

SUDAN'S 2019 CONSTITUTIONAL DECLARATION

Its Impact on the Transition



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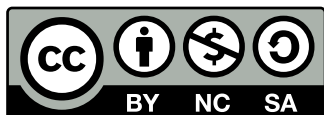
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INTRODUCTION

The signing of the Draft Constitutional Charter for the 2019 Transitional Period was met with jubilation on the streets and around the world.

On 17 August 2019, four months after President Omar al-Bashir was ousted, the revolutionary protest movement Forces for Freedom and Change (FFC) and the Transitional Military Council (TMC) signed a constitutional document to ferry Sudan through a transitional period to a civilian-led, democratic order. The signing of the Draft Constitutional Charter for the 2019 Transitional Period (the 2019 Constitutional Declaration) was met with jubilation on the streets and around the world. Rallies, firework displays and other celebrations were held across Sudan to welcome the agreement. Representatives from the African Union, the European Union and the Troika (Norway, United Kingdom and United States) attended the signing ceremony, along with regional dignitaries such as Ethiopian President Abiy Ahmed (Walsh 2019). After several months of intense negotiation, the signing of the 2019 Constitutional Declaration, and a related political agreement a few weeks earlier, appeared to bring Sudan back from the brink of civil war.

However, much of that support was tempered by reservations about the parties' ability to meet the Declaration's ambitious goals and timeline, as well as the wisdom of preserving Sudan's powerful and widely detested military in government (Walsh 2019), and its lack of inclusion of all who participated in the revolution (Dabanga 2019), among other concerns. In a country that has had two other popular revolutions end in military dictatorship, many feared that this one would meet the same fate. Two and a half years later, it appears that those fears have been realized. On 25 October 2021, the military arrested and detained Prime Minister Abdalla Hamdok and several other civilian leaders, suspended the 2019 Constitutional

Declaration's provisions for the creation of the Sovereignty Council and Transitional Cabinet, and stated that it was taking over control of the government as a necessary 'correction' in the face of political gridlock and a crippling economic crisis (Atta-Asamoah 2021). Several weeks later, the military reconstituted the government under a political agreement signed by a newly reappointed Prime Minister Hamdok, to near-universal shock and outrage among Sudanese protest groups, civil society and armed movements.

The new agreement lasted less than two months. On 3 January 2022, Prime Minister Hamdok resigned, dissolving both the government and the political agreement signed in November (BBC 2022). As of May 2022, the date of writing, Sudanese protesters have remained out on the streets fighting for complete civilian control over the transition. The military remains fully in power, having failed for months to form a government. A mediation effort by the United Nations Integrated Transition Assistance Mission in Sudan (UNITAMS) has struggled to gain traction and legitimacy (Al-Jazeera 2022). Local resistance committees, the grassroots backbone of the 2018–2019 revolution, have attempted to consolidate their positions into a harmonized political roadmap to present to the military authorities.

Moreover, the future and status of the 2019 Constitutional Declaration and its associated documents, still officially in force as the transitional period's constitutional framework, remain unclear. However, many of the initial reservations voiced during the negotiation and signing of the 2019 Constitutional Declaration about the potential consequences of its structure have proven to be prescient, raising the question: did the constitutional framework contribute to the current crisis, and if so, how?

Answering that question is the object of this paper. Through the lens of the constitutional framework, this paper will evaluate the nature of its contribution to the current crisis, identify the structural weaknesses of the constitutional framework that led to that contribution, and offer some initial discussion about the lessons future drafters might be able to take away. Specifically, it will argue that several structural weaknesses of the 2019 Constitutional Declaration directly contributed to the political gridlock and economic deterioration that undermined the transitional government, and

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Did the constitutional framework contribute to the current crisis, and if so, how?

indirectly set the stage for the 25 October 2021 coup by giving the military the pretext, legitimacy and institutional perch from which it could launch its intervention. Those weaknesses include:

1. The choice of and treatment of the parties to the transitional government was flawed in various ways, including:
 - the incorrect assumption that the FFC and the military could effectively govern together in a power-sharing executive;
 - the retention of the military at the centre of government, allowing its leadership to stall progress on security sector reform, the dismantling of the kleptocratic networks under the previous regime, and transitional justice priorities, such as the transfer of al-Bashir to the International Criminal Court and the investigation of the 3 June 2019 massacre; and
 - the treatment of the FFC as a coherent and popularly legitimate political party capable of effectively and efficiently governing.
2. Fragile political arrangements enabled the aggrandizement of military power, including:
 - the failure to give the Transitional Cabinet enough mechanisms to keep the military component of the Sovereignty Council from hijacking the process;
 - an incorrect assumption that the Transitional Legislative Council (TLC) could be established in a timely manner; and
 - the dismantling of the state's dispute resolution mechanisms without including a realistic plan to establish a replacement.
3. An unrealistically ambitious implementation process included little sequencing of the government's core priorities and an overly broad mandate.

As events unfold, the details of these and other structural features will undoubtedly come into better focus. At the time of writing, the situation in Sudan remains fluid, with the military still fully in charge and organizations such as the FFC and the resistance committees forced to rapidly consolidate themselves into a coherent bloc capable of negotiating—and potentially governing—together. As such, this paper acknowledges that a complete analysis of the constitutional framework's contribution to the transition's breakdown may not

be possible at this juncture. However, there is still great benefit in evaluating the constitutional origins of the events as they have already unfolded, especially given the uncertainty about exactly what constitutional framework will replace the 2019 Declaration. If there is any opportunity for good-faith actors to bring forward a viable proposal for change to the transition's constitutional framework, they will need to be armed with a clear and concrete understanding of what went wrong with its predecessor. This paper covers the following:

1. An analysis of the constitutional framework under the 2019 Political Agreement, the 2019 Constitutional Declaration, and the 2020 Juba Agreement for Peace in Sudan.
2. An evaluation of how the structures of the Constitutional Declaration contributed to the current crisis, through an analysis of: (a) the choice of and treatment of the parties included in the transitional government; (b) the choice of political arrangements; and (c) the choice of how the transitional government's mandate was sequenced.
3. An evaluation of the future of the 2019 Constitutional Declaration and November 2021 Political Framework given the events that have unfolded after the 25 October 2021 coup.
4. Concluding thoughts on some of the generalizable lessons that can be taken from the consequences of the constitutional framework's structural features.

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Chapter 1

THE CONSTITUTIONAL FRAMEWORK OF THE TRANSITIONAL PERIOD

In the two years since its signing, the constitutional framework governing the transitional period has mutated into a tangled and sometimes contradictory web of instruments.

After the overthrow of President al-Bashir in April 2019 and sustained, peaceful mass protest into the summer, the TMC agreed to negotiate an interim constitutional framework with the FFC that would abrogate the 2005 Interim Constitution and provide for government during a transitional period. Those negotiations resulted in the 2019 Constitutional Declaration, an agreement which included at its core a power-sharing deal between the FFC and TMC—and, crucially, no other party. In the two years since its signing, the constitutional framework governing the transitional period has mutated into a tangled and sometimes contradictory web of instruments. That framework has become only more complicated by the 2021 Political Framework signed on 21 November 2021 between the Sovereignty Council Chairman and Commander of the Sudan Armed Forces (SAF), Lieutenant-General al-Burhan, and the Prime Minister Abdalla Hamdok. At the time of writing (May 2022), the main parties do not fully agree on the status of the documents relative to each other, let alone on their bearing on the transitional period's political arrangements.

As such, a closer look at these instruments that comprise the constitutional framework—as well as the main questions that remain regarding their relationship and legality—is both topical and warranted. Ordered chronologically, the relevant instruments are: the 2019 Political Agreement, the Draft Constitutional Charter for the 2019 Transitional Period (the 2019 Constitutional Declaration), the 2020 Juba Agreement for Peace in Sudan (the Juba Agreement), and—although many dispute its legality—the 2021 Political Framework. The 2019 Constitutional Declaration

was designed to be the core constitutional document governing the transitional period, but it must be read in light of these other documents, as demonstrated in the rest of this section. The section offers a brief overview of each political agreement, and how the political arrangements that they create together have governed the transitional period to this point.

1.1. THE 2019 POLITICAL AGREEMENT

The 17 July 2019 Political Agreement was the first negotiated document between the TMC and the FFC, and it was designed to serve as a legal blueprint for the main political arrangements that were to be enshrined later in the 2019 Constitutional Declaration. The Agreement establishes three main branches of a transitional government: a Sovereignty Council, a Council of Ministers and a Legislative Council.

The Sovereignty Council was designed as an 11-member head of state, with 5 members chosen by the TMC and 5 by the FFC, with a 6th civilian (and 11th member) chosen jointly by the two parties (article 5). For the first 21 months of the 39-month transitional period, a TMC member was to preside over the Sovereignty Council as chairperson, with the position then transferring to a civilian chairperson for the remainder of the transitional period (article 6).

The Council of Ministers was to consist of a Prime Minister chosen by the FFC and a cabinet not exceeding 20 members. The ministers were to be selected by the Prime Minister from a list of nominees provided by the FFC and confirmed by the Sovereignty Council. However, the Ministers of Interior and Defence would be nominated by the TMC, and the Prime Minister could nominate two 'partisan individuals' (articles 9–10).

Finally, the Legislative Council under the Political Agreement would be composed of 67 per cent FFC members and 33 per cent individuals who did not sign the FFC's Declaration of Freedom and Change. The Agreement states that the Legislative Council would only be formed after the establishment of the Sovereignty Council and Council of Ministers, but no more than 90 days after the establishment of the

Sovereignty Council. Until the formation of the Legislative Council, the legislative powers were to be reserved to the Sovereignty Council and Cabinet acting jointly (articles 13–17).

Other provisions in the political agreement include the establishment of a National Independent Commission of Inquiry to investigate the 3 June 2019 massacre, in which hundreds of peaceful protestors were killed, injured and/or raped during a sit-in in front of the TMC's headquarters, and a list of the 'missions of the transitional period'.

1.2. THE DRAFT CONSTITUTIONAL CHARTER FOR THE 2019 TRANSITIONAL PERIOD

The transitional declaration was designed as the primary constitutional framework governing the transitional period.

The Draft Constitutional Charter for the 2019 Transitional Period (the 2019 Constitutional Declaration) was signed by the FFC and TMC (thereafter dissolved) on 17 August 2019, a little under three weeks after the signing of the Political Agreement. The 21-page transitional declaration was designed as the primary constitutional framework governing the transitional period, and it includes a transitional system of government, oversight bodies such as a public prosecutor and auditor general, a list of independent commissions, provisions on declaring a state of emergency, and a list of rights and freedoms, among others (Sudan 2019) (see Figure 1).

The transitional system of government detailed retains the broad outlines of the three main bodies provided for in the 2019 Political Agreement. It also includes new provisions on a reconstituted judiciary and a federal system composed of regional/provincial and local government, although the detail of these structures was left to be elaborated through ordinary law.

1.2.1. The Sovereignty Council (Chapter 4)

As outlined in the 2019 Political Agreement, the Sovereignty Council would remain an 11-member body shared between the FFC and the military, with the military chairing the Sovereignty Council for the first 21 months of the transition. The Declaration expands on the Sovereignty Council's powers, with a long list of competencies and powers (article 11), including:

1. Direct appointment power over the Cabinet's first prime minister, and over the chairpersons and members of four commissions named in the Declaration, including the Peace Commission and Constitution Drafting and Constitutional Conference Commission.
2. Confirmation power over nominations for: subsequent prime ministers by the Transitional Legislative Council (TLC); all ministerial appointments in the Cabinet; all TLC member replacements; every provincial governor; key members of the judiciary; and almost every other high-level post in the transitional government.
3. The power to determine the compositional breakdown of the TLC, and to sign and veto laws passed by the TLC.
4. The power to 'ratify' final rulings from the Judicial Authority.
5. The power to declare war and states of emergency under certain conditions.

Chapter 4 also includes conditions for membership and member replacements in the Sovereignty Council. Most notable is that the TLC would replace a vacancy if the empty seat belonged to a civilian, and the Supreme Commander of the Armed Forces (Lieutenant-General al-Burhan) would replace the vacancy if the empty seat belonged to a member of the military (article 13). Finally, the Sovereignty Council would take decisions by consensus or two-thirds vote, although it is not clear when the different voting thresholds should be used.

In August 2019, the Sovereignty Council was officially established according to the 2019 Constitutional Declaration's procedures, with Lieutenant-General al-Burhan as Chairman. In February 2021, after the 2020 Juba Agreement had been signed, the Council was expanded to 14 members to include members of three armed groups: the Sudanese Revolutionary Front, the Sudan People's Liberation Movement (SPLM) faction led by al-Tahir Hajar, and SPLM-North (SPLM-N) led by Malik Agar. On 25 October 2021, al-Burhan dissolved the Sovereignty Council as part of the coup. It was reconstituted shortly afterwards, through unilateral decree by al-Burhan, with all members retaining their posts except for the five FFC nominees.

1.2.2. The Transitional Cabinet (Chapter 5)

As outlined in the 2019 Political Agreement, the 2019 Constitutional Declaration establishes a Transitional Cabinet (formerly known as the

On 25 October 2021, al-Burhan dissolved the Sovereignty Council as part of the coup. It was reconstituted shortly afterwards, through unilateral decree by al-Burhan, with all members retaining their posts except for the five FFC nominees.

Council of Ministers). The structure and composition of the Cabinet detailed in the Declaration is identical to that in the 2019 Political Agreement, except for the provision that the Prime Minister could appoint two 'partisan individuals' of his or her choosing, which is excluded (article 14). The powers and competencies (article 15) of the Transitional Cabinet include:

1. Aiding in the legislative process by 'expediting' draft laws and budgets, supervising the 'enforcement of the law', and issuing 'regulations organizing its activities', although it is not clear what these powers specifically entail;
2. Drafting programmes and policies for the public civil service in charge of 'administering the apparatus of the state';
3. Requesting the Sovereignty Council declare a state of emergency; and
4. Establishing any commissions not stated in the Declaration (article 38(5)(h)).

The 2019 Constitutional Declaration does not enumerate what those presidential powers would be, or which bodies would assume other residual powers that did not belong to the President.

Article 70(4) also leaves 'all authorities and powers of the President' under the 2005 Interim Constitution to the Prime Minister '[w]ith the exception of the authorities and powers granted to the Sovereignty Council' under the 2019 Constitutional Declaration. The 2019 Constitutional Declaration does not enumerate what those presidential powers would be, or which bodies would assume other residual powers that did not belong to the President, such as legislative powers.

On 8 September 2019, the Transitional Cabinet was sworn in according to the 2019 Constitutional Declaration's procedures, with Prime Minister Hamdok at the helm (France 24 2019). It was then dissolved by the military coup on 25 October 2021, and has not yet been reconstituted since Prime Minister Hamdok's resignation in January 2022.

1.2.3. The Transitional Legislative Council (Chapter 7)

The final transitional governing body is the Transitional Legislative Council (TLC). As outlined in the 2019 Political Agreement, the 2019 Constitutional Declaration states that 67 per cent of its members would be from the FFC, and 33 per cent of its members would be composed of appointees who did not sign the FFC's

Declaration. It additionally caps the TLC at 300 members and states that the 'political, civil and professional forces, Sufi orders, native administrations, and armed movements', along with other components of Sudanese society, must be taken into account (article 23). The TLC was envisioned to serve two purposes: to check the transitional government, and to serve as a source of popular representation (albeit unelected) beyond those who are members of or follow the FFC. The powers and competencies (article 24) of the body include:

- voting on and enacting legislation;
- approving the general budget of the state;
- ratifying bilateral, regional and international agreements and treaties;
- enacting rules and regulations that organize its own activities; and
- holding the Cabinet accountable through withdrawing confidence from either individual members or the body as a whole (article 24).

The TLC was to name a new Prime Minister, to be confirmed by the Sovereignty Council, in the event that confidence was withdrawn. The 2019 Constitutional Declaration also provides that, until the TLC is formed, the Sovereignty Council and Transitional Cabinet would assume its duties under the Declaration and take decisions by consensus or two-thirds vote (article 24).

As at the time of writing, the TLC has yet to be formed, largely due to political gridlock and the FFC's inability to present a list of names to fill its portion of the TLC membership. As such, the Sovereignty Council and Transitional Cabinet acted as the de facto legislature for the entirety of the transitional period.

1.2.4. The judiciary (Chapter 8)

The 2019 Constitutional Declaration briefly outlines three judicial bodies: a Supreme Judicial Council, a Judicial Authority and a Constitutional Court (articles 28–30). The 2019 Constitutional Declaration clearly borrows substantially from Sudan's 2005 Interim Constitution, in some cases simply rebranding old institutions with new names. The judiciary is not included in the Declaration's definition of 'transitional bodies', and so it is unclear—on the words of the 2019 Constitutional Declaration alone—whether these judicial

The TLC was envisioned to serve two purposes: to check the transitional government, and to serve as a source of popular representation (albeit unelected) beyond those who are members of or follow the FFC.

The 2019 Constitutional Declaration designed the Constitutional Court to be an independent, separate body with jurisdiction over matters concerning the constitutionality of laws, the protection of rights and freedoms, and the adjudication of constitutional disputes (including regarding the 2020 Juba Agreement).

bodies are expressly transitional, or whether they are meant to be the permanent arrangements included in the final constitutional document.

Under the 2019 Constitutional Declaration, the Supreme Judicial Council is a direct replacement for the National Judicial Service Commission, which was the judiciary's primary regulator, and it expressly assumes all its duties under the 2005 Interim Constitution (article 28). The only change from the 2005 Interim Constitution is that the Supreme Judicial Council is to directly appoint the members of the Judicial Authority and Constitutional Court, rather than giving much of that appointment power to the President.

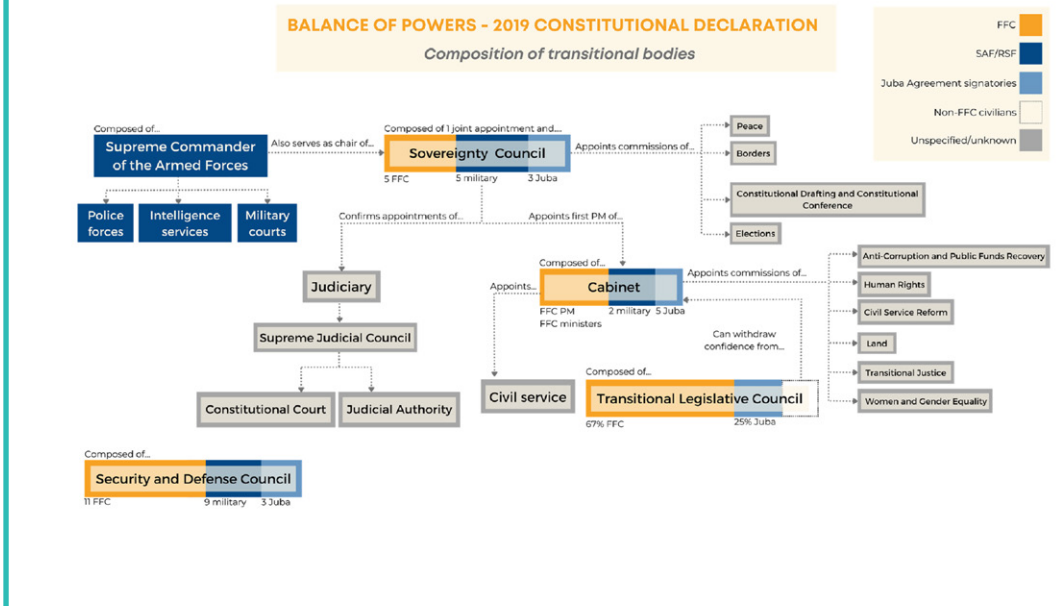
The Judicial Authority was designed to preside over all judicial functions other than those that had been allocated to the Constitutional Court. The 2019 Constitutional Declaration offers very little detail on the Judicial Authority but provides it with broad jurisdiction 'to adjudicate disputes and issue rulings in accordance with the law' (article 29). As in the 2005 Interim Constitution, the President of the Judicial Authority would also be Chief Justice of the Supreme Court (article 29).

Finally, the 2019 Constitutional Declaration designed the Constitutional Court to be an independent, separate body with jurisdiction over matters concerning the constitutionality of laws, the protection of rights and freedoms, and the adjudication of constitutional disputes (including regarding the 2020 Juba Agreement). Article 20 also allows anyone to bring a challenge before the Court if they were 'harmed by the actions of the Sovereignty Council or Cabinet' relating to 'any infringement of the constitutional order or constitutional freedoms, protections or rights'. This implies that the rights outlined in the Declaration would be directly enforceable before the Court. The rest of the Constitutional Court's powers were left to ordinary law (article 31).

At the time of writing, only the Supreme Court of the Judicial Authority has been established. The Supreme Judicial Council and, crucially for this analysis, the Constitutional Court have remained unformed. As such, there has been no formal adjudicator of disputes

unformed. As such, there has been no formal adjudicator of disputes between the transitional bodies for the entirety of the transitional period.

Figure 1. Balance of powers in the 2019 Constitutional Declaration



1.3. THE 2020 JUBA AGREEMENT FOR PEACE IN SUDAN

The 2020 Juba Agreement for Peace in Sudan (the Juba Agreement) is a 245-page peace agreement signed between the transitional government and a series of armed groups on 3 October 2020. The first part of the agreement, the 'Agreement on National Issues', is (as its name suggests) a nationwide agreement between the transitional government and all the signatories on issues of national importance. The remainder of the peace agreement is an aggregation of various bilateral agreements between the transitional government and each party, namely, a coalition of armed groups in Darfur (the Darfur Track), the SPLM-N faction led by Malik Agar, Masar al-Sharq, Masar al-Shamal, Masar al-Wasat and Al-Jabaha al-Thalitha-Tamazaj.

The Juba Agreement stands as a significant moment in the peace process during the transitional period.

The Juba Agreement stands as a significant moment in the peace process during the transitional period. For some, it was proof that the transitional government could deliver on its promises to finally bring peace to Sudan. For others, the military's domination of the process rang an early alarm bell regarding its ambitions to co-opt the transitional period to fulfil its own ambitions. While its actual terms have been well documented elsewhere (Al-Ali 2021), the following section explores its impact on the other legal and political arrangements in the constitutional framework.

The legal status of the Juba Agreement

There is a live debate on the legal status of the Juba Agreement itself. While the Agreement on National Issues is binding on the transitional process at large, it is agreed that the individual track agreements are only binding on the signatories to those agreements. However, some parties to those individual agreements have appeared to maintain in later statements that their track agreements also constrained the entire process. And some provisions of those bilateral agreements appear to make decisions about the structure and composition of government that have national implications. As such, the very nature of the Juba Agreement remains unsettled.

Stating that the 2019 Constitutional Declaration should be amended to comply with the provisions of the Juba Agreement de facto places the Agreement above the Declaration in the hierarchy of laws.

The Juba Agreement in the hierarchy of laws

The Agreement on National Issues also states that, not only is it binding on the transitional process, but, in the event of a conflict between the Agreement and the 2019 Constitutional Declaration, the Declaration should be amended to comply with the Agreement's terms (article 21.2). This provision has enormous significance on the legal framework of the transition, and it complicates the understanding of what exactly the 2019 Constitutional Declaration is. Stating that the 2019 Constitutional Declaration should be amended to comply with the provisions of the Juba Agreement de facto places the Agreement above the Declaration in the hierarchy of laws. This provision directly conflicts with the idea that, as the country's transitional constitution, the 2019 Constitutional Declaration is the supreme law of the land.

The Juba Agreement's impact on the political arrangements

On 2 November 2020, the Declaration was amended to include the Juba Agreement as an annex and incorporate its substantive

provisions as amendments, including the provision that the Juba Agreement would prevail in a conflict with the 2019 Constitutional Declaration. The substantive portions of the 2019 Constitutional Declaration that were amended to comply with the Juba Agreement include:

1. Expansion of the Sovereignty Council by three members (article 4.1). The 2019 Constitutional Declaration now states that the three new members would be chosen by the Juba Agreement signatories, with those parties allowed to replace the members as well (article 11).
2. Giving the Juba Agreement signatories five ministries in the Transitional Cabinet, or 25 per cent of the Cabinet (article 5.1). The amended 2019 Constitutional Declaration also states that both the FFC and the parties to the Juba Agreement would now be responsible for putting forward a list of Cabinet minister nominations, to be selected by the Prime Minister. However, no other party besides the military would be able to put forward a nominee list for the Ministers of the Interior and Defence.
3. Giving the Juba Agreement signatories 25 per cent representation in the TLC, or 75 out of 300 seats (article 6.1); and
4. Creation of the Council of Transitional Partners (article 80). The text of the article states that the Council should serve as: (a) a deliberating forum that includes the Juba Agreement signatories; and (b) the main body that would resolve all disagreements between the main stakeholders and ensure the success of the transitional period. However, implementation of the provision was stalled due to popular outrage, which largely saw the body's establishment as an attempt to supplant the yet-to-be-formed TLC. As such, the Council met only once, and it wielded little authority or influence in practice.

It is clear that the Juba Agreement served in part to bring more parties into the process, but at a more pragmatic level what the Agreement achieved was an expansion of the proverbial pie. The power-sharing arrangement between the FFC and the military was then enlarged to grant 25 per cent of that power to a proportion of Sudan's armed groups. Whether that expansion has come at the expense of the FFC or the military through a dilution of their influence on these transitional bodies has been a subject of debate that

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The Juba Agreement placed, in the words of one expert, 'the people with the guns at the top of the political arrangements'.

remains outside the scope of this paper. However, what is undeniable is that the Juba Agreement placed, in the words of one expert, 'the people with the guns at the top of the political arrangements', without necessarily considering who and how many people they actually represented.

Chapter 2

THE IMPACT OF THE 2019 CONSTITUTIONAL DECLARATION ON THE TRANSITIONAL PERIOD

External observers and members of the transitional government have both attributed the coup's origins to a variety of sources, many of which have very little to do with the constitutional framework under the 2019 Constitutional Declaration. They include: the increasingly sharp scrutiny on the full extent of the military's corruption and vast commercial holdings; continued pressure by the FFC to give oversight of military institutions, such as the police, to civilian authorities; and the growing strength of calls to hand over former President al-Bashir to the International Criminal Court (ICC) and to investigate the 3 June 2019 massacre against the sit-in movement. All of this would have undermined the military's financial, military and political authority, and thus increased the feeling of urgency to take control. Many are sceptical that the military ever had any interest in civilian rule, and rather used the transition as a way to stop the protests and consolidate power after the FFC lost the momentum of the streets (and thus its negotiating leverage; see Davies and Oyolu 2020). Those who hold this belief suggest that the military used its position to deliberately sabotage the transitional government, although evidence of such malfeasance will likely remain purely circumstantial.

However, there is wide recognition that many of the root causes of the political gridlock, economic crisis and slow progress towards the goals of the transition can be found in the 2019 Constitutional Declaration and the political arrangements it establishes. Under this argument, the Declaration may have only indirectly led to the military's coup, but it contributed directly and significantly to the conditions that allowed the coup to occur. It placed two unreliable and antagonistic parties at the head of government; created

Many of the root causes of the political gridlock, economic crisis and slow progress towards the goals of the transition can be found in the 2019 Constitutional Declaration and the political arrangements it establishes.

a fragile and ungainly system that falsely assumed those two parties could cooperate and govern together in good faith; and it gave those parties a mandate that was too vague and broad to be successfully implemented given the resources of the state and nature of the parties charged with carrying it out. Specifically, the 2019 Constitutional Declaration's primary structural weaknesses were:

1. The choice of and treatment of the parties to the transitional government was flawed in various ways, including:
 - the incorrect assumption that the FFC and military could effectively govern together in a power-sharing executive;
 - the retention of the military at the centre of government, allowing its leadership to stall progress on security sector reform, the dismantling of the kleptocratic networks under the previous regime, and transitional justice priorities, such as the transfer of al-Bashir to the ICC and the investigation of the 3 June 2019 massacre; and
 - the treatment of the FFC as a coherent and popularly legitimate political party capable of effectively and efficiently governing.
2. Fragile political arrangements enabled the aggrandizement of military power, including:
 - the failure to give the Transitional Cabinet enough mechanisms to keep the military component of the Sovereignty Council from hijacking the process;
 - an incorrect assumption that the TLC could be established in a timely manner; and
 - the dismantling of the state's dispute resolution mechanisms without including a realistic plan to establish a replacement.
3. An unrealistically ambitious implementation process included little sequencing of the government's core priorities and an overly broad mandate.

The sum total of these structural weaknesses was stalled progress on urgent economic reforms, rising tension between the FFC and military leadership and the eventual breakdown of their relationship.

The sum total of these structural weaknesses was stalled progress on urgent economic reforms, rising tension between the FFC and military leadership and the eventual breakdown of their relationship, political gridlock and competition for political power, and frustration and loss of confidence in the transition, along with continued and

worsening suffering by the poorest in Sudan who desperately needed relief. These conditions provided the military with a pretext for the necessity of a coup, and were likely to have been the basis for the military leadership's flawed assumption that the international community and Sudanese people would tolerate, if not welcome, the takeover.

At the same time, it is unclear whether any other viable arrangement would have been possible, given the constraints and political realities of the context in which the 2019 Constitutional Declaration was negotiated. By the time negotiations began in the summer of 2019, both the FFC and the military had proven incapable of unilaterally defeating the other. Sustained protests by the FFC had not produced the military's capitulation, and violent crackdowns by the military had only hardened the resolve of the protesters. There was little chance that the FFC could have forced the military to step aside from a role in government entirely—although some believe that the military would have accepted a narrower portfolio had the FFC refused to come to the table for a few weeks longer. Moreover, the negotiators were under immense pressure to reach a deal, both from the protesters in the streets and from the international community and mediators involved. Drafts of the Political Agreement and Constitutional Declaration changed dramatically by the day, as the negotiators raced to flesh out arrangements in greater detail. Those who provided assistance to the negotiations believed that this pressure—both internally from within Sudan and externally—in part led the FFC to accept a premature deal, the ambiguities and contradictions of which were later exploited by the military and could have been resolved given more time.

Finally, although the FFC negotiators were wary about the military's willingness to hand over power, there was a sentiment among many that the military would act broadly in line with the terms of the Declaration. This was enabled by a lack of information about the full extent of the military leadership's personal implication in the state's corruption and violence in regions such as Darfur. This might explain, in part, the lack of checks and accountability mechanisms on bodies such as the Sovereignty Council.

By the time negotiations began in the summer of 2019, both the FFC and the military had proven incapable of unilaterally defeating the other.

The following subsections expand on each of the weaknesses named above.

2.1. THE CHOICE OF AND TREATMENT OF PARTIES INCLUDED IN THE 2019 CONSTITUTIONAL DECLARATION

At its heart, the 2019 Constitutional Declaration is a power-sharing deal between the military and the FFC. This arrangement defines the composition of bodies such as the Sovereignty Council and Transitional Cabinet; it anchors the power to transform the state's future political arrangements in these two parties—the military and the FFC—and it is through them that critical tasks, such as achieving peace with the armed groups throughout the country, are meant to be achieved.

Such an arrangement assumes that the parties at its helm will be capable of negotiating, cooperating and making concessions in good faith with each other.

Such an arrangement assumes that the parties at its helm will be capable of negotiating, cooperating and making concessions in good faith with each other. As just one example, the 11th member of the Sovereignty Council is chosen by both parties, and decisions must be made by consensus or two-thirds vote, requiring participation from both sides (article 11(3)). The Transitional Cabinet will also be partially composed of ministers from the FFC and the military, with the latter choosing the nominee list for the Ministers of Interior and Defence. Together, the two bodies are jointly and/or individually tasked with executing the priorities of the transitional government, which include establishing the remaining transitional bodies, designing and implementing the constitution-drafting process, executing government policies, running the peace process, reforming the state security apparatus, prosecuting former regime members, and other objectives. While in the most ideal scenario this structure incentivizes cooperation by essentially requiring it, it also creates a significant risk of gridlock.

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Comparative experience is replete with such cautionary tales. Libya's 2011 National Transitional Council, composed of former officials, activists and military leaders, quickly became bogged down in political jockeying between various stakeholders (Gritten 2011). The infighting led to delays in the transition, a decrease in public

confidence and a spiralling economic and security crisis. By 2014, the transitional government had split into two factions, each with their own armed militias, and violence eventually escalated into a multi-sided civil war that has yet to be comprehensively resolved (Rowan 2019). In Cambodia, infighting between the two prime ministers in 1993 practically paralysed the shared government for four years. In 1997, a coup overthrew the gridlocked government, ending the transition (Papagianni 2008).

Sudan's transitional government seems to have failed in areas where other power-sharing transitional governments also commonly have: an unwillingness to make necessary compromises, irreconcilably diverging interests, and too much emphasis on the advancement of individual agendas at the expense of the transition's goals—all these have stymied progress, increased frustration among Sudanese citizens about the lack of movement on key issues such as transitional justice and the economy, and given the military a pretext to launch the coup on 25 October.

Of course, this gridlock is not entirely due to the parties themselves. The potential for such stalemate was exacerbated by an overly broad and poorly sequenced mandate (see Section 2.3), limited financial and organizational resources, external regional and international pressure from actors with their own agendas, and others—all of which made the task of governing for any transitional government much more difficult. However, it is undeniable that one of the biggest reasons for the gridlock was the two parties that the Declaration put at the helm of the transitional government. Independently, they were too ill equipped or ill intentioned to achieve the sweeping tasks of the transitional period, and together they were even less suited to govern and negotiate effectively. Assuming that they would work together without including clear divisions of power, properly established mechanisms to hold the other accountable, and a workable mandate and sequence of priorities was a significant weakness of the 2019 Constitutional Declaration.

2.1.1. The military

Many have referred to the retention of the military at the centre of government as a 'fatal flaw' of the 2019 Constitutional Declaration. Among others, the 2019 Constitutional Declaration gave the military

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equal representation on the Sovereignty Council and chairpersonship of the body for 21 months (article 10). The military is allowed to select the nomination list for the Transitional Cabinet posts of Ministers of Defence and Interior (article 14(1)). It nominates the replacements for its own vacancies on the Sovereignty Council. And perhaps most crucially, the Declaration also gave the military the task of reforming its own bodies (article 7(12)) and retained military oversight over the SAF and Rapid Support Forces (RSF) (articles 34–6).

This arrangement was perhaps the result of a seemingly necessary compromise between the FFC and the military at the time of the 2019 Constitutional Declaration's negotiation. However, to many Sudanese experts advising on the process, putting the military at the helm of the Sovereignty Council and other bodies and positions was likely to impede, if not entirely undermine, the achievement of transitional tasks—such as security sector reform, the dismantling of the kleptocratic networks that sustained Bashir's regime, and the prosecution of regime officials for crimes committed in Darfur and around the country, as all of these directly implicated the military's political, financial and security interests.

There was little in the Declaration or other constitutionalized documents that established any incentive—positive or negative—for the military to reform its own structures, give up its vast financial holdings to the state, and then hand over power to a civilian leadership.

What's more, there was little in the Declaration or other constitutionalized documents that established any incentive—positive or negative—for the military to reform its own structures, give up its vast financial holdings to the state, and then hand over power to a civilian leadership that had clearly demonstrated a desire to prosecute officials from the previous regime. There were informal discussions at the time of the Constitutional Declaration's drafting about including provisions on a general amnesty, but they were ultimately excluded because it was expected that the protesters would flatly reject any deal that would seemingly violate one of the main tenets of the revolution: justice for the 3 June massacre specifically, but also for decades of state-sponsored violence against Sudanese citizens in Darfur and across the country. It is also unclear whether assurances like a general amnesty would have been enough for the military to hand full control of the government to civilian leadership.

Whatever the reasons and the merit of placing the military in such a dominant position in the transitional government, with little incentive to abandon it to civilian control, the dynamic that the Declaration established was one of the ‘fox guarding the henhouse’, with every reason for the fox to act according to its nature. This was precisely what occurred. Acting through the Sovereignty Council and enabled by ambiguities in the 2019 Constitutional Declaration and the relative weakness of the FFC, the military was able to strengthen its economic position while doing virtually nothing to reform its own structures.

Security sector reform

The 2019 Constitutional Declaration only briefly mentions the need for reform of the military and security services, and it expressly gave the military the task of doing this. To experts observing and advising on this process, such an arrangement was alarming. The Declaration also left decisions about civilian oversight of the police force and the much-feared intelligence services (both traditionally portfolios of civilian governments) to a later date, allowing the military to subsequently insist, successfully, that it retain control over those bodies.

Moreover, the lack of detail in the Declaration on the actual protocols and modalities of reform gave the military little direction on what ‘security sector reform’ should actually look like in practice (even if there had been the political will to do so). Such little detail also meant that the civilian leadership had few ways to assess whether the military was adhering to its obligations on an issue that is notoriously costly, logistically burdensome and difficult to evaluate. Such careful planning and accountability is all the more important in resource-poor and politically polarized environments such as Sudan, where the military is one of the strongest political and economic forces in the country. As a result, by the time of the 25 October coup, the military’s organizational structures, priorities, culture and leadership remained largely unchanged, with the civilian leadership unable to compel them to act otherwise.

Economic reform

Another pillar of the transitional government’s priorities was economic reform and the dismantling of the vast network of

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corruption and kleptocracy that had sustained the Bashir regime. Like security sector reform, cooperation by the military was essential to achieving that goal. Military and security spending consumed an estimated 60–70 per cent of the state's budget, by some figures (Gallopín 2020). However, as with security sector reform, the Declaration included very few incentives for the military to cooperate in its own financial dismantling, and few points of leverage for the civilian leadership to make them do so.

Most of the mechanisms for economic reform were anchored in the establishment of commissions dedicated to revealing the full extent of the corruption under the previous regime, reclaiming assets and holdings that had so far evaded state scrutiny or jurisdiction, and prosecuting or purging those who had engaged in such malfeasance. The flagship body was the Empowerment Removal Committee, colloquially called *tamkeen*, tasked primarily with reclaiming and reintegrating the vast assets in the regime's holding companies back into the national economy.

The Empowerment Removal Committee has not been able to actually penetrate and reorganize those financial networks at a fundamental level, mostly due to the little leverage the 2019 Constitutional Declaration gave to the civilian leadership.

Along with these bodies and the work of civil society groups, the Empowerment Removal Committee had some success during the transition. By one estimate, it evaluated the financial malfeasance of 109 ambassadors and others in the Ministry of Foreign Affairs, 651 employees of different civil institutions, and 98 legal advisors in the Ministry of Justice and other institutions (Ahmed 2021). And it threw more light onto the vast web of the military's financial interests and the extent of its dominance in the Sudanese economy. Through its efforts and other previous investigations, it is now known that the SAF's Defence Industrial System, its defence manufacturer, owned over 200 companies in May 2020 with annual revenues of USD 2 billion. For its part, the RSF is estimated to have over 50 companies under its control with unknown revenues, although it gave USD 1 billion to the Bank of Sudan to support essential imports in 2019, giving a sense of the expanse of its wealth in a country with an annual GDP of USD 26 billion (Baldo and Mailey 2021). When pressed on the issue, al-Burhan has suggested that few if any of the SAF's or RSF's companies have been paying taxes to the state (Sayigh 2021).

These information-gathering efforts are certainly an achievement. However, the Empowerment Removal Committee has not been

able to actually penetrate and reorganize those financial networks at a fundamental level, mostly due to the little leverage the 2019 Constitutional Declaration gave to the civilian leadership. None of the military leaders of the Sovereignty Council have disclosed the full extent of their assets, as required under article 18(1) of the Declaration, and they have presumably continued to undertake other financial activities beyond their public duties in violation of article 18(2). Importantly, the Declaration offers no redress for such violations. When asked by the civilian Treasury Minister, the military has simply refused to disclose its financial assets or turn them over to the state. Prime Minister Hamdok has stated that 82 per cent of the military-controlled companies remained 'outside the jurisdiction' of the Finance Ministry, which could account for only 18 per cent of its revenue (Sayigh 2021). He named this lack of control as one of the reasons for the slow economic recovery. In response, al-Burhan accused Hamdok of blaming the military for the FFC's failures.

With now no mechanism for civilian oversight to continue, and the future of the 2019 Constitutional Declaration in doubt, it is not clear what progress can be made on the reclamation and reintegration of regime assets in the short term. However, what is clear is that the Declaration failed to adequately give the civilian leadership:

- clear ownership over these processes, leaving space for the military to stall progress;
- enough tools to hold the military accountable to its obligations;
- clear protocols and mechanisms for implementation of these priorities, which could have been used to identify where the military was failing to act; and
- compelling positive or negative incentives for the military to cooperate.

These failures allowed the military to amass more wealth in the voids left by purged regime officials, and do nothing to change their military and security structures. As such, by the time of the coup on 25 October 2021, the military was arguably in a stronger economic position than it had been in August 2019.

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After the 2019 Constitutional Declaration's signing, the FFC fractured under the demands of the transitional period and failed to act decisively and efficiently in the face of urgent and complex crises.

2.1.2. The Forces for Freedom and Change

In addition to assuming that the military would act in good faith (and against its interests), the 2019 Constitutional Declaration's power-sharing arrangement incorrectly assumed that the Forces for Freedom and Change (FFC) would be capable of negotiating and making decisions as a cohesive bloc. In reality, this has not proven to be true either. After the 2019 Constitutional Declaration's signing, the FFC fractured under the demands of the transitional period and failed to act decisively and efficiently in the face of urgent and complex crises. That failure slowed down the gears of government, enabled the dominance of the military over the transitional period, and further alienated Sudanese citizens from the process, who became frustrated with the body that was supposed to most represent their interests in the power-sharing deal.

The FFC is a relatively new player on Sudan's political stage. Officially formed on 1 January 2019 by prominent groups in Sudanese society—including the Sudanese Professional Association (SPA), as well as political parties, civil society organizations, and armed groups of varying influence—the FFC is a loosely organized umbrella group formed out of necessity during the revolution. Its organizing charter establishing the coalition gives little detail about how the group would be formed or run, offering only a list of priorities, including the immediate end of al-Bashir's regime and the formation of a national transitional government.

The FFC eventually organized itself into defined pillars—one for the SPA and trade unions, one for civil society groups, one for armed groups, and so on—with each pillar given one vote on a central committee. Some in the FFC like the armed groups were angered at their collective influence being relegated to just one vote on the central committee, but time did not allow for renegotiation or maturation of those arrangements. Just several months after its formation, when the TMC offered to negotiate a power-sharing arrangement, the FFC was vaulted into the highest levels of government while possessing an infrastructure that was more suited to organizing protests than the complex and technical work of rebuilding a state. Observers note that there was little if any time to carefully think about how to reorganize the FFC coalition into an actual governing structure, with defined levels of leadership, clear

roles distributed to each, viable decision-making mechanisms, clear communication channels, and other protocols for ensuring inclusivity among a membership that at one point exceeded 30 groups.

Thus, the FFC assumed leadership in the transitional government stuck with its existing skeletal organizational structure. This had several consequences:

1. It delayed the implementation of the core priorities of the transition. For example, the FFC was never able to agree on the membership of the 201 seats it was allocated in the TLC, delaying its establishment and leaving the Sovereignty Council and Transitional Cabinet to legislate jointly in its absence.
2. It impeded the FFC's ability to act efficiently in response to urgent crises. This was exacerbated by the fact that, since Prime Minister Hamdok had no electoral mandate, there was enormous pressure to reach consensus on each issue before taking a decision. As one example, in late 2019 Prime Minister Hamdok sought to liberalize the exchange rate to qualify for urgently needed debt relief and international aid by the International Monetary Fund (IMF) and other institutions (Lewis and Eltahir 2021). He and others initially sought to devalue the Sudanese pound (SDG) and merge the official rate (SDG 55 to USD 1) with the black-market rate (around SDG 267 to USD 1 at that time) (Galopin 2020). However, because the deliberation process took months to reach consensus, by the time the government instructed Sudan's Central Bank to merge the official and black market rates in February 2021, the latter had skyrocketed to SDG 350–400 to USD 1 (Abdelaziz 2021), giving Sudan one of the highest rates of inflation in the world.
3. It weakened the FFC's negotiating position as a counterweight to the military. Many have cited the gap between the FFC and the military's capacity to negotiate as a cohesive bloc as a primary reason why the military was able to act without consequence when it undermined or outright violated the 2019 Constitutional Declaration. Faced with a military that had, by its nature and training, a cohesive and well-defined hierarchy, clear priorities and the resources to implement its objectives, the FFC component of the transitional government was time and again left without the organizational strength it needed to stop the military from

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encroaching on key competencies belonging to the civilian leadership. For example, they were unable to stop the Sovereignty Council from seizing ministerial portfolios clearly belonging to the Transitional Cabinet, from dominating the peace process, from obstructing financial sector reform, and other actions.

4. It contributed to the ultimate fracturing and further weakening of the FFC. Wracked with political infighting, painfully slow decision-making processes, and poor communication channels that left FFC members feeling marginalized and excluded, the FFC began to show signs of fracturing early in the transitional period. The group finally split in 2020, when in July the SPA officially left the FFC and in November the Sudanese Communist Party (SCP) followed suit, depriving it of two prominent members. Since that date, the FFC has split and shed members claiming to represent other, more 'legitimate' versions of the FFC. Attempts to reunify the FFC failed to include previous members like the SCP (Dabanga 2021), and large factions remained outside the original coalition up to the time of the 25 October coup.
5. It undermined confidence in the process among Sudanese citizens. Perhaps unsurprisingly, the above effects angered Sudanese citizens who were suffering from the economic liberalization's short-term effects and were frustrated with the lack of progress on issues such as the investigation of the 3 June 2019 massacre. Reliable opinion polling is difficult to find in Sudan, but a poll of youth conducted by the Carter Center found that, by August 2021, 65 per cent of respondents in Khartoum were dissatisfied with the performance of the transitional government (this opinion was generally found more widely in rural areas) (Carter Center 2021).

Many of the challenges the transition faced, from political gridlock to slow economic recovery, stem from the fact that the Declaration treated the FFC not as the loose coalition that it was, but as a cohesive and well-organized political bloc—which it never had time to become.

In sum, many of the challenges the transition faced, from political gridlock to slow economic recovery, stem from the fact that the Declaration treated the FFC not as the loose coalition that it was, but as a cohesive and well-organized political bloc—which it never had time to become. Observers and advisors to the process are split on what should have been done to avoid such a result. Some posit that, had the 2019 Constitutional Declaration given the FFC more authority and leverage to shape the transition, such as a greater percentage of seats in the Sovereignty Council or oversight of the military bodies, the higher stakes might have forced the FFC members to overcome

their individual differences and work collectively. Others suggest that only including the FFC as the civilian representative was the source of the problem, and that including a broader range of stakeholders—especially in a way that reflected Sudan’s existing federal system—would have produced a better outcome.

It is telling that, as the protests against the 25 October coup have continued, neighbourhood committees and other FFC components are reportedly using the moment to clarify and streamline their decision-making mechanisms, methods of communication and other organizational structures. This is a positive and urgently needed step that must be prioritized and implemented. Such work will strengthen the civilian opposition’s ability to make and implement decisions effectively, putting them on a more solid footing from which to engage with their constituencies and negotiate with other groups, such as the military, in the future.

2.2. THE CHOICE OF POLITICAL ARRANGEMENTS

The second set of structural features that had an impact on the transitional period were the actual political arrangements that the Constitutional Declaration established, and specifically the system of government, which included the Sovereignty Council, the Transitional Cabinet, the TLC (not yet established) and the judiciary (partially established).

2.2.1. The Sovereignty Council and Transitional Cabinet

Under the 2019 Constitutional Declaration, the Sovereignty Council was designed merely to be a symbolic head of state with nominal powers and a roughly equal split of civilian and military officials. The civilian leadership in the Transitional Cabinet, by contrast, was designed to assume the day-to-day role of governing. However, by the time of the coup on 25 October 2021, the Sovereignty Council had become the most powerful executive body in the transitional government, assuming many of the Cabinet’s competencies, demanding the Cabinet could not act without its approval, and marginalizing the civilian members on the Sovereignty Council itself. In two years, the balance of power in these two bodies had flipped from civilian control to military dominance, placing the authority

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over the transitional period in the hands of leaders who were often opposed to its most fundamental priorities of political, economic, military and financial transformation.

As a result, the Sovereignty Council became a perch from which the military could stall implementation of parts of the transition that threatened its interests, and a source of legitimacy from which it could ultimately derive its justification to seize control of the transition on 25 October. For example, at one point the Sovereignty Council began to demand that important Cabinet decisions be sent to it for approval—even though nothing in the 2019 Constitutional Declaration required such a process—and Prime Minister Hamdok capitulated to these demands anyway. As a result, when the Cabinet voted on important issues such as sending former President al-Bashir to the ICC for trial, it sent that decision up to the Sovereignty Council for approval, but no further action was taken. In the months before the 25 October coup, the military decided not to hold Sovereignty Council meetings anymore at all, halting both its and the Cabinet's work.

The actual system of government that the 2019 Constitutional Declaration established also often presented the military with the opportunity to recentre power in the Sovereignty Council and away from the Transitional Cabinet.

This dynamic in part resulted from the natural course of the transition's chaos. However, the actual system of government that the 2019 Constitutional Declaration established also often presented the military with the opportunity to recentre power in the Sovereignty Council and away from the Transitional Cabinet. The structures that enabled this consolidation of power—both those that existed and, crucially, those that did not—include:

1. The sequencing of the establishment of each body. By the terms of the Declaration, the Sovereignty Council had broad authority to shape the composition of the Cabinet, necessitating that the former be established before the latter. The result was that, as the Cabinet suffered from delays in finalizing appointments and then organizing its activities, the Sovereignty Council assumed many of its duties in the interim. It then proved reluctant (and, in some cases, unwilling) to fully transfer those powers to the Cabinet when it was finally established.
2. The lack of ability for the Transitional Cabinet or any other body to dissolve the Sovereignty Council or remove its membership. Article 13 of the 2019 Constitutional Declaration states that

Sovereignty Council members can only lose their membership through resignation, illness that prevents the completion of duties, conviction of certain crimes, death, or loss of one of the conditions for membership. The effect of this decision was to grant Sovereignty Council members essentially lifetime appointments, with no ability to hold them accountable for unconstitutional actions or other acts of malfeasance through affirmative removal. Moreover, the process for amending the constitution to impose such checks was interpreted by the Ministry of Justice to fall within the Sovereignty Council and Cabinet's interim legislative powers, inhibiting any chance of reform. One expert also noted that such lack of accountability also created a perverse incentive for some (but not all) of the civilian members of the Sovereignty Council to remain quiet when they disagreed with Sovereignty Council action. If they refused to take the risk to voice dissent against a fearsome military force that had terrorized them and their families for decades under the previous regime, there was no punitive action and nothing to hold them to account.

3. The absence of any rules or regulations governing the Sovereignty Council that could have constrained the military's domination over it. Almost immediately after the beginning of the transitional period, the military began to make decisions in its own favour about the composition and internal functions of the Sovereignty Council. For example, without warning—and with no provision for such a position in the 2019 Constitutional Declaration—RSF leader Hemedti appointed himself Deputy Chairman over the Sovereignty Council, giving him a powerful role in the body. Clearer internal regulations on the functioning of the Sovereignty Council that empowered the civilian component—such as a requirement to publish meeting notes, more egalitarian rules around calling meetings, rules on appointing a deputy and so on—could have provided a procedural counterweight against such actions.
4. Ambiguities in the Declaration regarding the division of power. The Declaration specifies a division of powers between the two bodies, but significant ambiguities remain. For example, under the Sovereignty Council's enumerated competencies it is allowed to 'sponsor the peace process with armed movements' (article 11(1)(p)), while the Transitional Cabinet is tasked with 'work[ing] to stop wars and conflicts and build peace' (article 15(2)). Both provisions

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on their own are vague, but together they set up a potential power struggle between the two bodies over who should bring the peace process forward. That ambiguity, and many others, were readily exploited by the military. Regarding the peace process specifically, as the FFC-led Transitional Cabinet struggled to establish the Peace Commission, al-Burhan and Hemedti established their own peace council that eventually dominated the process and served as the main focal point for negotiating with the armed group signatories to the Juba Agreement. Such action not only sidelined the Transitional Cabinet and the civilian leadership, but it allowed the military to craft a deal with the armed groups that was heavily criticized for diluting the FFC's influence in the transitional government and speaking only vaguely about security sector reform and transitional justice.

5. Other examples abound. For example, it was not clear exactly in the Declaration what role the Sovereignty Council should have in foreign affairs. While many interpreted the Declaration to only give the Sovereignty Council chairperson the power to engage in perfunctory diplomatic visits, Chairman al-Burhan began to aggressively build relationships with heads of state abroad, sidelining Prime Minister Hamdok in the process. For example, despite Hamdok's objections, al-Burhan became the primary point of contact with regional powers such as Egypt, Russia, Saudi Arabia and the United Arab Emirates. Tellingly, the Russian Government reportedly did not once confer with Hamdok while brokering an agreement to build a Russian base in Sudan. And in a similar case, Sudan's agreement with Israel signed on 23 October 2020 was almost solely negotiated and then signed by al-Burhan.

This dynamic occurred over and over again, where the military filled ambiguities and gaps in provisions with their own authority.

This dynamic occurred over and over again, where the military filled ambiguities and gaps in provisions with their own authority. However, there were also instances in which the military openly seized power that clearly belonged to the Cabinet under the 2019 Constitutional Declaration. For example, al-Burhan's unilateral declaration of a state of emergency during the 25 October 2021 coup clearly violated the 2019 Constitutional Declaration, which demands that such a declaration must come on the recommendation of the Cabinet, with later approval by the TLC within 15 days of its issuance (article 39). In another case, al-Burhan announced quickly after the commencement of the transition that the Sovereignty Council was taking control of

Cabinet portfolios such as the civil aviation regulatory body and the Telecommunications and Post Regulatory Authority, the regulatory body that controls telecommunications in Sudan. Despite protests by Hamdok and other civilian leaders, the portfolio shuffle stood.

Thus, as far as its impact on the larger process is concerned, the military's use of the Sovereignty Council gave it a legitimacy both domestically and abroad, a powerful platform to advance its own interests and stall the goals of the transition (which it could later point to as a reason for the 25 October coup), and an institutional perch from which it could ultimately launch a takeover.

2.2.2. The Transitional Legislative Council

There is little to say about the influence of the Transitional Legislative Council (TLC) on the transitional period, seeing that it has never been established. However, what is relevant to this paper is that, during the negotiation of the 2019 Constitutional Declaration, many at the highest levels of the FFC and the military recognized that the TLC would probably not be formed within the 90-day deadline, if ever. There was a sense that the FFC would not be capable of agreeing who to nominate to the 300-member body, and that creating a body whose purpose was in part to check the Sovereignty Council and Cabinet was not in any party's immediate interest.

As such, it is curious that the TLC's legislative powers are broadly conferred in the interim to the Sovereignty Council and Transitional Cabinet acting jointly through consensus or two-thirds vote, the primary targets of the TLC's oversight authority. The consequences on the transitional government's system of checks of balances are self-evident—and presumably were to the parties who decided on such a provision as well.

To observers and former advisors, the failure of the TLC's establishment stands as a dual lesson demonstrating: (a) the consequences of overly ambitious goalsetting at the expense of creating a viable system of checks and balances; and (b) the perils of asking those in power to set up the mechanisms that would check their power, without the proper incentives or pressure to do so. Some observers suggest that, if the parties had considered with clear eyes and good faith that the TLC in its proposed form was unlikely ever

Although the Sovereignty Council was designed as a largely symbolic head of state, it became the most important and powerful governing body in the transition, dominated entirely by the military. Moreover, there was very little in the 2019 Constitutional Declaration that allowed the civilian leadership to stop it.

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The lack of a Constitutional Court to serve as a judicial arbiter on the constitutionality of the transitional government's actions—and the absence of a provision for who shall take on that role before it is established—severely undermined the process.

to be established, then a rethinking of the system of checks and balances could have been conducted. Or, as an alternative, a less ambitious legislative body could have been designed.

2.2.3. The judiciary

The judicial branch unfortunately met much of the same fate as the TLC. The 2019 Constitutional Declaration replaced the entirety of the judiciary under the 2005 Interim Constitution with a new Supreme Judicial Council (a replacement of the National Judicial Service Commission), Judicial Authority and Constitutional Court. However, at the time of the 25 October coup, the Supreme Judicial Council and Constitutional Court remained unformed. Only the Supreme Court of the Judicial Authority has been established at the time of writing.

The lack of a Constitutional Court to serve as a judicial arbiter on the constitutionality of the transitional government's actions—and the absence of a provision for who shall take on that role before it is established—severely undermined the process. Its absence further enabled the military's encroachment on the executive authority of the Transitional Cabinet by depriving the civilian leadership of a body in which to seek a declaration of unconstitutionality. It also left the job of constitutional interpretation to the Ministry of Justice, which itself was worn thin by the demands of the transition and was without the authority or legitimacy to act as a binding dispute resolution mechanism. Thus, in the face of what many have called the military's 'soft coup' leading up to the events of 25 October 2021, the civilian leadership was left without redress in the courts, and with only their voices, the power of the streets, and what little political leverage the Declaration granted them.

Many have stated that the parties to the 2019 Constitutional Declaration should never have dismantled the judicial branch without clear protocols for quickly reconstituting it. This might well be the case and might have led to a better outcome, but comparative experience is split on the issue. However, it is undoubtedly clear that tasking the transitional government with rebuilding the judiciary from scratch was beyond its capabilities, given the breadth of its mandate and the demands on its already constrained resources. Moreover, establishing a power-sharing transitional government between two parties who deeply mistrusted each other, and with such ambiguous

divisions of powers between its bodies, without a court to arbitrate disputes had obvious consequences. However, retaining the old system may have come with its own obstacles that any future process must take into account.

2.3. THE SEQUENCING OF THE TRANSITIONAL GOVERNMENT'S MANDATE

Observers and advisors to the 2019 Constitutional Declaration's negotiation expressed concern at the time of its drafting that, with a sprawling mandate that outlined a long list of priorities with little definition of what should take precedence, the transitional government would be left with too much to do and all at the same time. The list of the transitional government's mandate was indeed expansive, including: achieving a 'just and comprehensive peace' with the country's armed groups, establishing and running three branches of government, prosecuting those implicated in the former regime, solving the economic crisis, 'rebuild[ing]' the justice system, designing and implementing a constitution-drafting process, reforming the security sector, dismantling the state's kleptocratic networks (*tamkeen*), and more (article 7). Moreover, most of the priorities listed were not given a level of priority or sequence. The only deadlines that the Declaration established were: (a) to form the TLC no less than 90 days from the date of the Declaration's signature (article 23); (b) to 'work... on completing' a comprehensive agreement during the first six months of the transitional period (article 67); and (c) to transfer the chairpersonship of the Sovereignty Council from a military member to a civilian member 21 months after the start of the transitional period (article 10). There was no detail on how that handover would happen, how the parties planned to ensure that the military was in a confident enough position to make that transition of power, or what should be the civilian component's options for redress if that transition did not occur.

Advisors and participants in the negotiation process have stated that this lack of detail resulted in part from a lack of time, from a secrecy imposed on the process due to fears of drafts leaking to the public, and from an assumption among the parties that later agreements would fill in the gaps created by the 2019 Constitutional Declaration,

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among others. There was a sense among the drafters that key issues, such as security sector reform, transitional justice and others, would be properly sequenced and then implemented in a more inclusive process that also brought the armed groups to the table.

However, while the 2020 Juba Agreement did provide more detail on modalities for security sector reform and the institutions that would be responsible for transitional justice, large gaps remained that further slowed down the work of the transitional government and inflamed tensions between the parties. At the time of the 25 October coup, key institutions and events had not yet been established or organized, including the TLC, the Constitutional Court, the Supreme Judicial Council, the constitutional conference and others.

For the institutions that had been established, their mandates were so sprawling that often bodies tasked with large-scale reform ended up simply creating sub-units that did not know how to work together effectively. And finally, the lack of detail on issues such as the handover of the chairpersonship of the Sovereignty Council allowed the military to delay (eventually indefinitely) the setting of a firm date to transition the chairpersonship seat, to the outrage and alarm of the FFC and other civilian groups.

As stated at length elsewhere in this paper, there are a variety of reasons, both external and internal, for the gridlock that slowed down the implementation of the priorities for the transitional period and undermined the process at large. However, it was obvious that the transitional government's mandate was overly broad and poorly sequenced, and that it would easily overwhelm the resource-strained Transitional Cabinet, especially since many of its ministers had not held high-level posts in the past.

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Chapter 3

THE 2021 POLITICAL FRAMEWORK AND FUTURE OF THE 2019 CONSTITUTIONAL DECLARATION

On 21 November 2021, Prime Minister Hamdok shocked both the international community and the civilian groups protesting across the country by emerging from his detention to sign a Political Framework with the military, rejoin the government as prime minister, and work to form a government of technocrats. Almost every prominent protest group flatly rejected the Framework, and an initially warm international reaction has since cooled. Although protests have continued into 2022, it was widely felt that Hamdok's signing of the Framework gave the coup some much-needed international legitimacy and hampered the momentum of the popular opposition. To date, the 2021 Political Framework's basic legality is contested by most of Sudan's political forces, and many broadly view the agreement itself as void since Hamdok's resignation. Proponents of this argument state that, since Hamdok signed the Framework as a single figure rather than as a representative of a larger constituency, his resignation has also ruptured the Framework and rendered it void. Whatever the outcome of the current crisis, it is unlikely that the civilian opposition will accept a deal with the 2021 Political Framework as the transition's constitutional basis.

However, the rupture of the 2021 Political Framework does little to resolve the question of what exactly is the status and future of the constitutional framework under the 2019 Constitutional Declaration. As at the time of writing, the draft consolidated roadmap by the Khartoum Resistance Committee provides for the Declaration's cancellation and replacement with a new transitional constitution. It then lays out the principles for that transitional government, which includes a civilian-led transitional cabinet, as well as a series of

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national, state and local-level transitional legislative councils. It is not known what this roadmap will look like in its final form, let alone whether the military would ever accept it. However, it appears that the 2019 Constitutional Declaration is now seen by the civilian leadership as a defunct document that requires radical reform, or replacement altogether.

Chapter 4

LESSONS LEARNED

If there is a unifying theme underpinning the structural weaknesses detailed in this paper, it is that the constitutional framework under the 2019 Constitutional Declaration created a power-sharing arrangement that falsely assumed the civilian component could check the military's domination over the process, and that the military would act in good faith to uphold the goals and aspirations of the 2019 Constitutional Declaration. As just a few examples, the 2019 Constitutional Declaration:

1. Ordered the military to hand over its seat of authority, the chairpersonship of the Sovereignty Council, 21 months into the transition without including any incentives to do so or mechanisms for redress should the military refuse;
2. Gave the military the task of reforming its own security sector but did not in turn give the civilian-led Transitional Cabinet oversight power for the SAF, RSF, police or intelligence services, or any other mechanism to encourage the military's compliance with its obligations;
3. Anchored the oversight mechanisms for the Sovereignty Council in the TLC and Constitutional Court, which the parties knew were unlikely to be established in a timely manner, if at all.

Other examples abound, and they are documented throughout this paper.

At the time of writing, the military has still failed to form a government after Hamdok's resignation and is currently acting alone. The biggest hope for a revitalization of the transition and a

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The biggest hope for a revitalization of the transition and a future democratic Sudan lies with the force and sustainability of the protests on the streets, the civilian opposition's ability to transform itself into a consolidated political bloc with a united negotiating position, and the degree of—potentially considerable—pressure that the international community is willing to exert.

future democratic Sudan lies with the force and sustainability of the protests on the streets, the civilian opposition's ability to transform itself into a consolidated political bloc with a united negotiating position, and the degree of—potentially considerable—pressure that the international community is willing to exert. Without those factors, it is feared that the current social unrest will spiral into wider violence, consolidation of state control by the military, or even a dissolution of the state, as seen elsewhere in the region. The military's stated plan to move forward with elections in 2022 is especially concerning, considering that: (a) there is little chance that it would allow such elections to be free and fair without guarantees of its continued dominance in public life; and (b) the negotiation of the constitutional framework to govern such a post-election order could itself lead to gridlock, further division and, potentially, violence. Any of these scenarios imperil Sudan's chances for economic recovery, for a successful resolution of the peace process, and for the future of democracy in the country.

However, the opportunity will undoubtedly arise again when those calling for a civilian-led, democratic Sudan are in a position to dictate the terms of its constitutional framework, be it in the near or long term. In that moment, it is essential that those parties in such a position are armed with a concrete understanding of not only what went wrong in the past, but also what lessons should be learned and implemented in the future. Based on the structural weaknesses explored in this paper, the following lessons are important to include:

The opportunity will undoubtedly arise again when those calling for a civilian-led, democratic Sudan are in a position to dictate the terms of its constitutional framework.

1. Clearly evaluate the power imbalances that favour those not committed to the aspirations of the transitional period and build in mechanisms to hold them accountable to the transition's priorities and goals. Parties should ask themselves: how can those committed to the transition's success be put in a structural position that best allows them to: (a) meet their goals; and (b) keep bad-faith actors from sabotaging it? For example, while the military may not have agreed to fewer seats on the Sovereignty Council in 2019, including specific rules about the Sovereignty Council's functions could have helped the civilian component to offset al-Burhan's dominance of the body. Those rules could have included the ability for any member to call a meeting, the taking and dissemination of meeting minutes to the media, a

requirement to vote on any Cabinet proposals within a certain amount of time, and others.

2. Design ways to share and distribute power that do not require collaboration and concession-making on every issue. Parties should ask themselves: are there ways to meet each stakeholder's interests in participating in the transitional government without setting them up for gridlock? As it stands, in each major political arrangement of the transitional government—the Sovereignty Council, the Cabinet, the TLC—the military and FFC are required to work together. This may have been a necessary compromise. However, some in Sudan have proposed that, instead of power-sharing within each institution, an institution-splitting formula would have avoided some of this gridlock. For example, they posit that the military might have accepted a deal whereby it was given a diminished role in the Sovereignty Council and Cabinet (thus retreating from the traditional realms of civilian control) if the Security and Defence Council was given a more prominent and long-term mandate over issues such as security sector reform.
3. Think realistically about what is within the capabilities of a transitional period, and what contingencies can be built in should certain provisions fail to be implemented. Parties should ask themselves, for each provision: (a) what is likely to happen if it is not implemented; and (b) how can this document minimize the damage of such a consequence? For example, despite the parties' recognition of the obstacles facing the establishment of the TLC, they still decided to anchor the interim legislative authority in the Transitional Cabinet and Sovereignty Council. Doing so only created a perverse incentive on the part of those bodies to continue to delay forming the TLC.
4. Scrutinize what is not included in the draft constitutional framework, and how that may be abused by bad-faith actors. Parties should ask themselves: (a) how does the absence of greater detail on each of these issues leave room for exploitation or abuse by bad-faith actors; and (b) if there is a risk of such abuse, what needs to be included to resolve that lack of detail? For example, the ambiguities in the division of powers between the Sovereignty Council and Transitional Cabinet created an opportunity for the military to encroach upon the Cabinet's portfolio. Clearer specifications of roles and limitations on the Sovereignty Council's mandate might have helped the Cabinet

It is essential that those parties in such a position are armed with a concrete understanding of not only what went wrong in the past, but also what lessons should be learned and implemented in the future.

Parties should ask themselves: are there ways to meet each stakeholder's interests in participating in the transitional government without setting them up for gridlock?

Parties should ask themselves, with each institution of government: (a) is a total transformation necessary to meet the specific goals of the transition; or (b) would a reform be an easier and more efficient alternative?

- push back on this encroachment, or at least decrease the number and intensity of the disputes between the two bodies.
5. Design the process's mandate such that it is tailored narrowly to the specific goals of the transition. Parties should ask themselves: (a) what are the goals of this transition; (b) what is strictly necessary to achieve that goal; and (c) what can be left until after the transition? For instance, a peace process with the armed groups was likely necessary to achieve the goals of Sudan's transition. However, while priorities such as the provision for 'maintaining a natural environment and biodiversity' that is listed in the 2019 Constitutional Declaration as a duty of the government are important, they are unlikely to be fully implemented during the transitional period and might instead simply delay the implementation of the transition's more immediate aims.
 6. Evaluate which institutions or arrangements must be rebuilt from the ground up, and which can be retained or amended to serve the purposes of the transition. Parties should ask themselves, with each institution of government: (a) is a total transformation necessary to meet the specific goals of the transition; or (b) would a reform be an easier and more efficient alternative? For example, some in Sudan believe that, rather than entirely sweeping away the old constitutional order, the 2019 Constitutional Declaration should have instead amended the 2005 Interim Constitution to be in line with the goals of the revolution. In such a scenario, the transitional government would not have had to: (a) re-establish institutions that ended up being nearly identical to their 2005 iterations, such as the judiciary or the levels of local government; or (b) laboriously renegotiate each piece of the state's structure.

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About International IDEA

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On 17 August 2019, four months after President Omar al-Bashir was ousted, the revolutionary protest movement Forces for Freedom and Change and the Transitional Military Council signed a constitutional document to ferry Sudan through a transitional period to a civilian-led, democratic order. The signing of the Draft Constitutional Charter for the 2019 Transitional Period (the 2019 Constitutional Declaration) was met with jubilation on the streets and around the world. Rallies, firework displays and other celebrations were held across Sudan to welcome the agreement.

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