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Rapid Response Analysis

# THE CONFLICT IN SUDAN: UNDERSTANDING THE UN FACT-FINDING MISSION

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## Executive Summary

This Rapid Response Analysis provides an overview of the formation and objectives of the Independent Fact-Finding Mission for Sudan (the "Sudan FFM"), as adopted by the UN Human Rights Council on October 11, 2023. By drawing on lessons learned from previous fact-finding missions, this Analysis also analyzes the potential impact of the Sudan FFM. The Sudan FFM comes at a pivotal moment amid Sudan's ongoing war and deteriorating humanitarian crisis. The resolution establishing the Sudan FFM underscores the international community's resolve to address the atrocities in Sudan, and reflects a significant step towards accountability and justice. The magnitude of violence committed in Sudan by the Sudanese Armed Forces and Rapid Support Forces is likely to amount to either crimes against humanity, war crimes, or both – and after many months of war the crisis demands international action.

The Sudan FFM has a broad mandate to investigate, document, and report on the situation in Sudan since the onset of the armed conflict in April 2023, focusing on identifying violations and those responsible to ensure accountability. This reflects the mandates of recent UN fact-finding missions, or commissions of inquiry, which have been instrumental in investigating and documenting human rights abuses during armed conflicts in other states. Despite varying mandates and scopes, these missions – aided by civil society – have documented atrocities, identified perpetrators, and laid the groundwork for accountability efforts. Further, as the commissions in Syria and Myanmar demonstrate, they can be successful even if local governments oppose them.

The mandate of the Sudan FFM goes beyond mere "fact-finding" to empower the mission to make recommendations, particularly on accountability. Moreover, its tasks include cooperating with judicial and other entities, including international, regional, and domestic accountability initiatives. This provides the Sudan FFM with a wide berth to support accountability measures at whichever level may be the most advantageous – international, regional, or domestic; either within Sudan or potentially a third-party state. The Sudan FFM's powers mirror those of independent mechanisms established to support the work of fact-finding missions for Syria and Myanmar by compiling and presenting evidence for potential use in investigations, proceedings, or prosecutions in multiple venues.

This Rapid Response Analysis begins by providing a brief overview of the atrocities being perpetrated by the Sudanese Armed Forces and the Rapid Support Forces since the onset of conflict in April 2023. Second, it describes prior fact-finding missions, establishing a comparative framework to understand the potential scope and outcome of the Sudan FFM. Third, the analysis evaluates lessons learned from these past missions and the potential impact of the Sudan FFM. The Rapid Response Analysis concludes by highlighting the Sudan FFM as a positive step, but whose success requires strong buy-in from civil society and a shared understanding of what has occurred.

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## Introduction: The Humanitarian Crisis in Sudan

Over six months of conflict has plunged Sudan into "one of the worst humanitarian nightmares in recent history."[1] Numerous reports indicate that the Sudanese Armed Forces and the Rapid Support Forces have committed countless atrocities, including war crimes and crimes against humanity.[2] The numbers are 15 stark: the UN reports that as of October 15, 2023, approximately 9,000 people have been killed and over five million displaced, and a further 25 million Sudanese require urgent humanitarian relief.[3] Reports suggest that the Rapid Support Forces and Arab militias have targeted Masalit community leaders (including West Darfur governor Khamis Abbaker, who was abducted and killed in June), as well as civilians of all ages who have been subjected to sexual assault and gender-based violence.[4] Journalists and human rights defenders have also been targeted in Sudan, making it difficult to monitor the situation.[5]

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[1] Statement by Martin Griffiths, UN Under-Secretary-General for Humanitarian Affairs (October 15, 2023), https://reliefweb.int/report/sudan/sudan-reeling-after-six-months-war-statement-martin-griffiths-under-secretary-general-humanitarian-affairs-and-emergency-relief-coordinator-enar

[2] *See* PILPG & Orrick Rapid Response Analysis, *Prosecuting Leaders In Sudan Under Command Responsibility for Atrocity Crimes Committed by their Subdordinates,* (July 2023), https://static1.squarespace.com/static/5900b58e1b631bffa367167e/t/64b99ee73ba55566252e1d35/1689886439841/Rapid+Response+Analysis+-+Prosecuting+Leaders+in+Sudan+under+Command+Responsibility+7.23.pdf

[3] Statement by Martin Griffiths, UN Under-Secretary-General for Humanitarian Affairs (October 15, 2023), https://reliefweb.int/report/sudan/sudan-reeling-after-six-months-war-statement-martin-griffiths-under-secretary-general-humanitarian-affairs-and-emergency-relief-coordinator-enar

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

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

## Formation of the Sudan FFM

On October 11, 2023, the UN Human Rights Council ("UNHRC") adopted a resolution to establish the Sudan FFM, by a vote of 19 to 16 with 12 member states abstaining.[6] The mission's mandate is to investigate, document, and report on the human rights and humanitarian situation in the country since the armed conflict began on April 15, 2023.[7] Specifically, the Sudan FFM has the following tasks, as outlined in Paragraph 18 of the resolution:

> (a) To investigate and establish the facts, circumstances and root causes of all alleged human rights violations and abuses and violations of international humanitarian law, including those committed against refugees, and related crimes in the context of the ongoing armed conflict, between the Sudanese Armed Forces and the Rapid Support Forces, as well as other warring parties;
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> (b) To collect, consolidate and analyze evidence of such violations and abuses, including those affecting women and children, and to systematically record and preserve all information, documentation and evidence, including interviews, witness testimony and forensic material, consistent with international best practices, in view of any future legal proceedings;
>
> (c) To document and verify relevant information and evidence, including through field engagement, and to cooperate with judicial and other entities, as appropriate;
>
> (d) To identify, where possible, those individuals and entities responsible for violations or abuses of human rights or violations of international humanitarian law, or other related crimes, in the Sudan, with a view to ensuring that those responsible are held accountable;
>
> (e) To make recommendations, in particular on accountability measures, all with a view to ending impunity and addressing its root causes, and ensuring accountability, including, as appropriate, individual criminal responsibility, and access to justice for victims;
>
> (f) To give the Human Rights Council an oral update on its work at its fifty-sixth session, followed by an interactive dialogue, and a comprehensive report thereon at its fifty- seventh session, to be followed by an enhanced interactive dialogue

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[6] UNHRC, Office of the High Commissioner, *Human Rights Council Adopts 16 Texts, Establishes a Fact-Finding Mission for Sudan and a Working Group for the Rights of Peasants* (October 11, 2023), https://www.ohchr.org/en/news/2023/10/human-rights-council-adopts-16-texts-establishes-fact-finding-mission-sudan-and

[7] UNHRC Resolution A/HRC/54/L.18 (October 6, 2023), *Responding to the human rights and humanitarian crisis caused by the ongoing armed conflict in the Sudan,* https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/212/50/PDF/G2321250.pdf?OpenElement

> that should include the participation of, inter alia, the United Nations High Commissioner for Human Rights, representatives of the African Union and the Special Adviser to the Secretary-General on the Prevention of Genocide;
>
> (g) To submit the above report to the General Assembly at its seventy-ninth session;
>
> (h) To cooperate and share best practice with other international, regional and domestic accountability initiatives, as and when these are established, as appropriate; and
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> (i) To include in its work a specific focus on the human rights and humanitarian situations in the areas of greatest concern, such as Khartoum and the Darfur region of the Sudan.[8]

The following member states voted in favor of the resolution: Argentina, Belgium, Chile, Costa Rica, Czechia, Finland, France, Georgia, Germany, Honduras, Lithuania, Luxembourg, Mexico, Montenegro, Paraguay, Romania, Ukraine, the United Kingdom, and the United States.[9] Members opposed to the resolution were Algeria, Bolivia, China, Cote d'Ivoire, Cuba, Eritrea, Malaysia, Maldives, Morocco, Pakistan, Qatar, Senegal, Somalia, Sudan, United Arab Emirates and Vietnam.[10] The fact that the resolution passed despite the currently polarized Human Rights Council underscores the international community's resolve to address atrocities in Sudan.

The United Kingdom, also introducing the resolution on behalf of Germany, Norway, and the United States, declared to the UNHRC that there is "urgent need to investigate and gather evidence of human rights violations and abuses of international law, no matter where in Sudan they were committed, or by whom they were committed."[11] Among other nations, Belgium echoed this sentiment, arguing that while both sides in the conflict have promised to investigate human rights and humanitarian abuses, "the silence is deafening," and "a larger inquiry is necessary to fill the vacuum."[12]

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[8] *Id.*
[9] UNHRC, Office of the High Commissioner, *Human Rights Council Adopts 16 Texts, Establishes a Fact-Finding Mission for Sudan and a Working Group for the Rights of Peasants* (October 11, 2023), https://www.ohchr.org/en/news/2023/10/human-rights-council-adopts-16-texts-establishes-fact-finding-mission-sudan-
[10] *Id.*
[11] United Nations Web TV, Vote on Draft Resolution A/HRC/54/L.18 (Oct. 11, 2023), https://media.un.org/en/asset/k1f/k1f8dcso7l
[12] *Id.*

However, the resolution faced opposition, including from the Government of Sudan, currently run de facto by the Sudanese Armed Forces. The Government of Sudan accused the resolution of unjustly equating the rebel militias to the Sudanese Armed Forces, and stated that the resolution "does not respect the sovereignty of Sudan."[13] Similarly, China argued that the resolution "ignores the efforts and achievements made by the Sudanese government," as well as "mediation efforts by the regional countries and organizations," and that "[t]his interference in the internal affairs of Sudan will only complicate the situation further."[14] The United States, however, found it "unsatisfactory" that Sudan "has announced that any domestic investigations will be focused only on abuses by the Rapid Support Forces," rather than the Sudanese Armed Forces. Further, the U.S. representative stated that "decades of impunity" have led to the current crisis, and that a mechanism is required "that can discern and document the truth."[15]

**Examples of Prior Fact-Finding Missions**

The UNHRC is the mandating body for most UN fact-finding missions, or commissions of inquiry, established since 2006. Prior missions have varied in their mandates, scope, and effectiveness. However, all share the common goals of investigating and documenting human rights abuses and violations of international humanitarian law in armed conflicts. As such, they provide potential roadmaps for how the investigation by the Sudan FFM might unfold.[16]

*Bosnia: The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) (informally known as the Bassiouni Commission)*

Amid the Bosnian War (1992-95), the ethnic cleansing of millions of Bosnian Muslims, Croats, and other non-Serb populations prompted the UN to

[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] In addition to the commissions and missions listed below, others that have been established over the past 20 years include those addressing human rights and humanitarian law violations in Ukraine, Libya, Lebanon, Guinea, Cote d'Ivore, Gaza, North Korea, Sri Lanka, and the Central African Republic, among others. *See* UNHRC, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law* (2015), https://www.ohchr.org/sites/default/files/Documents/Publications/CoI_Guidance_and_Practice.pdf

establish a Commission of Experts to record those crimes.[17] Professor Cherif Bassiouni, who led the commission, noted that its mandate "was the broadest mandate given to an international investigating body since Nuremberg," notwithstanding substantial resistance to its establishment and operationalization.[18] The commission identified 151 mass graves and 900 places of detention; it also conducted the largest mass rape investigation in history, obtaining affidavits from hundreds of victims.[19] Ultimately, it gathered over 65,000 pages of evidence, which would form the basis for indictments and prosecutions brought by the International Criminal Tribunal for the former Yugoslavia established in 1993.[20]

### *Syria: The Independent International Commission of Inquiry on the Syrian Arab Republic*

The UNHRC established the Independent International Commission of Inquiry on the Syrian Arab Republic on August 22, 2011, after unrest began in Syria in March of that year.[21] Its mandate was to investigate all alleged violations of international human rights law in Syria since that time, with the objective of establishing the facts and circumstances surrounding violations and crimes and, where possible, identifying those responsible so that they could be held accountable in the future.[22] The commission remains active, and its mandate has been repeatedly extended, most recently until March 31, 2024.[23] Its latest report – showing continued, grave human rights violations – is based on 447 first-hand interviews, together with documents, reports, forensic pathology analysis, photographs, videos, and satellite imagery from multiple sources.[24] Although the Syrian government has refused access to the country, the commission has produced over 20 reports demonstrating multiple examples of war crimes and crimes against humanity. The commission's reports have been read into evidence in trials in

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[17] U.N. Security Resolution 780 (1992) which established the Commission of Experts called on "all parties" to observe international law, http://unscr.com/en/resolutions/780. The Commision's findings are contained in M. Cherif Bassiouni, *Final Report of the U.N. Commission of Experts Established Pursuant to Security Council Resolution* 780 (1992), (December 28, 1994), https://phdn.org/archives/www.ess.uwe.ac.uk/comexpert/ANX/IV.htm#II-II

[18] S. Hrg. 104-448 (Aug. 9, 1995), https://www.intelligence.senate.gov/sites/default/files/hearings/warcrimesinbalka00unit.pdf

[19] *Id.*

[20] *Id.*

[21] UNHRC Independent International Commission of Inquiry on the Syrian Arab Republic, https://www.ohchr.org/en/hr-bodies/hrc/iici-syria/co-i-mandate#

[22] *Id.*

[23] *Id.*

[24] UNHRC, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic* (Sept. 12, 2023), https://reliefweb.int/report/syrian-arab-republic/report-independent-international-commission-inquiry-syrian-arab-republic-ahrc5458-enarruzh#:~:text=I,January%20to%2030%20June%202023

Germany against former Syrian intelligence officers who were subsequently found guilty of crimes against humanity and sentenced to life imprisonment.[25]

Building on this work, the International, Impartial and Independent Mechanism ("IIIM") was established on December 21, 2016, to assist in the investigation and prosecution of serious crimes committed in Syria since March 2011.[26] The IIIM aims to promote fair and independent accountability measures wherever they can best be achieved, whether criminal proceedings occur in "national, regional, or international courts."[27] The IIIM collaborates with multiple entities, including national judicial mechanisms in at least 12 third-party jurisdictions, including Belgium, the U.S., Austria, Norway, Sweden, and Switzerland.[28] These states recognize universal jurisdiction, which permits the prosecution of crimes under international law irrespective of where the crimes were committed.[29]

*Myanmar: The Independent International Fact-Finding Mission on Myanmar ("IIFFMM")*

The UNHRC established the IIFFMM in March 2017 following the Myanmar military's campaign of atrocities against Rohingya Muslims, including massacres, rapes, and arson.[30] The mission's mandate concluded in September 2019.[31] Over its operational period, the IIFFMM delivered several reports concerning human rights violations in Myanmar, notwithstanding the junta's opposition to the mission. Upon conclusion of its mandate, the IIFFMM handed over its evidence of serious crimes under international law to a new mechanism, the Independent Investigative Mechanism for Myanmar (IIMM), which was

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[25] OHCHR, *UN panel welcomes landmark guilty verdict in Germany's prosecution of former Syrian intelligence officer for crimes against humanity,* (Jan. 13, 2022), https://www.ohchr.org/en/2022/01/un-panel-welcomes-landmark-guilty-verdict-germanys-prosecution-former-syrian-intelligence

[26] OHCHR, *International, Impartial and Independent Mechanism on international crimes committed in the Syrian Arab Republic*, (Feb. 27, 2017), https://www.ohchr.org/en/statements/2017/02/international-impartial-and-independent-mechanism-international-crimes-committed

[27] *Id.*

[28] Forbes, *International Impartial and Independent Mechanism for Syria Shows the New Path Towards Justice,* (Apr 1, 2021), https://www.forbes.com/sites/ewelinaochab/2021/04/01/international-impartial-and-independent-mechanism-for-syria-shows-the-new-path-towards-justice/?sh=29f7ce3d3c58

[29] *Id.*

[30] UNHRC, Independent International Fact-Finding Mission on Myanmar, https://www.ohchr.org/en/hr-bodies/hrc/myanmar-ffm/index#:~:text=In%20March%202017%2C%20the%20United, IIFFMM%20ended%20in%20September%202019

[31] *Id.*

mandated by the Human Rights Council to prepare files for criminal prosecutions and follow up on the IIFFMM's findings.

Like the IIIM for Syria, the IIMM continues the work of the prior fact-finding mission by collecting, analyzing, and sharing evidence with relevant national, regional, or international tribunals in order to ensure accountability for crimes committed in Myanmar.[32] Since its establishment in 2018, the IIMM has shared evidence, information, and analytical reports with those working on ongoing cases concerning the Rohingya at the ICC, the ICJ, and in Argentina.[33]

*Ethiopia: The Commission of Inquiry on Tigray*

In June 2021, the African Commission on Human and Peoples' Rights established a commission of inquiry to investigate allegations of human rights violations in the Tigray region of Ethiopia following a seven-month conflict.[34] Through its mandate, the Tigray commission of inquiry sought to document and uncover human rights abuses in the region, with the goal of fostering accountability and addressing the humanitarian crisis. However, the African Commission decided to terminate the mandate of the Tigray commission of inquiry in June 2023, which "shocked and perplexed" some observers, given that the commission of inquiry failed to publish a report of its findings and recommendations.[35]

*Sudan: High-Level Mission on the Situation in Darfur*

In 2004, the UN Security Council authorized a commission of inquiry in Darfur, whose mandate was "to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable."[36] This language marked an early shift to an "accountability driven mandate," in that the commission appeared to adopt a quasi-judicial approach.[37] Although the commission did not conclude that a genocide had occurred in

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[32] UN, *Independent Investigative Mechanism for Myanmar*, https://iimm.un.org/
[33] UN News, *Increasingly brazen war crimes evident in Myanmar, reports Independent Mechanism* (Aug. 8, 2023), https://news.un.org/en/story/2023/08/1139522
[34] Al-Jazeera, *African Union launches probe into alleged rights abuses in Tigray* (June 17, 2021), https://www.aljazeera.com/news/2021/6/17/african-union-launches-probe-alleged-rights-abuses-tigray#:~:text=17%20Jun%202021,month%20conflict%20has
[35] Human Rights Watch, *Concerns Regarding the Premature Termination of the Commission of Inquiry on the Situation in the Tigray Region of the Federal Republic of Ethiopia*,
[36] UN Security Council Resolution 1564 (2004), para. 12.
[37] M. Frulli, *Fact-Finding or Paving the Road to Criminal Justice? Some Reflections on United Nations Commissions of Inquiry* (2012) 10(5) *Journal of International Criminal Justice*.

Darfur, its findings did lead to the referral of the situation in Darfur to the International Criminal Court.[38]

**Lessons Learned and the Path Forward**

Prior fact-finding missions demonstrate that they are a critical tool to clarify the factual situation on the ground, including determining whether violations of international law have occurred and who is responsible. Following the trend of recent resolutions, the Sudan FFM's mandate is broad. Indeed, the mandate goes beyond mere "fact-finding" to also empower the mission to make recommendations, "particularly on accountability," and to determine whether acts amount to violations of international humanitarian and human rights law.[39] Importantly, the resolution provides that "accountability" is not limited to "criminal responsibility."[40] As prior fact-finding missions have stressed, accountability includes reparation through "measures to bring relief and redress to the victims [...] to complete the process of accountability."[41] Thus, while fact-finding is worthy by itself, it is also a means to an end.

Moreover, the tasks of the Sudan FFM also include cooperating with judicial and other entities, including international, regional, and domestic accountability initiatives. This gives the Sudan FFM broad authority to support accountability measures at whatever level may be the most advantageous – international, regional, or domestic, either within Sudan or potentially a third-party state. For instance, and as observed in the mandates for the IIIM and IIMM, the Sudan FFM may facilitate – in a third party state – the prosecution of atrocities committed in Sudan under the domestic laws of the third party state, to the extent the third-party state provides for prosecution under its universal jurisdiction laws.

In an era of misinformation and competing narratives, the Sudan FFM has the potential to foster consensus about aspects of the conflict among diverse stakeholders at the local, national, regional, and international levels. The mission also provides an opportunity to open lines of communication that did not previously exist, enabling it to fulfill a diplomatic role by attempting to facilitate an agreement among the various parties, as was the case when the Bahrain

[38] UN Security Council Resolution 1593 (2005), para 1.
[39] UNHRC Resolution A/HRC/54/L.18 (October 6, 2023), *Responding to the human rights and humanitarian crisis caused by the ongoing armed conflict in the Sudan,* https://documents-dds-ny.un.org/doc/UNDOC/LTD/G23/205/21/PDF/G2320521.pdf?OpenElement
[40] *Id.*
[41] Report of the International Commission of Inquiry on Darfur to the Secretary General (S/2005/60), paras. 528 and 565.

Independent Commission of Inquiry intervened in the 2011 conflict in Bahrain, at one point helping to secure the release of over 135 detainees.[42] The presence of the Sudan FFM may also motivate stakeholders to integrate commitments to cooperate with fact-finding missions into peace agreements.

However, neither the Sudan FFM, nor any other fact-finding mission, can replace formal modes of adjudication, such as international criminal tribunals. Certain fact-finding missions have led to referrals to the International Criminal Court, as demonstrated by the Bassiouni Commission and the High-Level Mission on the Situation in Darfur. Additionally, the commissions of inquiry for Rwanda and Syria also led to the establishment of ad hoc tribunals. While it may take time for criminal proceedings regarding Sudan to commence before an international tribunal, the Sudan FFM is in the meantime mandated to investigate atrocity crimes and to cooperate with existing atrocity accountability entities, as well as make recommendations regarding accountability measures. Fulfilling its wide mandate, the Sudan FFM could encourage timely prosecution in existing mechanisms, as well as the establishment of new accountability measures or mechanisms.

Notwithstanding multiple challenges faced by fact-finding missions, their importance in developing and providing an evidentiary record should not be understated. In scenarios where a government is uncooperative (as Sudan now appears) or worse, outright hostile, fact-finding missions can still operate. For example, the Myanmar mission overcame the junta's opposition and obtained over two million pieces of evidence regarding human rights violations in Myanmar.[43] NGOs and civil society organizations within the country or region can provide invaluable assistance, helping with documentation and data collection, and sometimes facilitating access to affected areas. Such investigations can also increasingly be conducted remotely, using geospatial and other information and communications technologies.[44] With respect to Sudan, the new mechanism's efforts in collecting and analyzing vast amounts of evidence could gradually build a compelling case, despite the opposition of the Sudanese Armed Forces, which de facto run the current wartime government.

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[42] Ahram Online, *More than 135 freed in Bahrain: probe* (Aug. 9, 2011), https://english.ahram.org.eg/newscontent/2/8/18488/world/region/more-than--freed-in-bahrain-probe.aspx

[43] UN News, *Myanmar: In race against time, experts collect evidence of rights violations*, https://news.un.org/en/story/2021/10/1103042#:~:text=The%20team%20of%20professionals%20are,human%20rights%20violations%20in%20Myanmar

[44] *See* P. Alston and C. Gillespie, *Global Human Rights Monitoring, New Technologies and the Politics of Information* (2012), 23 European Journal of International Law, 1089.

## Conclusion

Fact-finding missions play a critical role in addressing violations of international humanitarian and human rights law. Through rigorous investigations, they document and verify evidence, thereby creating a factual foundation for an international response. They also encourage input among various stakeholders, whose collaboration is required for the Sudan FFM to be effective. Thus, the establishment of the Sudan FFM, while not a panacea, is a positive development for Sudan and the region. The Sudan FFM has the potential to foster, and ultimately reflect, a shared understanding of important aspects of the Sudan conflict, rather than reinforce competing narratives and existing divisions.