



CRIMINAL LAW AND HUMAN RIGHTS IN SUDAN

A BASELINE STUDY

MARCH 2008

1. Objectives and methodology

This objective of this baseline study is to provide benchmarks for future impact assessment of the Criminal Law Reform Project- Sudan.¹ The study seeks to assess how criminal legislation frustrates the enjoyment of human rights and has led to violations. It aims to identify the most significant areas of victimization stemming from provisions in Sudanese criminal laws, which comprise the Criminal Code, Criminal Procedure Code and other laws that contain provisions pertaining to criminal justice, and its practical application. The study reviews the status of current criminal law reform efforts relevant to the human rights concerns mentioned above, focusing on pertinent legal sources, bills introduced and debated, acts passed and the position of key actors. To this end, it examines the role and work of governmental bodies, parliament, civil society and international actors in promoting and bringing about criminal law reform. In so doing, the study seeks to identify indicators regarding criminal laws, human rights and pertinent legislative reforms that can be used to evaluate as the progress made in reform efforts.

The study is based on a thorough review of Sudan's criminal legislation and an examination of official documents, reports from various sources and literature that deal with Sudan's criminal law and human rights as well as relevant legislative reforms. It also draws on a series of interviews conducted with community groups, civil society organizations, academics, lawyers, journalist, parliamentarians, members of governmental bodies and UNDP, UNMIS as well as UNAMID staff.

2. Criminal legislation and human rights

A. *Criminal laws that facilitate human rights violations: Failure to protect and lack of accountability*

Obligations under international human rights law and the Bill of Rights in the Sudanese Interim National Constitution

Under international human rights law, states must respect, protect and fulfil human rights.² A similar obligation is contained in the Sudanese Interim National Constitution, according to which: (i) international human rights treaties binding on Sudan are an integral part of the Bill of Rights (Part Two of the Constitution) and

1 REDRESS and The Khartoum Centre for Human Rights and Environmental Development (KCHRED) implement a Criminal Law Reform Project in Sudan. The Project aims to advance the process of bringing Sudanese law in conformity with the National Interim Constitution and international standards as stated in article 27 of the Bill of Rights

² See General Comment No. 31, *The Nature of the General Legal Obligation imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004.

(ii) “the State shall protect, promote, guarantee and implement this Bill” (Article 27 (2)). This obligation entails that the state does not commit human rights violations and that it takes adequate measures to prevent such violations. Such measures include the reform of laws that facilitate violations and the enactment of laws that make violations a criminal offence subject to prosecution and punishment. The state must equally provide victims of any such violations with effective remedies.³

Nature of Violations

A large number of serious violations of human rights have been documented over the last two decades, including extrajudicial killings, disappearances, arbitrary arrest and torture, and mass rape. Recently, these violations have taken place in different contexts, in particular:

(i) the conflict in Darfur: As document by the UN, the ACHPR and a number of observers, this conflict has been characterised by systematic attacks on civilians by militias, often with the apparent support of the Government of Sudan, which included air bombardment, killings, various forms of ill-treatment and rape.⁴ Emergency legislation and public order offences have also reportedly been used to arrest alleged rebels and others and arrests are often arbitrary and individuals ill-treated and tortured in custody.⁵ Moreover, there has been a campaign of mass rape against girls and women in Darfur. A UN Commission of Investigation held that it is likely that the violations it found amount to war crimes and crimes against humanity.⁶ The International Criminal Court, which is investigating the situation in Darfur following referral by the UN Security Council, has charged two individuals with crimes against

³ Ibid. and Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law, UN Doc. A/RES/60/147, 16 December 2005.

⁴ See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, pursuant to UN Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005 (hereinafter Commission of Inquiry on Darfur); Report of the African Commission on Human and Peoples’ Rights’ Fact Finding Mission to the Republic of Sudan in the Darfur Region (8-18 July 2004), in Twenty-Second Activity Report of the African Commission on Human and Peoples’ Rights (2007), Annex III; Concluding observations of the UN Human Rights Committee: Sudan, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para.9 (hereinafter UN Human Rights Committee, Concluding observations: Sudan).

⁵ See Final report on the situation of human rights in Darfur prepared by the group of experts mandated by the Human Rights Council in its resolution 4/8, presided by the Special Rapporteur on the situation of human rights in Sudan and composed of the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Representative of the Secretary-General for children and armed conflict, the Special Rapporteur on violence against women, its causes and consequences, the Special Representative of the Secretary-General on the situation of human rights defenders, the Representative of the Secretary-General on the human rights of internally displaced persons and the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter Group of Experts, Final Report), UN Doc. A/HRC/6/19, 28 November 2007, pp.61 et seq.

⁶ Commission of Inquiry on Darfur, para.630.

humanity and war crimes. The Government of Sudan has established Special Courts to investigate, prosecute and try crimes committed in Darfur but these courts have only heard a few cases and convicted a few individuals in relation to isolated incidents for crimes such as armed robbery and rape.⁷

(ii) protest movements: Following protests, such as against the construction of the Kajbar dam in the North of Sudan and against evictions in Soba, the authorities reportedly arbitrarily arrested, held incommunicado, and tortured dozens of individuals. In the case of the Kajbar dam, four protesters were killed and several injured by security forces opened in the course of a peaceful protest against the dam.⁸

(iii) Criminal investigations: There are continuing reports about arbitrary arrests and detentions as well as torture in the course of criminal investigations. In a high profile case, ten individuals were sentenced to death for the killing of the journalist Mohamed Taha Mohamed Ahmed on the basis of confessions, which, according to their testimonies and statements by their defence lawyer, had been extracted under torture.⁹

The majority of these violations, as well as a large number of violations that were committed throughout the 1990s and thereafter, have never been investigated due to a combination of factors, including the lack of specific criminal offences and immunity legislation; as a result, perpetrators have not been held to account and victims have not received justice and reparation.¹⁰

A large number of victims are affected by these violations. In Darfur alone, over 200,000 persons are estimated to have been killed and more than 2, 2 million have been displaced.¹¹ It is difficult to estimate the number of victims of other violations. Given that they are often of a collective nature, it is realistic that thousands of individuals have suffered a violation of their rights- a much larger number faces a potential violation of their rights without adequate protection. There are also hundreds of thousand of victims of violations in the 1990s, which include the victims of large-scale violations committed in the North-South conflict, the Nuba mountains and in the crackdown against political dissidents.¹²

The victims come from a cross-section of society but there are certain groups that have been particularly affected that include:

⁷ See REDRESS, Accountability and Justice for International Crimes in Sudan, A Guide on the Role of the International Criminal Court, May 2007.

⁸ See UN Human Rights expert concludes visit to Sudan, UN Press Release, 6 August 2007.

⁹ Group of Experts, Final Report, pp.85,86.

¹⁰ REDRESS, National and International Remedies for Torture, A Handbook for Sudanese Lawyers, March 2005, pp.31 et seq.

¹¹ UN expert decries human rights violations by both sides in Darfur, UN News Centre, 10 March 2008.

¹² Amin Mekki Medani, Crimes against Humanitarian Law in Sudan: 1989-2000, 2001.

- Women, in particular rape victims in Darfur;
- Members of ethnic groups targeted in conflicts, in particular Darfurians both in Darfur and Khartoum, and internally displaced persons (IDPs) in several parts of Sudan;
- Political activists and those perceived as being opposed to the Government;
- Local communities protesting against certain projects or actions;
- Individuals suspected of criminal conduct who often belong to marginalised communities, such as IDPs.

Legal framework facilitating violations

The National Security Act and emergency legislation provide broad powers of arrest and detention that lack safeguards and may facilitate human rights violations.¹³

Article 4 of the Criminal Procedure Code provides for some rights of the defence but there are no adequate custodial safeguards against arbitrary detention and torture. Relevant laws, in particular the Security Forces Act, do not fully guarantee the right to access a lawyer of one's choice,¹⁴ to inform family members,¹⁵ and the right of access to a doctor.¹⁶ There is also no effective provision of habeas corpus, i.e. the possibility to challenge the legality of detention,¹⁷ which is a crucial safeguard against arbitrary detention and '*incommunicado*' detention.

¹³ 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).

¹⁴ 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.

¹⁵ 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.

¹⁶ 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.

¹⁷ 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

In July 2007, the Director-General of Police issued Order No.58/2007 on the treatment of detainees. Similar instructions were issued by the Director General of the National Intelligence and Security Service. Order 58/2007 reminds officers of their obligations under existing laws, prohibits any assaults of detainees or prisoners, and orders officers to provide access to family members and to a lawyer and to respect the presumption of innocence. The order was issued as a short-term measure in response to a recommendation by the UN Human Rights Council's Group of Experts. According to the assessment of the Group of Experts: "... Police Order No.58/2007 did not deal specifically with these human rights violations [arbitrary detention and forced disappearances]. Furthermore, the two orders mentioned above did not apply to the armed forces or any militias under the Government's control. According to the information received, cases of arbitrary detention, torture and summary executions continued."¹⁸ Moreover, "implementation has started in the sense that orders and instructions have been issued, but incidents have continued to be reported of the denial of such guarantees."¹⁹ Accordingly, the Group of Experts recommended as a mid-term measure to: "Ensure institutional and legislative reform of the National Intelligence and Security Services in accordance with the CPA and Interim National Constitution. In particular, broad powers of arrest and detention should be reformed (art.31 and art.33 of the national security act) and judicial oversight mechanism established. Emergency laws should not grant security agencies broad powers to arrest and to restrict freedom of movement, assembly and expression."²⁰

Accountability for serious human rights violations

- Defining international crimes in Sudanese laws

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

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.

¹⁸ Group of Experts, Final report, p.67.

¹⁹ Ibid., p. 70.

²⁰ Ibid.

which constitute crimes pursuant to the Sudanese Criminal Act, other penal laws and the international humanitarian law.”²¹ 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. 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 recently enacted Sudanese Armed Forces Act includes international crimes. However, it only applies to the armed forces and the definition of the crimes fall short of internationally recognised standards.

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 UN Convention against Torture²² 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,²³ which states are bound to prosecute and punish under international law.

- Mode of criminal liability

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, with the exception of the recently enacted Sudanese

²¹ 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.

²² “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.”

²³ 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.”

Armed Forces Act applying to members of the armed forces. In practice, no cases are known in which any higher-ranking official had to stand trial for human rights violations that constitute international crimes.

- Immunity and amnesties for those accused of such crimes

Immunity legislation has contributed greatly to the prevailing climate of impunity for serious human rights violations.

Article 33 of the National Security Forces Act of 1999, article 46 of the Police Act 1999 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 is rarely granted, mainly in cases against the police that are then tried in special Police courts, which raises separate concerns about the adequacy of such trials. As a result, there have been only few convictions of officials in spite of a large number of cases of alleged violations, most of which have not even been investigated.²⁴

Amnesties that may cover individuals who have committed international crimes, such as Presidential Decree No.114 issued in the context of the Darfur Peace Agreement, equally contribute to impunity.

The Armed Forces Act passed in late 2007 and the draft Police Forces Bill retain immunity provisions. According to the Government's submission to the Group of Experts in September 2007: "... police immunity was crucial to the police carrying out their official duties. The Government was in the process of revising the police code and the national security law, based on the new Constitution. New draft laws were under ongoing discussion. The Government intends to revise laws according to the following considerations: the need to prosecute any person committing a crime without any impediment; the need to protect police officers from groundless accusations at the same time; and the need to protect the morale of police forces in context of insecurity."²⁵ According to the Group of Experts' assessment: "Legal immunities [footnote omitted] have not been abolished, although the Government has taken a number of steps to establish procedures for lifting immunities with regard to the police [Order of the Director General of Police No.57/2007 dated 31 July 2007 on the procedures for lifting immunities of police officers] and the National Intelligence and Security Services. The pending Bills on the Armed Forces and the Police will not change the discretionary nature of decisions to lift immunities even in cases of serious violations of human rights. ... This system [envisaged under art.34 of the Sudanese Armed Forces Bill] would, in practice, provide very far-reaching

²⁴ UN Human Rights Committee, Concluding Observations: Sudan, paras.9 and 16 and Group of Experts, Final Report, pp.86 et seq.

²⁵ Ibid., p.91.

immunity in cases where human rights violations were committed as part of carrying out an order by a competent authority.”²⁶

- *Statutes of limitation*

The Criminal Procedure Act of 1991 introduced statutes of limitation. Some of these statutes of limitation, such as two years or five years respectively for acts of torture (depending on whether they are prosecuted under article 115 or 142 of the Criminal Act of 1991) fall way short of international standards according to which limitation periods must be substantial for serious violations and should ideally be abolished altogether.²⁷

- *Legal framework governing investigations*

There are no independent bodies or even units that are tasked with investigating crimes allegedly committed by officials. The National Human Rights Commission that would probably be mandated to investigate human rights violations and to recommend prosecutions has not been established to date in spite of its mention in the Interim National Constitution (Article 142).

Current legislation does not provide effective protection of victims and witnesses, which has been an issue of recurring concern.²⁸

There is also 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.²⁹ Human rights defenders have been repeatedly subjected to threats and harassment, a practice that undermines the effectiveness of their work.³⁰

- *Victims' rights*

Sudanese 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. Victims may lodge complaints and may bring civil suits, including in the course of criminal proceedings. However, immunity legislation, the lack of protection, and the difficulty of proving a case in the absence of a full investigation frequently render these avenues ineffective, contrary to victims' right to an effective remedy under international law.

²⁶ Ibid., p.93.

²⁷ See General Comment 31, The Nature of the General Legal Obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para.18.

²⁸ Group of Experts, Final Report, pp.71, 72.

²⁹ 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.

³⁰ ³⁰ Group of Experts, Final Report, p.73.

Rape

The prevalence of rape and other sexual violence, and the impunity with which it has been committed, has been a persistent cause of concern that has become even more pressing in light of the mass rapes in Darfur. This includes both rape committed by officials and the failure to take effective action to combat rape, irrespective of the perpetrator(s).³¹ The legal framework governing rape and sexual offences is characterised by a series of shortcomings, in addition to the areas of concern already mentioned that pertain to crimes committed by officials.

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. In addition, Sudanese criminal laws do not recognise the offences of domestic rape, sexual harassment and female genital mutilation.

A conviction for rape requires the testimony of four credible mature male witnesses who have witnessed penetration.³² 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.

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. 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.

Moreover, 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. Victims of rape have refrained from lodging criminal complaints due to the shame associated with rape and the lack of protection in criminal proceedings.³³

Broad and vague offences and human rights

³¹ See in this regard UN Human Rights Committee, Concluding Observations: Sudan, para.14.

³² Article 62 of the Evidence Act of 1993.

³³ Group of Experts, Final Report, p.47.

Sudanese criminal laws contain a number of offences that may and have been used against anyone who opposes or criticise the state, or is seen to be doing so, even where done in a peaceful manner. Such laws act as deterrent and undermine the legitimate exercise of human rights.

Offences against the state and against public morality contained in the Criminal Act and in Emergency Declarations based on the Emergency and Protection of Public Safety Act of 1997 (Act Number (1) 1998) are vague and open to abuse. Many of these offences have been used routinely and seemingly arbitrarily against those who are perceived to belong to the opposition.³⁴ There are a number of articles in the Criminal Act of 1991 that restrict or are used to restrict the freedom of assembly and the freedom of the press. The Public Prosecutor decided in January 2007 that “Art. 130 of the Criminal Procedures Code “must not be used by the Press and Publications Prosecution Office to arrest journalists or ban any newspapers on the basis of complaints of defamation. Since then no disruptions have been reported.”³⁵ However, there are still a number of offences in the Criminal Code (articles 66, 115, 159 and 16)) that restrict the freedom of the press and exposes journalist to sanctions.

A number of crimes are based on Shari’a law, such as those relating to the sale and consumption of alcohol. The Interim National Constitution recognises the principle that non-Muslims should not be subject to prescribed Shari’a punishments in the capital but it is not clear how this extends to other parts of Sudan. This exposes non-Muslims to punishments for activities that are seen as culturally legitimate, such as brewing and consuming alcohol. For example, the majority of prisoners in the Omdurman Women’s Prison are imprisoned for alcohol-related offences. According to the Government of Sudan: “Pursuant to an agreement on the rights of non-Muslims concluded in the capital Khartoum with the Commission of Non-Muslims and the judiciary, approximately 800 individuals, mostly from the southern states, who had been accused or found guilty of smuggling alcohol, were released.” This is a noteworthy development but it is not clear whether this agreement will solve the underlying generic problem of the application of Shari’a law to non-Muslims.³⁶

The crime of apostasy contained in the Criminal Act is also of concern as it 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.³⁷ It is also discriminatory in as much as followers of other religions are free to renounce their religion without facing any punishment.

³⁴ 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.

³⁵ Group of Experts, Final Report, p.73.

³⁶ Ibid., p.59. See also Taha Ibrahim, *Why the Criminal Law Needs to be Reformed*, in Akolda M. Tier and Balghis Badri (eds.), ‘Law Reform in Sudan’, Ahfad University of Women, 2008, pp.122-137.

³⁷ Article 126 of the Criminal Act.

Punishments

The system of sanctions in the criminal law of Sudan on the one hand has resulted in excessive and inhuman punishment while, on the other, contributing to impunity for serious crimes.

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. The Criminal Act provides for capital punishment for a series of crimes 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 offences in Sudanese criminal law include embezzlement by officials, robbery with violence, drug trafficking, as well as practices which arguably should not be criminalised such as committing a homosexual act and illicit sex.³⁸ According to the latest available figures, at least 65 persons were executed for various offences in Sudan in 2006.³⁹ The mere existence of the death penalty for a large number of crimes is disproportionate, and, in conjunction with concerns over the lack of fair trials and confessions extracted under torture, enhances the possibility that innocent persons may be executed.

The Criminal Act also 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.⁴⁰ Whilst stonings have not been carried out recently, the punishment of flogging is routinely imposed and executed, often against individuals belonging to vulnerable or lower-class groups in society.⁴¹

Special concerns relating to the status of children in criminal law

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 exposes children as young as seven to the full force of criminal law. It is contrary to international standards according to which children under the age of twelve should not be liable for criminal offences.⁴² The Criminal Act also allows the imposition of the

³⁸ UN Human Rights Committee, Concluding observations: Sudan, para.19.

³⁹ Amnesty International, Death penalty: Death sentences and executions in 2006, available at <http://www.amnesty.org/en/death-penalty/death-sentences-and-executions-in-2006>.

⁴⁰ UN Human Rights Committee, Concluding observations: Sudan, para.10.

⁴¹ Sudanese NGOs *Alternative Report On the International Covenant on Civil and Political Rights (ICCPR)*, July 2006, p.13.

⁴² 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.

death penalty against persons under the age of 18 in contravention of international standards.⁴³ Cases are currently pending both before the Constitutional Court and the African Commission on Human and Peoples' Rights that challenge the compatibility of this legislation with human rights granted in the Bill of Rights and the African Charter on Human and Peoples' Rights.

Neither the Criminal Act nor the Child Act provide adequate protection and punishment of individuals, including officials, who ill-treat children. There are also no provisions that provide adequate protection and punishment of recruitment of child soldiers. In practice, the lack of protection has made children, in particular street children or children living in areas of conflict, more vulnerable to violations.⁴⁴

Rights of the defence and fair trial rights

There are persistent concerns about violations relating to the right of suspects in criminal cases. Emergency legislation provides for wide grounds of arrest. Moreover, the police may detain individuals for up to six months (*garde à vue*).⁴⁵ The laws provide for insufficient safeguards 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. This applies in particular to arrest and detention by the security forces. In practice, the combination of wide powers and inadequate safeguards have resulted in arbitrary arrest and detention, including incommunicado detention. The law does not provide detainees with effective remedies against arbitrary detention and ill-treatment, such as habeas corpus. The right to lodge complaints is effectively curtailed by immunity legislation. A further concern relates to the use of confessions and information extracted under torture. 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.⁴⁶

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

⁴³ UN Human Rights Committee, Concluding observations: Sudan, para.20.

⁴⁴ Group of Experts, Final Report, pp.55,56.

⁴⁵ UN Human Rights Committee, Concluding observations: Sudan, para.21.

⁴⁶ See for example the case concerning the killing of the journalist Taha Mohamed Ahmed mentioned above.

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.

B. Conclusion: Identify priority areas based on adverse impact

The examination of Sudanese criminal laws and criminal procedure laws has highlighted the following key shortcomings:

- The failure to provide protection against serious violations due to the absence of effective safeguards and a lack of effective accountability mechanism, i.e. one that would make violations a serious offence subject to adequate punishments that will be effectively investigated and prosecuted irrespective of the status of the perpetrator.
- A series of broad offences that result in actual or potential criminalization of conduct that may constitute a legitimate exercise of rights.
- Some of the punishments envisaged in criminal laws is excessive or inhuman as a range of crimes are subject to corporal punishments or the death sentence.
- Suspects of crime are not given the full rights of defence, in particular in case of arrest and detention by the security forces, confessions extracted under torture may be used in court, and detainees do not have adequate remedies to challenge arbitrary detention or ill-treatment
- The use of special courts and summary trials undermine the right to a fair trial.

All of these shortcomings have had an adverse impact on the protection of human rights. The failure to provide adequate protection against serious violations is the most significant area of concern because of the seriousness of violations, their systemic nature and the large number of victims, including amongst the most vulnerable. In this regard, the reform of rape legislation is a priority that would benefit all women in Sudan, in particular in Darfur. A related area of priority is the abolishment of immunity laws which signify special protection reserved for government officials that has in practice fostered impunity. Reforms in these areas would send an important signal that respect of human rights will be taken more seriously; it will also potentially act as deterrent for officials not to violate rights. To this end, the reform of immunity legislation will have to be complemented with a full recognition of international crimes in line with accepted standards and reforms in the system of investigating such crimes.

2- INDICATORS:

- **Increased awareness about criminal legislation detrimental to human rights**
- **Concrete reform initiatives aimed at changing criminal legislation detrimental to human rights**
- **Changes to legislation detrimental to human rights.**

3. Current law reform initiatives

3.1. The legal framework: Comprehensive Peace Agreement and Bill of Rights

Most of the laws pertaining to criminal justice and human rights were passed in the 1990s. The current Criminal Code and Criminal Procedure Code were passed in 1991, with the acts governing the Security Forces and the Police both being adopted in 1999. There had been civil society initiatives in the late 1990s and early 2000s that called for a comprehensive reform of Sudanese laws, including criminal laws, to bring them in line with international standards.⁴⁷ However, these initiatives met with limited responses at the time. It was only with the adoption of the Comprehensive Peace Agreement (CPA) in 2005 that the issue of law reform gained new impetus. Chapter II, 1.6. of the CPA contains a commitment of the Republic of Sudan to comply fully with its international human rights treaty obligations and lists a series of human rights and fundamental freedoms. Chapter II, 2.4.3 stipulates that the “human rights and fundamental freedoms as specified in the Machakos Protocol, and in the Agreement herein, including respect for all religions, beliefs, and customs, shall be guaranteed and enforced in the National Capital, as well as throughout the whole of Sudan, and shall be enshrined in the Interim National Constitution.” The CPA also provides for the setting up of a National Constitutional Review Commission (NCRC) tasked with preparing the National Interim Constitution and “such other legal instruments as is required to give effect to the Peace Agreement (2.12.9)” and is responsible “for organizing an inclusive Constitutional Review Process. The process must provide for political inclusiveness and public participation (2.12.11).” The CPA also provides for the setting up or reform of institutions, such as by enacting a Human Rights Commission Act (2.10.1.2) and a National Security Act (2.7.1.1).

In accordance with the CPA, a National Interim Constitution (NIC) was adopted in 2005. The NIC contains a Bill of Rights that incorporates international human rights binding on Sudan. Article 27 (2) of the Bill of Rights stipulates that “the State shall protect, promote, guarantee and implement this Bill” and, pursuant to Article 27 (4) “Legislation shall regulate the rights and freedoms enshrined in the

⁴⁷ A.H. Abdelsalam & Alex De Waal, *The Phoenix State: Civil Society and the Future of Sudan*, Asmara: The Red Sea Press, 2002.

Bill and shall not detract from or derogate any of these rights.” The NIC also makes provision for the NCRC (Article 140) and the establishment of the Constitutional Court, which is vested with the power to protect human rights and rule on the constitutionality of laws (Articles 119-122).

3.2. The institutional set up and current developments regarding criminal law reform

There are several committees with a role in law reform. The NCRC is composed of members from several parties. It has identified over 60 laws in need of harmonization with international human rights standards and is currently working on a number of priority areas, in particular issues related to arrest procedures, particularly arrest by the National Security Forces, rape legislation, evidence laws and immunity. The Ministry of Justice set up a Law Reform Committee, which is largely responsible for reviewing legislation that reaches it from other line ministries. There are also committees in Parliament that play both a proactive role in suggesting reforms and in reviewing bills pending in parliament. In 2006, the Legislative Standing Committee of Parliament identified 12 laws as priority areas, including the Criminal Act, Criminal Procedure Act, the National Security Forces Act, the Police Forces Act, the Armed Forces Act, the Evidence Act and the Press and Publication Act. The Parliamentary Committees are composed of party members and consult the public in the course of the readings of bills in Parliament. The Advisory Council on Human Rights, though not specifically focusing on law reform, may raise relevant human rights issues in relation to any of these laws with the Government. All these bodies play an important role. However, their effectiveness is hampered by lack of resources and capacity that would be necessary to undertake further research and more systematic work. There is a lack of coordination and concerted efforts by the various bodies to identify priorities and concentrate on concrete reforms. This is at least partly due to the lack of transparency of the process and the lack of clarity concerning the mandates of the various bodies.

The Government has introduced several bills relating to the army and law-enforcement agencies. An Armed Forces Act was passed in late 2007. Whilst it recognises international crimes, the definition of these crimes in the act is deficient and it only applies to armed forces. The act includes command responsibility for international crimes for the first time in Sudanese laws. However, it also includes immunity provisions according to which immunity can only be lifted with the approval of the President, thus setting a high threshold. The passing of the Act was noticeable for the limited public debate of some of these crucial issues, not least because there was limited NGO action in this regard.

The Police Forces Bill and the Security Forces Act were being deliberated in early 2008. The Police Forces Bill had passed its first reading at the time of writing debates. The Police Forces Bill retains provisions granting immunity and the providing for police courts both of which raise concerns about their compatibility with international human rights standards and the Bill of Rights. The National Security Forces Bill had been prepared by the Ministry of Security and was pending with the Council of Ministers at the time of writing, without any public debate having taken place on the details of the Bill to date.

As of early 2008, there were no initiatives for a wholesale review and possible reform of either the Criminal Act of 1991 or the Criminal Procedure Act of 1991. Neither had there been a review of the emergency laws (in particular the Emergency and Protection of Public Safety Act of 1997 (Act Number (1) 1998) and the Emergency and Public Safety Bylaw of 1998). With regard to criminal law and freedom of the press, there are still a number of offences in the Criminal Code (articles 66, 115, 159 and 16) that restrict the freedom of the press and exposes journalist to sanctions. According to the Group of Experts, “No action was taken to remove restrictions in National Press Laws or to harmonise the Press and Printed Publications Act 2004 with the Bill of Rights of the Interim Constitution.”⁴⁸

The Government has taken a number of steps to combat violence against women. In 2005, a National Action Plan on Combating Violence against Women was adopted and a new unit created in the Ministry of Justice in charge of implementing the plan. In June and July 2007, two workshops on combating violence against women and on the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa were held in collaboration with UNMIS. A policy was adopted in August 2007, stipulating zero tolerance against sexual violence, prosecution of perpetrators, provision of medical care, implementation of Criminal Circular 2 that relates to form 8 concerning medical examinations, and increasing the number of women police officers. A code of conduct for the armed forces was being prepared in late 2007 and the Armed Forces Act of 2007 recognises international crimes, which encompass rape committed in war.

The Group of Experts acknowledged these initiatives but found that “it seems that these activities had yet little impact on the ground.”⁴⁹ With regard to rape legislation, “the Government stated that it was committed to reviewing the current legal framework” but also “that Article 145 of the Criminal Code [the criminal offence of adultery] was clear and that there had thus far been no cases which confused rape and adultery.”⁵⁰

⁴⁸ Group of Experts, Final Report, p.76.

⁴⁹ Ibid., p.42.

⁵⁰ Ibid., p.53.

The Child Act was passed in 2004 and new legislation is envisaged to provide effective protection of children and to provide for effective investigation and prosecution of violations. The Government set up Gender and Child Units within the police but it is not clear how effective they are. In late 2007, the new Child Act was pending with the Council of Ministers for approval after having been finalised by the Legal Reform Committee. No further information was available on the contents of the bill.

The current situation regarding criminal law reforms is marked by a lack of a comprehensive approach that has resulted in piecemeal reforms. There is no transparent process of law reform and designated bodies such as the NCRC and the LRC have limited capacity. There has been little public debate and civil society involvement in law reform. Media coverage has been piecemeal.

The National Human Rights Commission, which could play an important role in promoting public debate and galvanizing reforms, has yet to be established as the relevant bill has been pending with the Council of Ministers. Parliamentarians and political parties have also not been very successful in advancing law reform, for example, no private member bills have been tabled even though this option is available according to the NIC (article 106 (2) and (3)). Other challenges consist of institutional resistance against particular reforms, such as evidenced in current debates on the Police Forces Bill, which may contribute to retaining such features as immunity legislation and police courts as a means of placating institutional concerns.

3.2. INDICATORS:

- **Policy commitment by the Government of Sudan to change relevant criminal legislation**
- **Progress in reforming specific acts**
- **Greater transparency and efficiency in the work of official bodies on criminal law reform**
- **More information made available to public on criminal laws and law reform.**

3.3. Current initiatives by civil society

Civil society organizations have undertaken a series of initiatives impacting on criminal law reform or concerning particular aspects of criminal law consisting of:

- Rights awareness campaigns, such as the current campaign to implement the CPA and the Bill of Rights, which calls for the reform of relevant laws as a means of implementation; and
- Issue-specific activities, such as workshops on law reform for rape and gender-based violence, e.g. in July 2006 by the Gender Centre for

Research & Training and KCHRED in collaboration with UNMIS, and several workshops on justice and accountability organised by KCHRED.

Human rights lawyers and NGOs have also brought cases before the recently established Constitutional Court, challenging the constitutionality of emergency legislation, immunity provisions in various laws and the imposition of the death penalty against children under the age of 18. No rulings have been issued in any of these cases and it remains to be seen what impact a judgment of the Constitutional Court that declared a law or particular provision to be unconstitutional would have on criminal law reform.

There are only few civil society organizations that have the capacity to take the lead in law reform initiatives. Many organizations, in particular outside Khartoum, have focused on the provision of legal aid, monitoring and advocacy, such as for women's rights. Most of these organisations have limited capacity and legal expertise with regard to specific aspects of criminal law and the process of legislative reform. However, there is some local experience with rights awareness campaigns and advocacy.

Academics and individual human rights lawyers and others have done considerable work on law reform, including criminal law reform, which has inter alia resulted in the publication of key books on the issue.⁵¹ However, to date there has been limited collaboration between this group of persons and civil society organizations on the issue of reforms.

There is a lack of a coherent civil society strategy and focus on criminal law reform. A number of activities are of a general nature focusing on democratic transformation and holistic approaches without resulting in concrete initiatives. The campaigns and litigation mentioned above have the potential of creating a better awareness and momentum for reforms and of resulting in landmark rulings. However, they are not part of a bigger strategy aimed at a comprehensive reform. While more concerted efforts have been made with regard to key areas, such as rape legislation, these initiatives do not appear to have been based on a sustained and coherent strategy, not least in the light of the limited impact to date.

This assessment is supported by the limited press coverage that criminal law reform and specific aspects of it have received in Sudan. Whilst this is partly due to the technical nature of reforms, there have been limited campaigns by civil society coupled with limited interest by the majority of journalists to cover any of the relevant issues in a more sustained and in-depth manner. The limited

⁵¹ See Mohamed Abdelsalam Babiker, *Application of International Humanitarian and Human Rights Law to the Armed Conflicts of the Sudan: Complementary or Mutually Exclusive Regimes?* Intersentia, Antwerp/Oxford, 2007 and Akolda M. Tier and Balghis Badri (eds.), *Law Reform in Sudan*, Ahfad University of Women, 2008.

coverage of the reform of the Armed Forces Act and relevant human rights concerns is a case in point.

3.3. INDICATORS:

- **Increased societal awareness of criminal law and law reform, particularly amongst victims communities**
- **Enhanced focus and coordination of the work of civil society on criminal law reform**
- **Enhanced capacity of civil society in dealing with efforts relating to criminal law reform**
- **Greater advocacy efforts of civil society concerning criminal law reform**
- **Enhanced media coverage of criminal law reform and relevant issues, including quality of coverage.**

3.4. The role of regional and international bodies

The United Nations, in particular the human rights unit of UNMIS, has carried out a number of initiatives to advance relevant legislative reforms, particularly in the context of CPA implementation, seeking both to build the capacity of key bodies and to engage on the harmonization of Sudanese laws with the Bill of Rights. One of its priorities has been rape legislation and in 2007, UNMIS, in cooperation with the National Assembly and the Women Center for Human Rights, held a workshop on Reform of Legal Provisions of Criminal Law 1991 and Evidence Law 1994 on Violence against Women. UNMIS is a key actor in bringing together various actors and in strengthening the capacity of relevant bodies. However, its work had limited tangible impact to date and observers maintain that it could enhance its role by seeking to enhance the capacity of civil society to engage in law reform. The UNDP has a rule of law unit but it has to date not focused in-depth on criminal law reform.

Other UN bodies have played an important role, in particular the UN Human Rights Council Groups of Experts that have developed a detailed list of recommendations with regard to the situation in Darfur, many of which concern criminal legislation that applies throughout Sudan, and have engaged with the Government on implementation.

The UN Human Rights Committee has engaged with the Government of Sudan and civil society groups in the course of the consideration of Sudan's state party report under the International Covenant on Civil and Political Rights in 2007. The Committee made a number of specific recommendations on legislative reforms, such as concerning immunity legislation, custodial safeguards, rape and

apostasy, and called on Sudan to “ensure that its legislation gives full effect to the rights recognised in the Covenant.”⁵² The Committee requested the Government of Sudan to report on the follow-up to a number of these recommendations within one year. This is an important dialogue on various aspects of criminal law reform that may influence debates within Sudan. However, the impact of the Committee’s recommendation may be limited given the nature of follow-up procedures, which does not allow sustained and detailed engagement on the issues.

The International Criminal Court has been vested with investigating the situation in Darfur. As part of the admissibility requirement, the ICC may only prosecute individuals if Sudan has been unable or unwilling to do so itself, a principle known as complementarity. In response, Sudan set up Special Courts in Darfur and vested the Courts with the power to prosecute and try crimes under international humanitarian law. However, following charges being brought against two Sudanese nationals in 2007, the Government of Sudan has stopped any cooperation with the ICC.⁵³ The ICC investigation does therefore, at least to date, not provide for a framework that fosters debate and engagement on criminal law reform although, arguably, some of the recent changes in legislation, such as the recognition of international crimes in the Armed Forces Act, has been prompted by the ICC investigations.

The African Commission on Human and People’s Right and the African Union have engaged with the Government of Sudan, in particular on the situation in Darfur. The African Mission in Sudan (AMIS), which was replaced by the United Nations and African Mission in Darfur (UNAMID) undertook work on human rights protection but not specifically in the area of law reform.

Regional and international bodies work on a plethora of issues in Sudan, with the main focus on the situation in Darfur. Immediate concerns over human rights violations and how to ensure protection have arguably been detrimental to a more concerted effort that would focus on putting in place a legal framework best suited to protect human rights and ensure accountability. UNMIS, UNDP and UNAMID can all play a stronger role on the ground in supporting civil society engagement in criminal law reform and in advancing key issues relating to the recognition of rights. Regional bodies, such as the African Union and the European Union, as well as the various UN bodies seized with the situation in Sudan could arguably develop a stronger focus on the need for legal reforms as a means to strengthen the rule of law and ensure human rights protection.

3.5. INDICATORS:

⁵² UN Human Rights Committee, Concluding observations: Sudan, para.8.

⁵³ Group of Experts, Final Report, p.93.

- Enhanced focus on the importance of criminal law reform in the protection of human rights in Sudan in reports and activities of regional and international bodies.