Priorities for Criminal Law Reform in Sudan:
Substance and process

An options paper prepared by REDRESS and KCHRED

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I. Introduction

In October 2005, the Minister of Justice established a Law Reform Committee (LRC) to ensure compatibility with the Comprehensive Peace Agreement (CPA) and the Interim National Constitution, in particular the Bill of Rights. This is an important recognition by the Government that the law is in need of reform. However, there has been limited progress to date. A new Armed Forces Act and a new Police Act are under consideration but the bulk of legislation remains unchanged.

Sudan's criminal law comprises the Criminal Act, the Criminal Procedure Act and other laws containing offences or procedures pertaining to criminal justice. Criminal law reform that is in line with the Bill of Rights and international standards and takes on board best practices from other countries is bound to result in greater freedom for all members of society to exercise their rights. It is also an important means to end discrimination and to benefit marginalised and impoverished groups. Ideally, all groups and communities should have the opportunity to engage in the law reform process to voice their views and concerns, identify their needs and formulate priorities that align with these needs. This is critical to ensure that their rights and situation are adequately taken into account.

REDRESS and the Khartoum Centre for Human Rights and Environmental Development (KCHRED) are partners in a project on the reform of criminal law: the Criminal Law Reform Project. The two organisations have prepared this Options Paper to initiate discussions with national civil society groups, governmental bodies and international organisations.

This Paper seeks to identify and contextualise priority areas with a view to developing and advancing the work on law reform in line with the objectives set out below. It is intended to facilitate discussion and decision-making on both the substance (which issues and laws?) and process of law reform (who, how, when?). As such, its main aim is to help civil society and all those working on law reform to formulate an agenda and plan of action that can serve as a basis for a long-term engagement in criminal law reform.

The Paper examines the objectives of criminal law reform, priority areas and the process of law reform, as well as methods and challenges. We consider these issues to be essential to furthering the law reform agenda and initiating a sustainable law reform process. By its very nature of being an Options Paper, the issues that are considered in this Paper are intending only to be a starting point for the facilitation of strategies and process. We hope that this Paper will encourage discussion and debate amongst a range of stakeholders as part of a participatory process.

II. Objectives of law reform

Criminal laws are an integral part of any legal and societal order. They are necessary to protect individuals from crime and to guarantee a safe and peaceful society. Criminal laws are also a key means of enshrining particular notions of acceptable and unacceptable conduct. Criminal laws are necessary to provide for an orderly society but on the other they may restrict liberties or even result in violations of fundamental human rights. For this very reason, the contents and application of criminal law in a country is often a key indicator of the state of the rule of law.

Criminal law reform may serve one or several goals. It may: (i) implement particular notions of order and/or justice by defining human relationships and (un)acceptable conduct; or (ii) pursue "legal-technical" purposes of clarifying terminology and ensuring coherence and consistency of the law; or both.

The policy objectives of law reform may be, in terms of their intended impact on human liberties and human rights:

I. ***"Neutral"***: to respond to changed circumstances or gaps in a given system with a view to preventing crime, for example criminalising

harmful conduct arising out of the use of modern technology, such as cyber crime, or to abolish offences that are no longer relevant

II. ***"Negative"***: to use criminal laws as a means of quashing dissent by restricting political and personal freedoms, for example criminalising peaceful demonstrations and imposing excessive punishments

III. ***"Positive"***: to respond to perceived shortcomings and to change criminal laws so that they reflect a society with respect for fundamental rights while protecting the populace from crime.

International bodies have held that criminal laws in Sudan have at times been either repressive by their very nature or have been used in a repressive way. They have also failed to protect individuals from crimes committed by or with the acquiescence of State officials. Concluding observations by the United Nations Human Rights Committee, decisions by the African Commission on Human and Peoples' Rights and reports by national and international bodies and organisations have identified such failings and called upon Sudan to undertake the necessary reforms.[1]

In the current situation in Sudan, the primary goal of criminal law reform could ideally be considered to be to further fundamental "positive" legal policy objectives. This would be the most consistent reading of the mandate given to the Law Reform Committee (LRC) to ensure compatibility with the Comprehensive Peace Agreement (CPA) and the Interim National Constitution, in particular the Bill of Rights.

It is important but not sufficient to focus on legal technical aspects of law reform. Law reform should ensure that criminal justice is in line with fundamental liberties, human rights and the rule of law. Such an approach is in keeping with the letter and spirit of the National Interim Constitution. It will be the only means of achieving the broader long-term objectives of respect for human rights of all and of applying the rule of law to all.

The process of any law reform is arguably as important as the substantive consideration of legal issues and the criminal laws themselves. Law reform can be a legal-technical endeavour that only involves politicians and lawyers. Such a

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[1] Concluding observations of the UN Human Rights Committee: Sudan, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007; Amnesty International and Others v. Sudan, Communications 48/90, 50/91, 52/91, 89/93 (1999); Final report on the situation of human rights in Darfur prepared by the United Nations Experts Group on Darfur, presided by the Special Rapporteur on the situation of human rights in Sudan and composed by the Special Representative of the Secretary-General for children and armed conflict, the Special Rapporteur on extrajudicial, summary on arbitrary executions, the Special Representative of the Secretary-General on the human rights defenders, the Representative of the Secretary-General on human rights internally displaced persons, the Special Rapporteur on the question of torture and the Special Rapporteur on violence against women, its causes and consequences, UN Doc. A/HRC/6/19 Advance edited version, 28 November 2007; REDRESS/SOAT, National and international remedies for torture in Sudan, A Handbook for Sudanese lawyers, March 2005.

process is effectively elite-driven; it normally comprises a small group of experts who converse in surroundings and in a language largely inaccessible to lay persons. There will be elements of the law reform process, such as the question of the legal meaning of a particular word or the application of fundamental legal principles, which require a legal-technical approach. However, if the whole law reform process were conducted along those lines, there would be a genuine risk that the idea of criminal justice will not take root in society at large. Criminal laws would probably be drafted in a way that does not reflect the experiences of persons most affected by their application. Such a process would also do little to raise much needed rights awareness in society and amongst concerned groups.

Fundamental liberties, human rights and the rule of law are not abstract notions but values that are given meaning in their practical application. A system of criminal justice that is supposed to reflect these values should be based on a process that gives the people who the reform is meant to serve an opportunity to actively engage. It is therefore critical that the process of law-reform is as broad based and transparent as possible.

III. Priority areas for criminal law reform

Given the multitude of laws and issues of concern, criminal law reform in Sudan is a major undertaking, which will take a considerable time to implement. There is thus a need to prioritise the issues, laws and legal provisions that should be reformed. To this end, there should be general agreement on the best possible strategy to

- prioritise areas of law reform for the benefit of those most at risk of human rights violations and;
- ensure conformity of criminal laws with the bill of rights without undue delay.

a. A **pragmatic approach** would focus on bills that are pending or laws already under review by the executive and/or legislature. This approach would have the advantage of responding to ongoing debates and of providing relevant input at the time. However, the proposed approach would essentially be reactive. There would thus be a genuine risk that the agenda is set by those who have already proposed bills or decided about the timetable for review. This includes the risk that the consideration of issues or reform of laws that are of major concern to vulnerable communities, for example rape legislation, are not advanced expeditiously.

It will be important to address issues of concern in bills pending, such as the Armed Forces Act and the Police Forces Act at the time of writing. However, the overall strategy should be guided by priority issues as outlined below.

b. A **proactive legislation specific approach** would focus on specific laws that should be reformed as a matter of priority because they are a major source of human rights violations. The laws in question would be identified on the basis of criteria to be further developed. A primary focus on legislation instead of issues would have the advantage of mirroring the process of law reform, which comprises the identification, review and reform of specific legislative acts. Following such an approach would be advisable where a bill is pending and where timely input would be needed. In other instances, focusing on particular pieces of legislation may narrow the perspective and lead to piecemeal results. This would ignore the fact that many violations result from the interrelated application, or non-application, of several laws. An example is the lack of accountability for rape, which can be attributed to a combination of factors; the ambiguity over the applicable offences, ineffective and discriminatory evidentiary laws, the lack of victim protection and immunity laws.

c. A **proactive issue specific approach** would focus on areas of major concern, to be identified on the basis of criteria to be further developed. It would have the advantage of taking a comprehensive approach that is bound to lead to a good understanding on how various pieces of legislation combine to result in gaps or violations and on what is needed to remedy the identified shortcomings. The identification of issues would require a threefold approach:

i. What are the issues of concern?

The objective of criminal law reform is to ensure conformity with the bill of rights and to enshrine the rule of law. Prime issues of concern are therefore provisions, or the lack thereof, that either by their nature or by virtue of their application result in serious violations of human rights and/or undermine fundamental precepts of criminal justice, including accountability of officials and fair trials. Where a priority area has been identified using these criteria, further prioritisation may be based on pragmatic considerations, i.e. whether the issue is ripe for reforms (see above).

ii. Do they relate to substantive provisions (criminal offences) or criminal procedures, or both?

The areas for criminal law reform can broadly be divided into substantive provisions relating to characterisation of offences and criminal procedures. Several issues may require a reform of both substantive provisions and procedural norms. An example would be the definition of torture, war crimes and crimes against humanity in line with international standards (substantive) and the related question of lifting immunity for officials suspected of having committed such crimes (procedural). Both measures would be needed to create a legal

framework capable of ensuring accountability of those responsible for the commission of international crimes.

iii. Which laws would need to be changed in order to address the issues of concern?

On the basis of the issues identified, a comprehensive list of pertinent laws (to be amended, enacted or repealed) should be drawn up.

Based on the experience of the project partners and preliminary research drawing on reports by United Nations bodies, in particular the Group of Experts, decisions by the African Commission on Human and Peoples' Rights as well as reports by national and international experts and human rights organisations,[2] the following list of issues could be considered as a priority:

a. Preventing the occurrence of, and combating impunity for serious human rights violations including extrajudicial killings, disappearances, torture, rape and similar crimes – need to:

(i) Provide adequate custodial safeguards and protection against violations

The Bill of Rights in the National Interim Constitution guarantees the right to life, the right to be free from torture as well as the right to personal liberty.[3] However, statutory laws do not fully guarantee the right to access a lawyer of one's choice,[4] to inform family members,[5] and the right of access to a doctor.[6] There is also no effective provision of habeas corpus, i.e. the

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[2] See above, footnote 2.

[3] Articles 28, 29 and 33 of the Constitution.

[4] Article 83 (3) of the Criminal Procedure Code of 1991 (CPC) stipulates that an arrested person has the right to contact his/her lawyer. However, the law is not clear in respect of the presence of a lawyer during the investigation, especially during the initial questioning by the police. In practice, lawyers have faced persistent difficulties in gaining access to their clients during the initial investigation. The National Security Forces Act contains no guarantees for immediate access to counsel. In practice, lawyers have found it extremely difficult to gain any access at all.

[5] Article 83(5) of the CPC stresses that the arrested person has the right to inform his/her family or employer and the right to contact them with approval of the prosecutor or the court. Under the Treatment of Detainees Regulation of 1996, the security authorities are obliged to notify the family of the detainee or his/her employer, and the detainee has the right to communicate with his/her family. Article 32(2) of the Security Act provides the detainee with the right to inform his/her family or employer of the arrest and the detainee is allowed to communicate with family "where such contact does not prejudice the progress of the interrogation, inquiry and investigation of the case". In practice, detainees are often not informed about this right and permission is normally refused in the few instances when it is sought.

[6] Article 83(1) of the CPC provides that an arrested person should be provided with appropriate medical care. The Treatment of Detainees Regulation also imposes a duty on the authorities to provide medical care to detainees. The National Security Forces Act contains no such provisions. In practice, detainees often do not receive immediate or only basic medical care, if any.

possibility to challenge the legality of detention,[7] which is a crucial safeguard against arbitrary detention and '*incommunicado*' detention.

The National Security Act and emergency legislation provide broad powers of arrest and detention that lack safeguards and may facilitate human rights violations.[8]

(ii) Incorporate international crimes in conformity with international definitions

The Criminal Act does not criminalise the international crimes of genocide, crimes against humanity and war crimes. In November 2005, the jurisdiction of the Nyala Criminal Court for Darfur's Incidents was extended to cover: "Actions which constitute crimes pursuant to the Sudanese Criminal Act, other penal laws and the international humanitarian law."[9] This appears to allow the Special Court to try war crimes. It is less clear whether the amendment also covers genocide and crimes against humanity, which do not explicitly form part of international humanitarian law. There is no jurisprudence to date that might provide such clarification. It would thus be beneficial to specify in the law itself the types of crimes and their definitions. In addition, the jurisdiction of the Nyala Criminal Court, though important, only covers one part of Sudan and not the entirety of the country.

The definition of torture in Article 115 (2) of the Criminal Act is deficient. It does not criminalise acts of torture in line with the internationally recognised definition contained in article 1 of the

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[7] The CPC does not provide for an express right to challenge the legality of detention. Article 165 of the Penal Code of 1991 stipulates that "Whoever detains a person in a certain place without legal justification or continues the detention after knowing that an order of acquittal has been issued, will be deemed to have committed the crime of illegal detention and shall be punished with a term of imprisonment not exceeding one year or with fine and can be punished by both". In practice, it is recognised that a lawyer can petition a prosecutor to issue an order for immediate release of the person who has been illegally detained by the police and for the institution of criminal proceedings against the responsible official. However, this possibility falls short of applicable standards as the right to habeas corpus is a right to challenge the legality of detention before a judicial body. Article 31 of the National Security Forces Act gives any member of the security forces the "power to detain any person for a period not to exceed three days for the purpose of questioning and investigation." This period can be extended to a maximum of nine months, and detainees can appeal the decisions taken by the Director General (initially alone and then only with the approval of the Attorney General) or the National Security Council to prolong the period of detention. In practice, even the maximum period prescribed under article 31 of the Act is reportedly regularly exceeded and many detainees are held for lengthy periods without being given the possibility to challenge the legality of detention before a judge.

[8] Articles 31 and 33 of the National Security Forces Act and article 5 of the Emergency and Protection of Public Safety Act of 1997 (Act Number (1) 1998).

[9] Article 5 (a), Order of the Establishment of Criminal Court for Darfur's Incidents, seated in Nyala, Issued under my seal and signature this day the 16th of November 2005, by Jalal Al-Din Mohamed Osman, Chief Justice.

UN Convention against Torture[10] and carries inadequate punishments. It also fails to provide for the possibility of prosecuting anyone suspected of torture for acts of torture committed in a third country (in line with the obligation to extradite or prosecute).

Sudanese criminal law also does not recognise the crime of enforced disappearances,[11] which states are bound to prosecute and punish under international law.

(iii) Establish command responsibility for international crimes

Command responsibility is a recognised mode of criminal liability that is important as it enables the prosecution of those in positions of control higher up the chain. It provides that commanders and other superiors can be held criminally liable for failing to prevent their subordinates from committing international crimes where they would have been able to do so. Sudanese criminal law does not recognise command responsibility.

(iv) Remove immunity and amnesties for those accused of such crimes

Article 35 of the National Interim Constitution provides that all persons have a right to litigation.

Article 33 of the National Security Forces Act of 1999, article 45 of the Police Act 2007 (article 46 of former Act) and article 34 of the Armed Forces Act 2007 provide immunities for state officials for any acts committed in the course of their duties. The immunities shield officials from any civil suits or criminal prosecutions unless the head of their forces approves such legal action. In practice, immunity legislation has resulted in impunity for serious human rights violations.

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[10] "'Torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

[11] According to article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance (not yet in force): " 'Enforced disappearance' is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."

Amnesties that may cover individuals who have committed international crimes, such as Presidential Decree No.114 in the context of the Darfur Peace Agreement, equally contribute to impunity and should be abolished. The provision of amnesties is contrary not only to the right to litigate in the Bill of Rights but also the state's obligations under international law.

(v) Establish institutional transparency and accountability

There has been concern that the lack of transparency and accountability of law-enforcement bodies and other institutions, such as the security forces, facilitates violations. It is critical that the legislation governing the various institutions is reformed to ensure full political and legal accountability of the members of the forces and the forces themselves.

(vi) Provide victim and witness protection

There is no legislation that provides effective protection of victims and witnesses.[12] The lack of protection of victims and witnesses, for instance, to ensure that they do not suffer reprisals when coming forward to report a crime or to seek a remedy, has contributed to impunity, especially in the course of conflict.

(vii) Provide protection for human rights defenders

There is no adequate legislation providing the freedom to advocate for human rights, to exercise legitimate human rights activities and to be protected against threats, harassment or other attacks.[13] Human rights defenders have been repeatedly subjected to threats and harassment, a practice that undermines their work.

(viii) Establish a national human rights commission in line with recognised principles so as to investigate human rights violations and take adequate measures to prevent recurrence.

The National Human Rights Commission envisaged in the National Interim Constitution and the Human Rights Commission Bill of 2006 has still not been established. It is not

[12] The only provision is article 4 (e) of the Criminal Procedure Code, which stipulates that victims should not be subject to any injury or ill-treatment.
[13] There are in particular concerns over the Organisation of Humanitarian and Voluntary Work Act, 2006. Although this is not a criminal law, adequate protection may require that those who subject human rights defenders to threats and harassment should be subject to criminal prosecution.

clear whether the Commission, once established, will be fully independent and effective in line with recognised principles.

b. Sexual offences – need to, in addition to the points just mentioned:

(i) Clarify the definition of rape

There is a lack of clarity concerning the definition of rape in article 149 of the Criminal Act 1991, in particular its relation to the crimes of adultery or sodomy (article 145 and 148 of the Criminal Act respectively). As a result, a woman who alleges rape may face a prosecution for adultery, which undermines the right of women to complain about rape and contributes to impunity.

(ii) Introduce further offences that provide for adequate protection and punishment against sexual attacks

Sudanese criminal laws do not recognise the offences of sexual harassment and female genital mutilation.

(iii) Remove obstacles to the effective investigation and prosecution of perpetrators, in particular discriminatory provisions in the evidentiary law

A conviction for rape requires the testimony of four credible mature witnesses who have witnessed penetration.[14] This requirement constitutes a threshold that is almost impossible to meet. It also discriminates against women who are not recognised as acceptable witnesses. The evidentiary threshold has contributed to impunity for rape as a conviction can realistically only be secured where the perpetrator confesses to the crime.

(iv) Ensure access to justice by establishing procedures for taking and using medical evidence

There are no clear provisions stipulating that victims of rape have a right to immediate medical treatment of their choice and that any medical examination undertaken by a qualified person may be used as evidence in criminal proceedings.[15]

[14] Article 77 of the Evidence Act of 1993.
[15] Some changes have recently been made in Criminal Circular No.2 to the requirement of using Form 8, widely acknowledged to be deficient, but the right to medical treatment should be put on a statutory footing.

(v) Ensure that women who allege that they have been raped may actively take part in criminal proceedings that duly take into account the nature of the offence in question and its consequences

There are no provisions that adequately protect the dignity of victims of rape in criminal proceedings and minimise the risk of re-traumatisation, especially with regard to evidence to be admitted and cross-examination. The shame associated with rape and the lack of protection of rape victims in criminal proceedings has prompted rape victims not to lodge criminal complaints.

c. Political, public order and religious offences – need to:

(i) Repeal legislation that criminalises conduct, which constitutes a legitimate exercise of political rights, such as freedom of expression and freedom of assembly

There are a number of articles in the Criminal Act 1991 that are used specifically to restrict the freedom of assembly. Many of the offences listed in Chapter 5 of the Criminal Act 1991 have been used routinely and seemingly arbitrarily against those who are perceived to belong to the opposition. [16]

(ii) Amend legislation that is vague and lends itself to be used as a tool to criminalise political opponents or to harass vulnerable groups in society, such as internally displaced persons, including offences contained in emergency laws.

This includes in particular the following offences against the State:

- Undermining the constitutional system (article 50 of the Criminal Act;
- Waging war against the State (article 51);
- Dealing with an enemy State (article 52);
- Espionage (article 53).

It also includes any offences prosecuted and punished pursuant to Emergency Declarations based on the Emergency and Protection of Public Safety Act of 1997 (Act Number (1) 1998).

[16] In particular the following offences in the Criminal Act: Article 67 Disturbance, Article 66 Propagating False News, Article 69 Breach of Public Peace and Article 77 Public Nuisance.

(iii) Repeal legislation that criminalises conduct, which constitutes a legitimate exercise of religious rights, such as the freedom to change one's religious beliefs

The crime of apostasy contained in the Criminal Act provides that Muslims in Sudan can not renounce Islam or change their religion. If they do, they face the death penalty. The crime of apostasy has been drawn in vague and ambiguous terms and is incompatible with the right to freedom of religion.[17] It is also discriminatory in as much as followers of other religions are free to renounce their religion without facing any punishment.

d. Punishments- need to amend legislation that provides for:

(i) inadequate punishment in proportion to the seriousness of the offence

There is a series of offences that do not provide adequate punishment. Punishments may be either too lenient, such as the maximum punishment of three months imprisonment for the offence of torture in article 115 (2) of the Criminal Act, or excessive, such as some of the offences carrying the death penalty (see below, iii).

(ii) Cruel or inhuman punishments

The Criminal Act contains a series of offences that carry punishments of flogging, amputation or stoning, which the UN Human Rights Committee has held to be inhuman and degrading.[18]

(iii) The death penalty in contravention of recognised international standards according to which capital punishment should only be imposed against adults for the most serious crimes following a fair trial, if not abolished altogether.

The Criminal Act provides for capital punishment for a series of crimes. This includes embezzlement by officials, robbery with violence, drug trafficking, as well as practices which arguably

17 Article 126 of the Criminal Act.
[18] Concluding observations of the UN Human Rights Committee: Sudan, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para.10.

should not be criminalised such as committing a homosexual act and illicit sex according to the position taken by the UN Human Rights Committee.[19]

The Criminal Act allows the imposition of the death penalty against persons under the age of 18 in contravention of international standards.[20]

e. Rights of victims of arbitrary arrests, detention and torture – need to provide:

(i) The unambiguous right to be informed of the reason of arrest, to prompt access to a lawyer of one's choice, to access to a doctor and to communicate with a family member as a safeguard against torture

These rights are not adequately provided in current legislation (see above).

(ii) The right to habeas corpus at all times, including in times of emergency

These rights are not adequately provided in current legislation (see above).

(iii) That confessions extracted under torture are invalid and that the prosecution carries the burden of proof in this regard.

There is no express prohibition against the use of evidence and confessions extracted under torture. Article 20 of the Evidence Act of 1993 appears to rule out the use of such evidence. However, article 10 of this Act gives judges discretion to admit any evidence if they determine it to be acceptable, in particular where corroborated by other evidence. There have been some instances where verdicts have been based on confessions even though the defendants alleged that they had been obtained under torture.

(iv) The right to lodge a complaint about any ill-treatment in detention and to have it investigated promptly and effectively

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[19] Concluding observations of the UN Human Rights Committee: Sudan, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para.19.
[20] Concluding observations of the UN Human Rights Committee: Sudan, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para.20.

A victim of a crime only has a general right to lodge a complaint.[21] There is no obligation on the authorities to undertake an investigation promptly and effectively; instead, officials are protected by immunity laws that are contrary to international standards (see above).

The statutes of limitation applying to offences that can be used in lieu of a crime of torture fall short of requirements. The applicable limits of two to five years is unreasonably short.[22]

Furthermore, criminal law does not provide for a right of victims to submit evidence at all stages of proceedings and to be informed of the outcome of proceedings.

(v) The right to an effective remedy, in particular to claim compensation and other forms of reparation against the individual perpetrator and, in case of officials, against the State.

Victims of torture and other human rights violations may bring a civil suit either as part of criminal proceedings or separately. However, immunity legislation and the lack of official investigations have in practice resulted in a lack of effective access to justice and reparation.

f. Fair trial safeguards- need to provide:

(i) The independence of the judiciary and the freedom of lawyers to exercise their profession

The independence of the judiciary is guaranteed in articles 123 and 128 of the National Interim Constitution. However, there are concerns about how well the independence of judges is guaranteed in statutory law and in practice. There are also continuing concerns about the freedom of lawyers to exercise their profession, including the right to defend those accused of crimes, and whether the Advocacy Law provides sufficient safeguards in this respect.

(ii) The full array of fair trial rights contained in article 34 of the Interim Constitution.

[21] Article 34 CPC.
[22] Article 38 (1) (b) CPC.

A number of fair trial safeguards are enshrined as general principles in article 4 of the Criminal Procedure Code. However, legislation such as the National Security Forces Act and emergency legislation provides the authorities with broad powers that undermine the right to defence. The Emergency and Protection of Public Safety Act of 1997 (Act Number (1) 1998) also provides for the establishment of Special Courts without providing adequate fair trial guarantees. In addition, the Criminal Procedure Code provides for summary trials in cases of lesser punishment that do not respect the full rights of defence.

g. Children and criminal law- need to:

(i) Bring the age of criminal responsibility in line with international standards

There is a lack of clarity regarding the age of criminal responsibility, which may be reached at any time between the age of seven and eighteen depending on the judge's assessment in the case concerned. This provision is contrary to international standards according to which children under the age of twelve should not be liable for criminal offences.[23]

(ii) Abolish the death penalty against children

See above.

(iii) Ensure children's rights in juvenile justice, in particular in the course of criminal proceedings

Criminal procedure laws should be amended in a manner that adequately reflects principles of juvenile justice as recognised by the UN Committee on the Rights of the Child. These principles include non-discrimination, the best interests of the child, the right to life, survival and development, the right to be heard and respect for the child's dignity.[24]

(iv) Provide for special protection for children against all forms of abuse and violations

[23] See Committee on the Right of the Child, General Comment No. 10, Children's rights in Juvenile Justice, UN Doc. CRC/C/GC/10, 9 February 2007, para.16.

[24] Committee on the Right of the Child, General Comment No. 10, Children's rights in Juvenile Justice, UN Doc. CRC/C/GC/10, 9 February 2007, para.4.

Neither the criminal act nor the child act provide adequate protection and punishment of individuals, including officials, who ill-treat children.

(v) Prohibit the recruitment of child soldiers.

Neither the criminal act nor the child act provide adequate protection and punishment of recruitment of child soldiers.

h. Vulnerable groups- need to:

Amend legislation that discriminates against particular groups in relation to criminal offences or criminal procedures or unduly criminalises members of vulnerable groups.

The Criminal Act stipulates the criminal offence of dealing alcohol, which carries a punishment of one year imprisonment or a fine (article 79). Many Southern Sudanese live in the North of Sudan, in particular in Khartoum. The making and selling of alcohol is a culturally legitimate activity and frequently the only way for Southern Sudanese, who are often internally displaced, to survive and maintain their families. The application of the criminal offence of manufacturing and selling alcohol affects persons belonging to this community disproportionately and harshly given the cultural and economic context.

IV. Methods of criminal law reform

Laws can be reformed either by repealing legislation in force, enacting new legislation, or by amending existing legislation, or through a combination of the three.

The method chosen is principally a policy choice. It should be based on an assessment as to whether a wholesale reform is needed or whether a piecemeal reform of legislation would suffice to achieve the objectives. There appears to be widespread agreement in Sudan that legislation such as the Police Forces Act, Armed Forces Act, National Security Forces and Child Act should be reformed in their entirety. There is less obvious agreement with regard to other acts pertaining to criminal law and criminal justice. Reform initiatives with regards to these laws require a careful assessment as to what extent they conform to the Bill of Rights and international standards and reflect best practice. Depending on

the assessment, a selected amendment may be adequate or a wholesale reform may be needed where the laws themselves are deemed deficient. In line with the rationale underlying the Comprehensive Peace Agreement and the Bill of Rights, repealing existing legislation and enacting new legislation where appropriate would open reforms to the widest possible debate and ensure a fresh beginning.

Short of law reform, governmental bodies may issue instructions that specify the meaning, scope and application of existing laws. This is a technique employed by Sudanese authorities, such as under Article 73 of the National Security Forces Act. While such instructions may be important to enhance human rights protection in the short-term, they remain subordinate laws. Also, they do not sufficiently promote the overall objectives of law reform, which includes participation of civil society as an integral part of the process.

V. Process of criminal law reform

Criminal law reform should be both a broad based societal process that reflects the rights and views of all people concerned and a technical process that ensures that laws enacted meet the objectives and the highest possible standards of drafting. To this end, it is critical that representative groups, especially those most affected [who exactly, affected by what?], are involved at all stages of the process. The following approach appears to be most suited to achieving this aim:

(i) Identifying areas of major concern through a broad consultation process
(ii) Examining compatibility of legislation with the interim constitution and international standards
(iii) Comparative research on best practices
(iv) Drafting proposals and/or commenting on pending bills/or bills for consideration.

In terms of sequencing, it would appear to be most efficient that the process focuses on bills under consideration so as to ensure timely input. In parallel, areas of concern and laws should be identified whose reform should be pursued as a priority because they are a source of human rights violations and/or impunity.

VI. Challenges

Any law reform process is bound to face a series of challenges. Judging by developments so far, there are a number of challenges that may arise in the

course of criminal law reform in Sudan. This may include without being limited to: insufficient coordination; limited capacity; delays; resistance of interest groups or institutions affected by the law in question; lack of political will, also because of different political priorities; insufficient involvement of various actors, such as civil society groups and/or international bodies.

It is important to identify the nature of challenges in relation both to criminal law reform in general and to specific issues/laws. This will enable all those committed to criminal law reform to develop strategies with a view to overcoming any obstacles that may arise in achieving the objectives of law reform. This will in all likelihood be an ongoing process as the nature of challenges and of appropriate strategies is bound to change over time. Any assessment of current and expected challenges and ways to respond to them should be based on objective criteria and be conducted in a transparent manner. This would help to avoid that the process becomes overly politicised, a development which would have an adverse impact on law reform.

VII. Concluding remarks

This Options Paper comes at the early stages of what is expected to be a long-term process of engagement of many individuals and institutions with a view to bringing about, it is hoped, the adoption of criminal laws that fully respect human rights and the rule of law. The very process can significantly contribute to a raised awareness of human rights and criminal justice in the whole of Sudan. This Paper does not purport to define the framework and agenda for criminal law reform; instead, it is an open invitation to contribute and to engage on the issues pertinent to such reform.

REDRESS and KCHRED welcome any comments and suggestions in relation to any of the issues raised, as well as any other points that may be relevant but are not covered by this Paper.