establish such a government, regardless of its specific characterization or the extent of its powers, may exacerbate political divisions, which would give warring parties a pretext to prolong the conflict.

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Chapter 1

OBJECTIVES AND SCOPE

On 25 October 2021, the military leadership in Sudan launched a coup against the transitional government (Reuters 2021), which was established through a political accord between the military leadership and the Forces of Freedom and Change (FFC) in July 2019, following the ousting of President Omar Hassan al-Bashir's government in April 2019, and which had enjoyed significant domestic popularity and wide international recognition. Following the coup, government institutions were disrupted due to their internal divisions, and the military leadership, confronted with substantial civilian opposition, failed to run government institutions.

In December 2022, following more than a year of political unrest, the military leaders signed a framework agreement with a group of civilian leaders, which was a step towards restoring democratic transition, restructuring the government, and implementing reforms in the security institutions to limit the role of the army to defence and military areas, and to integrate the Rapid Support Forces (RSF) and armed factions into the national army (the 2022 Framework Agreement). The signatories agreed to the formation of a civilian-led transitional government. However, disagreement emerged between the leaders of the Sudanese Armed Forces (SAF) and the RSF regarding the programme and timeline for integrating the RSF into the national army. Additionally, differences arose in determining the leadership of military institutions during the transitional period following the signing of the Framework Agreement. The dispute between the two leaderships deteriorated, and local and international mediation efforts failed, so war broke out between them on 15 April 2023 (UNSC 2023).

The country remained entirely under the control of the army from the coup on 25 October 2021 until 15 April 2023, when the war erupted. After abolishing the key provisions of the Constitutional Charter, the country was under martial law, invoked periodically by the army commander. This situation continued even after the onset of the war. With this division in power, the government lost its ability to exercise its functions. As a result, citizens are still suffering, even in remote regions that have not yet seen the war.

In this Report, the term ‘government’ means state institutions that provide public services to citizens, including maintaining security and safety, healthcare, education, identity documents, electricity and water supply, and transportation, among others.

This Report presumes that citizens are lacking these services and enduring hardships due to the absence of effective government. In response, citizens are proposing solutions to manage public facilities and provide essential services; this Report is one such proposal.

The primary objective of this Report is to delve into constitutional alternatives that address the absence of a functional executive power during the armed conflict that erupted on 15 April. The Report seeks to provide a political and constitutional analysis, and to review options from benchmark countries to inform local and international decision makers about optimal alternatives. Additionally, the Report discusses the feasibility of implementing these alternatives in the current political and constitutional context in Sudan.

The Report examines the following options as the best models for transitional governments during times of war and political unrest:

- emergency government;
- national consensus government;
- caretaker government;
- government in exile;
- shadow cabinet; and

The country remained entirely under the control of the army from the coup on 25 October 2021 until 15 April 2023, when the war erupted.

- government formed under Chapter VII of the United Nations Charter.

This Report explores each of these options by delving into the related political and constitutional conditions to enable policymakers to find the most fitting and optimal options for the Sudanese case. To better understand the requirements of the political situation in Sudan and collect more information about the available options, the report includes analysis of constitutional texts as well as the findings of in-person and online interviews.

Proposals from civil society organizations, research centres and partisan institutions are aimed at establishing an interim government that achieves the country's transitional goals. These civilian initiatives summarized the goals of the interim government (Abdul Jalil and Kameir 2023) as follows:

- to ensure civilian representation in the ceasefire and peace negotiations independent of the SAF and RSF;
- to initiate a democratic transformation by creating a broad national alliance and consensus among various actors with a strong will and a real desire to introduce democratic governance; and
- to end the war and restore the democratic transformation under civilian leadership.

However, the initiatives fell short of presenting clear proposals regarding the legal framework to form the transitional government and get legitimacy from the local, regional and international communities. Consequently, this Report strives to analyse the legislative and political frameworks that can be used to form the transitional government.

Chapter 2

INTRODUCTION AND CONTEXT

The crisis caused by the executive power vacuum in Sudan unfolded urgently following the coup on 25 October 2021, led by an SAF commander, General Abdel Fattah al-Burhan, and an RSF commander, General Mohammed Hamdan Dagalo (also known as 'Hemedti'). The coup overthrew the transitional government and resulted in the arrest of Prime Minister Abdalla Hamdok and his government ministers. Key provisions of the transitional constitution were suspended, including articles 11, 12, 15, 16, 24/3, 71 and 72 (Decision of the Chairman of the Transitional Sovereignty Council (TSC) of 25 October 2021), and all transitional measures taken by the transitional institutions were revoked. The transitional government was established in August 2019 based on the Sudan Constitutional Declaration, agreed upon by political parties, civil society organizations, unions and the SAF. This marked the inception of the first comprehensive political alliance following the ousting of the government of al-Bashir in April 2019, spurred by a popular revolution in December 2018.

The war erupted among the ruling partners—namely, between the TSC president, who is also the SAF commander-in-chief, and his deputy, the RSF commander-in-chief. The institutional relations between the SAF and the RSF and the transitional government were intertwined during the transitional period, and before military operations had had a significant impact on the performance and effectiveness of the existing executive power (Reuters 2023).

It is worth noting that the coup leaders were unable to form a temporary government until the war erupted on 15 April 2023. Despite their accommodation attempt to return Prime Minister Hamdok to

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his position, he had to submit his resignation in the end. This is a prominent indicator of the crisis within the ruling class during the post-coup period. Loyalties and affiliations were divided among three primary groups within the ruling class alliance at that time:

- loyalists to General Abdel Fattah al-Burhan, the TSC president and SAF commander-in-chief;
- loyalists to General Hemedti, the TSC first vice president and RSF commander-in-chief; and
- members of the armed movements that were signatories to the 2020 Juba Peace Agreement (JPA), and who, according to the agreement, occupy 25 per cent of the main positions in the transitional institutions.

The above groups form the class that was ruling the country on 15 October 2023, when the war broke out. This classification is important for analysing the composition of the ruling class and assessing its cohesion both during and after the war. It is crucial to note that the war originated from within the ruling coalition, causing a profound fracture in the country. This division manifested itself across various levels, from the TSC and the security agencies to the civil service. The political and social discord expanded to entities beyond the government, including political and societal institutions, tribal leaderships and religious leaders. This made it difficult to create a political consensus on forming a transitional government during a period of war and violence. What matters here is the vertical rift in the transitional government institutions and, more precisely, the paralysis and vacuum in the executive power, which called for urgent consideration of how to fill this vacuum.

The third group (the armed movements that were signatories to the JPA) that took part in the transitional government after the coup against Hamdok government continued to take part at different government levels, including the TSC. Despite the collapse of the transitional government and the freezing of key provisions of the transitional constitution and even after the outbreak of war and the subsequent breakdown of the state, they continued to participate in various government institutions (Saeed 2021). Their persistence

in remaining within the transitional government institutions, despite the shifting political and constitutional conditions in the country, suggests that this group made political gains for its movements through the JPA. They aim to maintain these gains even after the war ends (Saeed 2022). Therefore, an important question arises here regarding the effectiveness of the JPA after the outbreak of war, and the position of those armed movements that signed the JPA in any interim government or new political arrangements.

The FFC, which had been part of the transitional government before the coup, were completely excluded from power. Throughout the period following the coup, they put political pressure on the coup leaders to restore democracy, and provided political and constitutional alternatives to achieve this.

Chapter 3

LEGAL AND POLITICAL FRAMEWORK FOR A TRANSITIONAL GOVERNMENT

Establishing a transitional government amid the ongoing war requires the consideration of several constitutional and political limitations that are blocking the country's highest authorities from forming such a government. These include the political and security circumstances arising from the ongoing war, the absence of a constitutional framework due to the suspension of specific Constitutional Charter provisions since 25 October 2021 (Saeed 2021), and the obligations and rights guaranteed under the JPA, including the power-sharing mechanisms in the transitional period. The constitutional positions in the transitional authority were 25 per cent, allocated to armed movements and political groups that were signatories to the JPA.

In this section, the Report shows the legislative and political framework that encompasses the establishment of transitional authorities in Sudan and through which we can summarize the possibilities for forming a transitional government in Sudan during wartime.

3.1. LEGAL AND CONSTITUTIONAL DETERMINANTS

In this aspect, we study the legal framework required when deciding to form a transitional government. Thus, it is important to consider several legal determinants:

- a constitution that regulates the formation of a transitional government and determines its procedures;

- the authority that is entitled to form the government;
- the objective and temporal scope of the government; and
- the authority that monitors the performance of the government.

These provisions are necessary to ensure the legitimacy of the decisions to form a transitional government that gains legitimacy through these constitutional provisions. The following analysis delves into some of the crucial transitional documents that form the legal and constitutional framework of governance.

2019 Constitutional Charter

The provisions of the 2019 Constitutional Charter pertaining to the establishment of government institutions were suspended during the coup, and there remain no effective constitutional texts that can serve as a legal framework to form any transitional government. Furthermore, there is no legislation concerning the formation of any of the government models discussed in this paper. Apart from the illegal suspension of its provisions during the coup, the Constitutional Charter itself did not include detailed provisions regarding the formation of a transitional government during times of war and political crisis.

Reviewing the constitutional history and the interpretations of constitutional jurists in Sudan does not provide constitutional law scholars with a legal framework to power sharing when the constitution is abrogated by a coup. Throughout Sudan's history, numerous governments have been overthrown by violent revolutions, military coups or other forms of unrest. A coup effectively invalidates the constitution, and a new government cannot be formed legally within the old constitutional framework because it is suspended by the coup generals who came to power through direct violation of that constitution (Stavsky 1983). Accordingly, it was expected that the Sudanese constitutions should address this political dilemma if they wanted their political system to be stable, but they did not.

Juba Peace Agreement

On 3 October 2020 the transitional government in Sudan signed the Juba Peace Agreement with representatives of several armed groups,

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also called parties to the peace process (238 signatories). The JPA is important to forming a transitional government in the current circumstances because it regulates power sharing in the transitional period and during the period of its being in force.

The JPA amended the 2019 Constitutional Charter and established an asymmetric federal state in Sudan. The Darfur region will exercise different constitutional powers from those allocated for the Blue Nile and Kordofan. It is not clear what powers the rest of the federal regions will exercise. Furthermore, the JPA remains silent about crucial issues, including the formation of the national government and structures of state governments (Al-Ali 2021).

On national issues, article 5.1 stipulates that the JPA signatories 'shall be represented on the Council of Ministers by five ministries, which equals 25 per cent of the national Council of Ministers'. Article 6.1 stipulates that the parties shall occupy 25 per cent of the seats on the Transitional Legislative Council, which equals 75 seats.

In the Blue Nile and Kordofan regions, articles 50.2 and 50.4 stipulate that women and men from the two areas shall be appointed as judges on the National Constitutional Court and on the High Public Prosecution Council in accordance with the criteria of competency and proficiency. Article 15 of the Eastern Sudan Track Agreement stipulates that the Federal Government shall endeavour to ensure that men and women of Eastern Sudan fill up to 14 per cent of all public employment posts (Saeed 2022).

It is difficult to form an independent transitional government under conditions of war without previously determining which JPA provisions are applicable.

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Theory of exceptional circumstances

This theory constitutes both an exception to and a restriction on the concept of legitimacy and its outcomes, as it considers the security and safety of the nation to be more important than the freedom of individuals (Vázquez-Irizarry 1994). In case of necessity, the executive power may take some exceptional decisions outside its jurisdiction specified in the constitution and may exercise some legislative powers that are illegal, which is considered an abuse

of power (Berkowitz 2018). While violating the general rules that govern the actions of public authorities in normal circumstances, the constitution may permit such actions in exceptional circumstances to protect the country from imminent danger and if they are necessary and proportionate to the size and type of expected damage.

Exceptional circumstances have a clear impact on implementing the constitution and on the political situation in the country (Gaddafi 2020). Thus, when the executive power takes necessary measures and decisions to confront exceptional circumstances, it exceeds its constitutional jurisdiction. Some constitutions usually authorize the executive power to exceed its jurisdiction to maintain public order and ensure the proper functioning of public facilities. According to the French Council of State, this legality applies only to war powers. However, war powers are only one aspect of the exceptional-circumstances theory, which covers all emergency and abnormal circumstances. It includes the conditions of war but is broader in scope than the theory of war powers (Jaborbi 2016). Therefore, the theory of exceptional circumstances, implemented by a state during unusual situations to ensure the functioning of public services, justifies the establishment of a transitional government to navigate the crisis until the country's political and security conditions stabilize. Implementing this theory does not relieve the government of oversight. The administration must activate various monitoring and oversight systems, including subsequent parliamentary oversight, to ensure the administration's commitment to the provisions of legality and to prevent tyranny and abuse of exceptional circumstances (Shukrawi, Al-Budairi and Sa'sa'a 2014).

The 2019 Constitutional Charter did not have a separate article for exceptional circumstances. Article 41 mentions exceptional circumstances as an aspect of states of emergency (i.e. threats to the safety and unity of the nation and citizens), where 'the Cabinet may, in consultation with the Sovereignty Council, suspend part of the Bill of Rights found in this Charter'. In fact, article 41 is weak and unregulated. It does not establish effective measures to employ the theory of emergency circumstances in a way that maintains political stability in the country, while article 211(b) of the 2005 Transitional Constitution stipulated more practical measures compared with the 2019 Constitution. On the contrary, article 74 of the Egyptian

Constitution of 1971 gave exceptional circumstances a lot of attention, with more detailed provisions guaranteeing that exceptional circumstances would not justify government actions unless they enjoyed broad consensus. Under the Egyptian Constitution, the president of the republic could take exceptional measures 'after consulting the Prime Minister, the Speaker of the People's Assembly and the Shura Council, [addressing] a message to the people and [conducting] a referendum on the measures taken within sixty days of their adoption'. It is important that military coups are not included in the exceptional circumstances regulated by a constitution, since coups are constitutionally illegitimate.

It will be difficult to form an effective civilian interim government capable of daily communication with citizens without broad consensus among the main parties.

3.2. SECURITY AND POLITICAL DETERMINANTS

The conditions of the war that began on 15 April have made it difficult for citizens to access public services. There are also limitations on the movement of civil servants, who have to reach their workplaces to provide services to citizens. From this we conclude that the special restrictions on movement and mobility will significantly impact the performance of the prospective government. Thus, it will be difficult to form an effective civilian interim government capable of daily communication with citizens without broad consensus among the main parties. The government cannot manage public facilities without concluding an agreement on security arrangements and a political agreement on managing the next transitional phase. The political agreement serves as a legal framework that must (a) achieve national consensus on transitional issues and procedures; (b) establish security arrangements and a ceasefire agreement; and (c) set a vision for the transitional government, governance institutions and methods of oversight. Such measures were adopted in peace agreements with armed movements, including the JPA, as well as in the political agreement between the Transitional Military Council and the FFC in 2019. Table 3.1 shows the models of governments.

Table 3.1. Models of governments

	Nature of the government system	Legal framework for transitional government	Competent authority to form the transitional government
Kosovo government model	State is absent; international administration is formed by the UN Security Council (UNSC)	Pursuant to a UNSC resolution (articles 39 to 51)	UNSC
Government in exile	Foreign occupation or military coup	Has no constitutional basis	Formed by the democratic dismissed government
Shadow government	Parliamentary system	Has no written constitutional basis	Formed by the opposition party
National consensus government	Political transition—post-conflict or end of military rule	Based on political agreement or comprehensive peace agreement	National consensus government based on political agreement
Caretaker government	Parliamentary system	Under the effective national constitution	The constitutional sovereign authority
Emergency government	Legitimate government established under the constitution	Under the effective national constitution	The constitutional sovereign authority

Chapter 4

OPTIONS FOR FORMING THE TRANSITIONAL GOVERNMENT

In this chapter, we analyse potential options for establishing a transitional government amid war and political turmoil, drawing insights from constitutional experiences across various countries, including past practices in Sudan. Addressing these options includes studying constitutional prerequisites and the political conditions that necessitate a transitional government as well as an overview of the countries that followed the model under study. We will study the following models: emergency government, the national consensus government, caretaker government, government in exile, shadow government and a government formed under Chapter VII of the UN Charter.

There is no comprehensive definition of the term 'emergency government' beyond the interpretation borrowed from constitutions of an administration structured to manage an emergency situation.

4.1. EMERGENCY GOVERNMENT

There is no comprehensive definition of the term 'emergency government' beyond the interpretation borrowed from constitutions of an administration structured to manage an emergency situation, typically during natural disasters and wars, including the suspension of certain freedoms and modification of the functions and goals of government institutions. In this regard, the competent authority establishes an emergency government to handle urgent tasks till the end of the emergency situation. Subsequently, it is raised in parliament or by public referendum for endorsement, according to some constitutional experiences. So, it is an authority formed by the existing legitimate government in exceptional circumstances in accordance with the constitution.

The emergency situation is clearly the justifiable reason for an emergency government. Throughout history, during exceptional circumstances that befell nations worldwide, including World War II and the Cold War, political and constitutional experts developed a new concept of the nation and defined it as a complex and fragile set of vital systems that, if not properly managed, could cause the collapse or demise of a state. Therefore, they focused on establishing units and institutions dedicated to alleviating the weakness of the state. They organized an emergency government to enable preparedness for any emergency conditions and to run the state during potential disasters (Collier and Lakoff 2021). Thus, the concept of an emergency government was crafted by decision-making centres within the state to confront internal vulnerabilities and save the state.

The term 'emergency government' is ambiguous and not clearly defined, and often overlaps with other definitions. In the current situation in Sudan, the term refers to the formation of an interim government to address exceptional circumstances. During natural disasters and wars, governments often alter their goals and programmes, focusing only on addressing emergency conditions. So, the government is called an 'emergency government' since its primary function becomes to respond to emergencies. It is also sometimes referred to as a 'crisis government'. In such cases, temporary laws and measures may be issued to assist the emergency government in functioning.

Dissolving the existing government in Sudan, entirely or partially, and forming an emergency government is a constitutional issue that is easily initiated and monitored if there are clear constitutional provisions. Otherwise, the procedures would be unconstitutional. This suggests that there must already be a government when an emergency occurs. In such situations, an emergency government is typically formed by a sovereign authority to oversee emergency situations. Sometimes, ministers and undersecretaries from various ministries are delegated to perform such duties.

The Sudanese constitutions have had no clear and explicit provisions about forming an emergency government in times of war and crisis. However, it is easy to conclude that, in times of crisis, Sudanese

constitutions stipulate governmental measures to confront emergency circumstances. Article 211 of the 2005 Constitution stipulates that, 'The President of the Republic, with the consent of the First Vice President, may during the state of emergency take, by virtue of law or exceptional order, any measures that shall not derogate from the provisions of this Constitution and the Comprehensive Peace Agreement. However, the president may, among other things, dissolve or suspend any of the state agencies, or suspend any powers granted to the states under the Constitution. The president of the republic, with the approval of the first vice president, shall assume the duties of these agencies and exercise powers or decide how the affairs of the concerned state are managed.'

Building on article 211 of the 2005 Constitution we understand that the president of the republic has the authority to lead a caretaker government during the emergency period. Article 41 of the 2019 Constitutional Charter grants authority to the Council of Ministers to declare a state of emergency in the country. The article stipulates that, 'If the exceptional situation reaches the point that it threatens the safety of the nation, the Cabinet may, in consultation with the Sovereignty Council, suspend part of the Bill of Rights in this Constitutional Charter'. The 2019 Constitutional Charter allows for the suspension of part of the Bill of Rights during a state of emergency. However, it did not address the suspension of constitutional provisions regulating the functioning of constitutional institutions. So, the article does not explicitly grant the prime minister the authority to form an emergency government or a caretaker government.

The Constitution does not specifically outline the formation or powers of an emergency government.

In conclusion, the Constitution does not specifically outline the formation or powers of an emergency government. Some jurists argue that a government undertaking exceptional and emergency tasks, contextually speaking, is an emergency government.

Is an emergency government applicable in Sudan?

In summary, an emergency government formed during a state of emergency is a constitutionally legitimate government and operates with exceptional powers. In the current Sudanese situation, the military leadership had seized power through a coup before the outbreak of war, overthrowing the Constitution as well as the

institutions established under that Constitution. Consequently, the current military leadership does not represent a constitutionally legitimate authority, because the coup authorities may not acquire legitimacy in exercising constitutional powers after disrupting the same constitution by force.

In the current political circumstances, with the ongoing war and lack of constitutional framework to regulate the formation of a civilian emergency government, it would be challenging to establish an effective and competent civilian government capable of fulfilling the state obligations in providing public services, as advocated by some civil initiatives seeking to end the war and restore democracy. Consulting constitutional traditions may allow the ruling authority and the TSC president to form a 'war government' that helps the TSC to manage state institutions during the war by mobilizing revenues, resources and citizens to achieve the goals of the war. However, this does not achieve the goal of the community institutions that are calling for an emergency government of national technocrats that is independent of the warring parties to manage government facilities and provide public services.

4.2. CARETAKER GOVERNMENT

A caretaker government is a temporary government with limited powers designed to run government affairs in the short term. Its responsibilities are limited to addressing the country's power vacuum following the dissolution of the government or the withdrawal of confidence by the parliament. At times, caretaker governments may be established during a later stage after elections and before the formation of a new government by the parliament, or in any other emergency circumstance that prevents or delays the formation of a new government. The tasks of a caretaker government are limited to maintaining routine government work, particularly service provision. It may not decide political matters or undertake sensitive constitutional actions. Clear examples of caretaker governments can be seen in countries with parliamentary government systems. Unlike other forms of transitional governments, a caretaker government undertakes specific and limited tasks, in terms of both objectives and time frame. Based on the United Kingdom's experience, a caretaker

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government is formed when elections or the announcement of election results is postponed, or when the government is dissolved following a vote of no confidence by the House of Commons. The rules for establishing and operating a caretaker government in the UK were recently established, in 2011, and are included in the Cabinet Office's guide (UK 2011). According to the British system, a 'caretaker government' is a temporary government in terms of both time and specific competencies. A caretaker government was also recently formed in Lebanon.

Maintaining public services is the justification for forming a caretaker government in exceptional circumstances, as it is a requirement to ensure the rights of citizens and to protect the public interest. Constitution drafters must anticipate the need to include constitutional provisions that address a potential power vacuum. The Lebanese Constitution stipulates that if the government resigned or planned to resign, it would continue to carry out its duties until a new government is elected or formed within a specified time frame. The Lebanese Constitution also specifies that ministries may handle only the essential affairs related to the public interest, and may not take decisions that would entail political responsibility for the government. In accordance with the Constitution, a caretaker government is formed by the same ministers whose term ended with the dissolution of the government or the withdrawal of confidence. They will continue to provide daily and routine administrative services for a short period, which may extend to one or two months, until a new government is formed (Lebanese Constitution of 1991, article 17). Articles 61 and 64 of the 2005 Iraqi Constitution provide for the same the principles, which were used to form the caretaker government led by Prime Minister Mustafa Al-Kadhimi.

The Sudanese constitutions have not contained clear provisions on the formation of a caretaker government. Article 38 of the 1964 Constitution provided a brief definition of the term 'caretaking government affairs', stating that government work includes all executive actions of the government. The cabinet issues rules to ensure the streamlined handling of government affairs and work allocation among ministries. Article 211(b) of the 2005 Constitution addressed the caretaking of government agencies during a state of emergency by stipulating that the president of the republic,

with the consent of the first vice president, may during a state of emergency take, by virtue of law or exceptional order, any measures that will not derogate from the provisions of the Constitution and the Comprehensive Peace Agreement except as may be provided therein: to dissolve or suspend any of the state organs or suspend such powers as may be conferred upon the states under the Constitution. The president of the republic, with the consent of the first vice president, assumes the functions of such organs and exercises the powers or prescribes the manner in which the affairs of the state concerned may be managed.

Given the lack of a constitutional provisions, there is no clear practice of a caretaker government in the Sudanese constitutional experience. Additionally, Sudanese constitutional jurisprudence has not provided any contributions that can be consulted on this matter. In some cases, however, governments were formed to fill a vacuum in the executive power and to carry out its functions on an emergency basis, including appointing undersecretaries to handle ministerial work until the formation of a new government. This measure was implemented following Abdalla Hamdok's reinstatement to the transitional government after 25 October. The political agreement signed in November 2021 between military and RSF leaders and the prime minister sought to sustain the transitional period and nullify the customary measures taken by the army commander. Hamdok had assigned deputy ministers to conduct government work until a new government was formed. However, the 2019 Constitutional Charter does not stipulate special provisions for forming a caretaker government.

Constitutional experience in the Arab region shows that to avoid the dangers and caveats that arise from a vacuum in the executive authority, the constitutional custom in the Arab countries is that the president of the republic assigns the resigned ministry to remain in power until the new ministry is formed, and the scope of its work is determined by what is called 'the conduct of ordinary business'. This custom has become an inherent principle of public law that must be applied in cases where the ministry loses its legitimate governmental entity, including the case of resignation. One of the recent experiences in this regard is the experience of the caretaker government in Lebanon in 2022 led by Najib Mikati. Another

Given the lack of a constitutional provisions, there is no clear practice of a caretaker government in the Sudanese constitutional experience.

experience of the caretaker government in Iraq was in the same year, 2022, led by Prime Minister Mustafa Al-Kadhimi.

The latest experience was in Pakistan in 2023. Under the Pakistani Constitution, if the government ends its term or is dissolved, a caretaker government is formed in consultation with the outgoing prime minister and the leader of the opposition. Anwar ul Haq Kakar, a former senator from the Balochistan region, took the constitutional oath in mid-August as the head of the caretaker government that would oversee the parliamentary elections constitutionally scheduled to be held within 90 days (Pakistan 2018).

Roles of a caretaker government

The roles of a caretaker government may be specified in the constitution or in the cabinet regulations, as in the UK. As the arrangements are temporary, the roles may not include any tasks of a strategic nature. They are always limited to administrative, organizational and routine work and do not include policy development. So, a caretaker government may not propose draft legislation, borrow money, appoint or dismiss high-ranking government officials, or restructure ministries.

The above-mentioned constitutional examples show that a caretaker government is formed by mandating an elected and legitimate authority. It fulfils its responsibilities in a realistic and efficient manner, and is recognized by the country's key constitutional and political groups.

Is a caretaker government applicable in Sudan?

The theory of caretaker government is part of the parliamentary arrangements in a democratic system. Its procedures include the resignation of or a vote of no confidence against an elected government. The status quo in Sudan does not meet these requirements. Importantly, a caretaker government should be formed from the existing government, by assigning incumbent ministers to carry on routine work for a short period of time without handling strategic issues. Proposals to form a government of national technocrats from outside the current government do not fall under the notion of a 'caretaker government'. Rather, such a government would be similar to a national consensus government.

Proposals to form a government of national technocrats from outside the current government do not fall under the notion of a 'caretaker government'.

4.3. NATIONAL CONSENSUS GOVERNMENT

International experiences present another model for managing the transition of a country experiencing a political crisis by forming a national consensus government (also called a 'national salvation government'). The national consensus government is similar to the emergency government and caretaker government, in terms of responding to exceptional circumstances. Consequently, it functions as a temporary government with transitional and emergency responsibilities. It is formed under political consensus to overcome a political crisis. Moreover, because it does not follow standard procedures, it causes confusion among political elites. A national consensus government is formed during political turmoil coupled with disorders and chaos, or following a political or military coup. It aims to prevent government collapse or to stop the descent into civil war. In such circumstances, the government is formed of honest and competent persons consensually agreed on by political parties.

A national consensus government may be formed through international arrangements facilitated by the UN Security Council (UNSC) under Chapter VII of the UN Charter. It may also be part of national arrangements, such as imposing martial law after a military coup or concluding a political agreement between various political forces following a national dialogue or peace agreement. In either case, it becomes a consensual government that brings together members and leaders of influential political parties. Therefore, the legal framework for such a government is different from the existing constitution. Constitutions have no provisions regulating the formation of a national consensus government. It is true to say that establishing this type of government implies an acknowledgment that the constitution has failed to regulate constitutional relations, sustain political stability and preserve peace within the country. For this reason, politicians resort to alternatives outside the constitution to address the political situation in the country.

The success of a national consensus government depends on several factors, including consensus and unified political will among the key political actors. In many Arab countries that have endured wars, including Libya, Syria and Yemen, efforts were made to implement national consensus governments as an interim measure towards

A national consensus government may be formed through international arrangements facilitated by the UN Security Council under Chapter VII of the UN Charter.

peace and political stability. However, they all faced challenges, making it hard to achieve the transitional objectives of peace, stability and political consensus. Recent experiences suggest that a national consensus government is typically formed through a national agreement based on comprehensive dialogue and international sponsorship such as the 2015 Libyan Political Agreement, where the European Union supported the government in achieving its transitional objectives (Gazzini 2023).

Is a national consensus government applicable in Sudan?

In order to implement this type of government in Sudan amid the current circumstances, a political agreement must be reached between the parties to the conflict. The word 'consensus' indicates that the parties must agree on a new road map. In other words, forming a national consensus government requires a viable legal and political framework as well as consensus on political transition led by such a government. Otherwise, no government will get the approval of or support from the key political parties.

Forming a national consensus government requires a viable legal and political framework as well as consensus on political transition led by such a government.

4.4. GOVERNMENT IN EXILE

A government in exile is formed in exceptional circumstances. It has no constitutional basis and it seeks to gain legitimacy through popular acceptance and international recognition (Bell and Dennen 1944).

The term 'government in exile' refers to a government established outside a country's territory due to the illegal seizure of power by force, whether through a military coup or foreign occupation. It is a political group that claims legitimacy and popular representation but is unable to exercise power because it is located in a foreign country. Governments in exile usually plan to return one day to their country and regain official power. Accordingly, such a government seeks to represent the state before international institutions to gain the recognition of the international community. However, it remains controversial under international law, and efforts to build consensus around this concept have not been successful (Talmon 2012).

The world has seen so many applications of governments in exile. Being established abroad, governments in exile are different from

The term 'government in exile' refers to a government established outside a country's territory due to the illegal seizure of power by force, whether through a military coup or foreign occupation.

governments formed by rebels in the areas they control. The latter typically operate in a portion of a country's national territory and among part of its citizens.

The most recent example of a government in exile is in Myanmar. The National Unity Government of Myanmar (NUG) was founded in 2021 after a military coup and brought together members of parliament elected at the time. The elected parliament in Myanmar at the end of 2020 formed a government in exile called the Committee Representing Pyidaungsu Hluttaw (Myanmar's Government in Exile).

Countries that have refused to recognize the government established following the military coup in Myanmar have granted the NUG recognition and political support to delegitimize the coup. The United States and several European countries have recognized the NUG (Saeed 2021).

A key requirement for the establishment of a government in exile is that the original democratically elected government that enjoys popular support as well as its constitutional institutions must have been dissolved and removed from power in an unconstitutional manner, through either a military coup or foreign occupation. This ousted government presumably maintains its constitutional legitimacy and popular and international acceptance. Thus, it seeks to continue representing the people, from outside the country, meaning that it refuses to recognize the de facto authority that seized the government in a military coup and disrupted constitutional institutions. So, it is a form of political opposition to the coup.

Is a government in exile applicable in Sudan?

Sudan has no legal and constitutional framework governing the formation of a government in exile. This concept primarily serves the political and diplomatic objectives of a political group that was legitimately in power but was unlawfully ousted, subsequently opposing the de facto government. This scenario can be implemented abroad, given the fact that Hamdok was leading a constitutionally legitimate government. His government was overthrown by the coup of 21 October 2021. The success of such a government depends primarily on popular recognition and international support, as is the case of the NUG.

Sudan has no legal and constitutional framework governing the formation of a government in exile.

Shadow ministers are appointed by the leader of the opposition and generally hold roles designed to monitor the performance of the incumbent government departments.

4.5. SHADOW CABINET

A shadow cabinet brings together senior members of the main opposition party and its main spokespeople in specific areas of government. Shadow ministers are appointed by the leader of the opposition and generally hold roles designed to monitor the performance of the incumbent government departments. The task of each shadow cabinet minister is to examine and monitor the performance of the related minister in the actual government, and to propose alternative policies aligned with the strategy of the opposition party. The exact origin of the term 'shadow government' is not known; it emerged in the late 19th century in the UK. At that time, members of the party defeated in parliamentary elections would hold meetings to lead the opposition against the newly formed government. By the 1950s the shadow government became a key component of UK politics. Thus, it is a democratic practice produced by the Westminster system in Britain (Pannell and Baker 2021).

Despite its influential role in enhancing the constitutional system in the UK, fostering democratic practices and broadening oversight of government activities, the shadow government operates outside the formal constitutional structure. It functions alongside the recognized government. Based on the British experience, it is not an actual government because it does not seize power. Instead, it functions as part of the legislative authority rather than the executive power. A shadow government may be formed under a dictatorial regime as well as under a democracy. Some writers have used the term 'shadow government' to refer to the NUG, but this is not accurate, because the NUG is based in Washington (Yang and Gramer 2023).

Sudan's constitutional process, under both democratic regimes and military dictatorships, has never witnessed a shadow government similar to the Westminster model.

Sudan's constitutional process, under both democratic regimes and military dictatorships, has never witnessed a shadow government similar to the Westminster model. However, Sudan has had a unique experience in mobilizing youth within structures and committees known as the Sudanese shadow government, which was initiated by political activists and individuals engaged in public affairs in 2011 to monitor and critique the performance of the government led by ousted President Omar Hassan al-Bashir through the publication of periodic reports. After the fall of al-Bashir's government in April 2019,

those activists formed a new party called the Binaa Sudan Party (Shadow Government in Sudan n.d.).

Is a shadow government applicable in Sudan?

A shadow government is applicable in Sudan under various political circumstances. It constitutes a tool for monitoring, oversight and active participation in exercising citizenship rights and advancing national goals. However, it may not be effective in addressing the power vacuum, nor can it manage government facilities or provide public services to citizens. The effectiveness of a shadow government depends on how much democratic practices are deeply rooted and on the public awareness of democracy principles. In fact, democratic practices are not deeply rooted at the community level in Sudan.

4.6. GOVERNMENTS FORMED PURSUANT TO A UNSC RESOLUTION: KOSOVO GOVERNMENT MODEL

This is another model for forming a transitional government after the end of a war. It is based on a UNSC resolution, under Chapter VII of the UN Charter, to maintain international peace and security. The Republic of Yugoslavia entered a devastating civil war in the early 1990s. In 1999 the UNSC issued Resolution 1244, ordering the withdrawal of all Yugoslav and Serbian forces from Kosovo, and declaring the deployment of the United Nations Interim Administration in Kosovo (UNMIK). UNMIK was established to administer Kosovo under UNSC authorization for a period of 10 years, during which UNMIK performed state functions. Kosovo then gained its final independence in 2008.

According to its mandate, UNMIK helped ensure favourable conditions for a peaceful and normal life for all citizens of Kosovo and to promote regional stability in the Western Balkans. UNMIK prioritized building trust between communities; respecting human rights, the rule of law and gender equality; and empowering women and youth.

Since then, the process of building local political institutions in Kosovo has continued, in parallel with international institutions. In

the early years following the liberation, UNMIK played a key role in making political decisions, while Kosovo's political and governmental parties primarily focused on institution building to enable them to play advanced and more prominent roles in legislative and executive powers. On 17 February 2008 Kosovo declared its independence, and a significant portion of UNMIK's powers were transitioned to national institutions.

So, in Kosovo, the government was run under a UNSC resolution that entitled an international administration to protect civilians. Acting as a caretaker government, this international administration established institutions for the rule of law, providing basic services such as education and health, as well as judicial and police services, as part of a long-term plan to build the state, protect civilians and end the ethnic war. Therefore, this was an arrangement to help the state achieve political stability, peaceful coexistence and development, and it included broader objectives, namely ending the armed conflict and maintaining international peace and security.

Is this model applicable in Sudan?

The United Nations Integrated Transition Assistance Mission in Sudan (UNITAMS) was established by UNSC Resolution No. 2524 in 2020 with a specific mandate to assist the democratic transition by providing assistance in organizing elections, drafting a constitution for Sudan, helping solve the economic crisis and building sustainable peace. It is certain that the events on the ground and their impact on international peace and security will determine the UNSC's attitude towards Sudan and its new role in the country.

The experience in Kosovo proved to be financially burdensome, imposing substantial administrative, technical and logistical challenges on the UN and its agencies. Replicating this experience would be a complex and demanding effort. Any expansion of UNITAMS's mandate to include new political and administrative roles would require a new UNSC resolution.

Chapter 5

RESULTS AND RECOMMENDATIONS

The 2019 Constitutional Charter does not contain provisions regulating the formation of a transitional government during times of political and security crises. The exceptional measures outlined in the Constitutional Charter are specifically related to declaring a state of emergency. Despite the significance of establishing clear constitutional provisions to address the transitional government in exceptional circumstances, all Sudanese constitutions since independence have been completely silent in this regard.

The current political situation in Sudan makes it challenging to apply some models of transitional government. Certain models, such as emergency governments, shadow governments and caretaker governments, can be applied only in a parliamentary democratic system. The national consensus government model may be applied in situations following a comprehensive peace agreement or according to transitional measures established by a UNSC resolution to help build peace and democratic transition.

Given the escalating hostilities and the increasing distrust between the de facto government and civil society institutions and political parties, the formation of an independent civilian government during the ongoing war is challenging. Any government formed during war will necessarily be a government to support military activity and will reflect the will of the victorious party or the one in control on the ground.

Signing a comprehensive peace agreement is the easiest way to form a civilian transitional government that works according to a plan to

build democracy and sustainable peace. A peace agreement also provides proactive measures and a legislative and constitutional framework for the transitional government. One proactive measure needed is the establishment of a legislative framework within which consensual transitional measures can be implemented. This legislative framework can be incorporated in a comprehensive peace agreement that includes constitutional provisions to enable the establishment of transitional institutions.

The steps to political consensus will culminate with the launch of a broad political process with international and regional facilitation, producing a national consensus document that the warring military parties comply with.

The political consensus aimed at forming a transitional government can succeed only through engagement with community groups with a genuine interest in fostering change towards political stability, democracy, peace and sustainable development. In this context, it is crucial to support the efforts of political parties to engage resistance committees, women, youth, displaced persons and refugees. The international community should utilize its assistance mechanisms to support consultations and the involvement of civic forces, political leaders and active community groups, including women and youth. This investment will pave the way to establishing a government accountable to citizens, which is a cornerstone of any transitional government. The political experience before and after the war has proven that political consensus is a decisive and important factor in achieving political stability and sustainable peace. The steps to political consensus will culminate with the launch of a broad political process with international and regional facilitation, producing a national consensus document that the warring military parties comply with.

During war, widespread violence and weakened executive power, it becomes crucial for military institutions, especially those engaged in hostilities, to adhere to the national consensus charter and assume a vital role in safeguarding the transitional government, ensuring compliance with ceasefire provisions and protecting civilians.

Forming multiple governments, each controlled by different warring parties, is not a solution. It would rather exacerbate the crisis, diminish prospects for a solution, expose civilians to heightened risks and increase the dismantling of Sudan.

Forming a government through a political and ceasefire agreement, under independent and impartial international sponsorship, provides an avenue for creating an international mechanism to monitor the implementation of an agreement that will focus, among other issues, on forming a transitional government and ensuring its success and stability. Therefore, it is crucial to establish a supervisory body dedicated to monitoring the emerging transitional authority.

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This Report discusses the constitutional options that decision makers in Sudan can use as guidance in forming a government in conditions similar to what Sudan is going through. The Report discusses and analyses the essential forms of interim governments that can be applied in such situations of political and armed conflicts. It supports such options with the international practices of those models for interim governments.

The Report concludes that it is not easy to form an interim government without political consensus and a ceasefire in times of war. An interim government can only succeed in providing services and facilitating the provision of humanitarian assistance if the warring forces adhere to the agreement concluded between them. Establishing any interim government during internal armed conflict requires strong and skilled civil society, trade unions, and experienced leaders to manage crises and lead society in such critical circumstances.

The Report targets constitutional scholars, politicians, civil society and warring parties in Sudan to provide constitutional options for forming an interim government during wartime in Sudan after 15 April 2023.

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