

**REDRESS**

*Seeking Reparation for Torture Survivors*



# **TIME FOR CHANGE**

## **REFORMING SUDAN'S LEGISLATION ON RAPE AND SEXUAL VIOLENCE**

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# I. Introduction

This Position Paper is published by REDRESS and KCHRED as part of the Criminal Law Reform Project in Sudan.<sup>1</sup> It has been prepared in response to a number of well-documented challenges in respect of how allegations of rape and other forms of sexual violence are handled in Sudan. These challenges include the absence of appropriate and effective mechanisms to protect victims and witnesses in rape and sexual violence cases and the failure of the competent authorities to carry out effective investigations and prosecutions into allegations of such crimes. These shortcomings stem in part from deficiencies in the definition of the criminal offence of rape and overly narrow evidentiary rules applicable in such cases.

The Paper seeks to contribute to the ongoing debate on the reform of Sudan's legislation on rape and sexual violence. To this end, it proposes specific changes to Sudan's legislation so as to bring it in line with the Bill of Rights in the Interim National Constitution, international human rights standards and best practices from around the world. This approach is designed to ensure compliance with constitutional and international law requirements and to enhance the technical quality of the law.

The Paper examines the case for reforms, taking into consideration the state of the current debate and measures taken so far. It provides an overview of the prohibition of rape under international law and the rights and obligations flowing from that prohibition. These standards, together with the Bill of Rights and best practices from countries worldwide are used as a guide to examine current Sudanese legislation on rape and sexual violence and to develop specific reform proposals. The Paper examines the substance of the criminal offence of rape, the prosecution of such offences and the position of victims. A set of recommendations are provided, based on a detailed analysis of applicable standards and legislative reforms in key countries.

The Paper does not purport to provide a comprehensive review of legislation relating to gender-based violence, including such crimes as female genital mutilation and trafficking of women, which would need to be addressed in a separate position paper.

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<sup>1</sup> The Criminal Law Reform Project is a joint initiative by REDRESS and KCHRED aimed at advancing 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. **For any information on the project and/or the position paper, please contact: Ms. Ishraga Adam, Project Coordinator; Khartoum Center for Human Rights and Environmental Development, Sahafa Zalat St - White new flat, located in the South West Corner of the Saha Shaabia,- Aldeim, Khartoum, Sudan, Email: ishragha\_adam@yahoo.com, Mobile: + 249 9 122 341652.**

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## II. The need for a reform of Sudanese legislation on rape and sexual violence

Rape and other forms of sexual violence are some of the worst possible assaults on the physical, psychological and sexual integrity of victims, who are predominantly women but also, in some instances, men. These crimes tear at the fabric of personal relationships, families, communities and societies at large. The heinous nature of rape is recognised in the fact that it constitutes an international crime under certain circumstances and a criminal offence in national legal systems around the world. In Sudan, the criminal offence of rape and some forms of sexual violence (gross indecency) have been recognised in each of the Sudanese criminal acts in force to date (1925, 1974, 1983 and 1991).<sup>2</sup>

It is difficult to establish the prevalence of rape in Sudan in the absence of reliable statistics. Some statistics on rape and sexual violence in Darfur have been released but there does not appear to be a nation-wide systematic data collection on relevant complaints and their outcomes.<sup>3</sup> The number of formally lodged complaints of rape and related crimes of sexual violence cannot be taken as an accurate reflection of the prevalence of rape given that rape and sexual violence are likely to be grossly underreported.<sup>4</sup> A high number of rape cases have been reported in situations of conflict in Sudan and there have been reported instances of rapes in ordinary (non conflict-related) situations.<sup>5</sup> Despite this, there have only been a few cases in which perpetrators have been held to account. A series of shortcomings in law and practice

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<sup>2</sup> The crime of rape is recognised in article 316 of the 1925 and 1974 Criminal Act, article 317 of the 1983 Criminal Act and article 149 of the 1991 Criminal Act. The crime of gross indecency is recognised in article 319 of the 1925 and 1974 Criminal Act, article 319 of the 1983 Criminal Act and article 151 of the 1991 Criminal Act.

<sup>3</sup> *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 or 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, 28 November 2007, para.23 and pp.42, 43 (hereinafter Final report of UN Experts Group).

<sup>4</sup> *Ibid.*, p.43 and Concluding observations of the UN Human Rights Committee: Sudan, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para.14.

<sup>5</sup> Final report of UN Experts Group, *supra* n.3, p.47.

have contributed to the lack of protection of victims and to the impunity which has resulted.

Impunity for rape is a phenomenon that is not confined to Sudan. A combination of legal, institutional, social and cultural factors often result in a lack of full investigations let alone successful prosecutions.<sup>6</sup> In Sudan, a series of shortcomings in law and practice have been identified as factors that contribute to the lack of protection of women (and men) and to impunity, including but not necessarily limited to:

- Lack of clarity in the definition of rape, particularly in relation to adultery
- Lack of specificity of the rules on consent pertaining to rape
- Factors inhibiting victims from bringing complaints, such as: (i) the prospect of facing counter-charges for adultery (zina) or wrongfully accusing someone of adultery where rape cannot be proved (quadf); (ii) difficulties in securing timely and adequate medical examinations and evidence and; (iii) the absence of complaints procedures and facilities, such as women's desks at police stations
- The lack of programmes and/or procedural rules aimed at providing protection to victims of rape and at avoiding retraumatisation
- Evidentiary hurdles, such as the four male witness rule, which make a conviction almost impossible unless the perpetrator confesses to the crime
- Immunity for officials accused of rape.<sup>7</sup>

The Government of Sudan has taken a number of steps to combat violence against women. In 2005, a State Plan to Combat Violence against Women was adopted and a new unit was created in the Ministry of Justice that is in charge of implementing the plan.<sup>8</sup> 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 the United Nations Mission in Sudan (UNMIS) in which changes to Sudanese rape laws were recommended. A further workshop on rape legislation took place in Khartoum in June 2008. A number of measures were announced by the Government of Sudan in 2007, stipulating a policy of zero tolerance against sexual violence and a commitment to the prosecution of perpetrators, provision of medical care, implementation of Criminal Circular 2 that

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<sup>6</sup> *International, regional and national developments in the area of violence against women, 1994 to 2003*, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution 2002/52, Addendum 1, UN Doc. E/CN.4/2003/75/Add.3, 27 February 2003.

<sup>7</sup> See in particular workshop reports, UNMIS, *The Law Reform for the Prosecution of Rape and other Sexual Offences*, 5 July 2006 and UNMIS in cooperation with National Assembly & Women Center for Human Rights, *Reform of Legal Provisions of Criminal Law 1991 and Evidence Law 1994 on Violence against Women*, 25 January 2007.

<sup>8</sup> *Third period report of states parties due in 2001: Sudan*, UN Doc. CCPR/C/SDN/3, 10 January 2007, para.159.

relates to form 8 concerning medical examinations, and increasing the number of women police officers.<sup>9</sup> A code of conduct for the armed forces was being prepared and the Armed Forces Act of 2007 recognises international crimes, which encompass rape committed in war.<sup>10</sup>

However, concrete steps have yet to be taken to reform the legislation pertaining to rape in the Criminal Act, and the rules and procedures applying to the prosecution of rape. Reform initiatives aimed at revising the legislation on other forms of sexual violence are also needed. The offence of gross indecency in the Criminal Act does not cover a series of forms of sexual violence that are increasingly recognised as sexual offences in other countries and that states are arguably bound to criminalise as a matter of international law.

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<sup>9</sup> Final report of UN Experts Group, *supra* n.3, p.41.

<sup>10</sup> Article 153 (2) (d) of the Armed Forces Act, 2007.



# III. States' obligation to provide protection against sexual violence under international law

## 1. Prohibition of rape under international human rights law, in particular rape as torture

Rape is recognised as a serious criminal law offence in countries around the world. It has been recognised as an aggravated and specialised form of assault used not only to create physical pain and suffering, but also to degrade the victim and the victims' family and community and to demonstrate through violent means, control over them. As was held by Bangladesh's High Court in the case of *Al Amin & Others v. Bangladesh*, which concerned the acquittal of a suspect in a rape case and the lack of appeal by the state prosecution:

“Rape violates a victim's fundamental right to life and their human dignity... Given A's [the victim's] reliability as a witness and the fact that the evidence clearly established that she had been the victim of rape, the appellants' acquittal was perverse, unreasonable and unfounded, and proper punishment should have been imposed.”<sup>11</sup>

In addition to its recognition as a crime in penal codes around the world, rape which is perpetrated by officials of the state or in which it can be said that the state has facilitated, acquiesced or enabled others to commit rape, is absolutely prohibited under international human rights law as a form of torture.<sup>12</sup> Even where no official is involved in the rape, states have a positive obligation to protect persons subject to their jurisdiction from violations of their physical, psychological and sexual integrity,

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<sup>11</sup> *Amin & Others v. Bangladesh*, High Court, Judgment of 10 December 1998, 51 DLR (1999) 154, 19 BLD (HCD) (1999) 307, (1998) 2 CHRLD 453.

<sup>12</sup> *Aydin v. Turkey*, (57/1996/676/866, 25 September 1997), para. 83; *Maslova and Nalbandov v. Russia*, (Application no. 839/02, 24 January 2008), para. 107; *V.L. v. Switzerland*, CAT/C/37/D/262/2005, 22 January 2007, para.8.10.

and, to this end, to prevent and repress rape through adequate criminal legislation and other measures.<sup>13</sup>

The UN Security Council and other UN bodies, such as the UN General Assembly, have adopted several resolutions and declarations that condemn rape and sexual violence against women as forms of torture, international crimes and as violations in their own right.<sup>14</sup> Regional and international human rights bodies have repeatedly held that rape committed by, or with the acquiescence of state officials, constitutes torture. In the case of *Aydin v. Turkey*, the European Court of Human Rights found that:

“While being held in detention the applicant was raped by a person whose identity has still to be determined. Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.”<sup>15</sup>

This European Court of Human Rights recently confirmed this jurisprudence in *Maslova and Nalbandov v. Russia*.<sup>16</sup>

The Inter-American Commission equally held that rape constitutes torture in *Mejía v. Perú*:

“Regarding the first element, the Commission considers that rape is a physical and mental abuse that is perpetrated as a result of an act of violence. The definition of rape contained in Article 170 of the Peruvian Criminal Code confirms this by using the phrasing “[h]e who, with violence or serious threat, obliges a person to practice the sex act...” The Special Rapporteur against Torture has noted that sexual abuse is one of the various methods of physical torture... Moreover, rape is considered to be a method of psychological torture because its objective, in many cases, is not just to humiliate the victim but also her family or community...”<sup>17</sup>

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<sup>13</sup> *M.C. v. Bulgaria*, (Appl. No. 39272/98, 4 December 2003), para.153; Committee on the Elimination of the Discrimination of all Forms of Violence against Women, General Recommendation No. 19 (11th session, 1992).

<sup>14</sup> UN Security Council Resolution 1325 (2000) on Women and Peace and Security and UN Declaration on the Elimination of Violence Against Women, GA Res 48/104, 20 December 1993.

<sup>15</sup> *Aydin v. Turkey*, (57/1996/676/866, 25 September 1997), para. 83.

<sup>16</sup> *Maslova and Nalbandov v. Russia*, (Application no. 839/02, 24 January 2008), para. 107.

<sup>17</sup> *Raquel Martí de Mejía v. Perú*, Case 10.970, Report No. 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 157 (1996).

“Rape causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt or, in some cases, are even made pregnant. The fact of being made the subject of abuse of this nature also causes a psychological trauma that results, on the one hand, from having been humiliated and victimized, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them.”<sup>18</sup>

The Committee against Torture recently held in *V.L. v. Switzerland*:

“The acts concerned, constituting among others multiple rapes, surely constitute infliction of severe pain and suffering perpetrated for a number of impermissible purposes, including interrogation, intimidation, punishment, retaliation, humiliation and discrimination based on gender. Therefore, the Committee believes that the sexual abuse by the police in this case constitutes torture even though it was perpetrated outside formal detention facilities.”<sup>19</sup>

The Inter-American Court of Human Rights, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have equally held that rape constitutes torture.<sup>20</sup>

## 2. Prohibition of rape under international humanitarian law

Rape is prohibited under international humanitarian law in both international and non-international armed conflicts<sup>21</sup> and states have to take adequate measures to prevent and repress rape.

### - *International armed conflicts*

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<sup>18</sup> Ibid.

<sup>19</sup> *V.L. v. Switzerland*, UN Doc. CAT/C/37/D/262/2005, 22 January 2007, para.8.10.

<sup>20</sup> See below on rape and international crimes.

<sup>21</sup> See on the definition of an armed conflict, ICTY, *The Prosecutor v Dusko Tadic*, (IT-94-1), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para.70: “... an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”

The prohibition of rape is enshrined in all four Geneva Conventions of 1949 relating to the obligation of parties to an international armed conflict that are binding on Sudan.

Though not expressly mentioned, rape constitutes the grave breach of

“torture or inhuman treatment, ... [and] wilfully causing great suffering or serious injury to body or health, ..., not justified by military necessity and carried out unlawfully and wantonly.”<sup>22</sup>

States parties are under an obligation

“to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.”<sup>23</sup>

Article 27 of Geneva Convention IV relative to the Protection of Civilian Persons in Time of War imposes a specific obligation on states parties to the effect that:

“Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”

Article 75 of the 1<sup>st</sup> Additional Protocol of 1977 relating to the protection of victims of international armed conflicts binding on Sudan stipulates fundamental guarantees, which include the absolute prohibition of:

“(a) violence to the life, health, or physical or mental well-being of persons, in particular:  
... (ii) torture of all kinds, whether physical or mental; [and]  
(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault...”

Article 76 (1) of the 1<sup>st</sup> Additional Protocol imposes a specific duty on states parties to protect women from rape:

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<sup>22</sup> Articles 50, 51, 130 and 147 of the four Geneva Conventions respectively.

<sup>23</sup> Articles 49, 50, 129 and 146 of the four Geneva Conventions respectively.

“Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.”

Article 11 (4) of the 1<sup>st</sup> Additional Protocol defines grave breaches of the Protocol:

“Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.”

Rape arguably constitutes such an act, entailing an obligation of states parties to enact legislation repressing such acts and to prosecute the perpetrators pursuant to Article 85 of the 1<sup>st</sup> Additional Protocol.

#### **- Non-international armed conflict**

With regards to non-international armed conflicts, article 3 common to the four Geneva Conventions of 1949 prohibits, *inter alia*:

“ a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;... and  
(c) outrages upon personal dignity, in particular humiliating and degrading treatment...”

which clearly encompasses acts of rape and other forms of sexual violence.

Article 4 of the 2<sup>nd</sup> Additional Protocol to the Geneva Conventions of 1977 relating to the protection of victims of non-international armed conflicts, to which Sudan is a state party, explicitly mentions rape as one of the acts that is absolutely prohibited:

“(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault.”

### **3. Rape as an international crime**

International crimes are those crimes that entail individual criminal responsibility as a matter of international law and in regard to which states have a duty to prosecute and punish (or extradite) the perpetrators.<sup>24</sup> Rape may constitute any of the international crimes of genocide, crimes against humanity and war crimes, as well as torture.

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<sup>24</sup> Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, p.15.

The International Criminal Tribunal for Rwanda recognised in several cases that rape may constitute genocide<sup>25</sup> even though it is not explicitly mentioned in the definition of genocide.<sup>26</sup> Rape and sexual violence are expressly listed as a crime against humanity in Article 5 (g) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY),<sup>27</sup> Article 3 (g) of the Statute for the International Criminal Tribunal for Rwanda (ICTY)<sup>28</sup> and Article 7 (g) of the Rome Statute of the International Criminal Court (ICC).<sup>29</sup> Both the ICTY and the ICTR have recognised rape as crimes against humanity in several cases, such as *Prosecutor v. Furundzija*, *Prosecutor v. Delalic*, *Prosecutor v. Akayesu*, *Prosecutor v. Musema* and *Prosecutor v. Semanza*.<sup>30</sup>

Rape also constitutes a war crime if committed in the course of an international or a non-international armed conflict as stipulated in Article 2 of the ICTY Statute, Article 4 (e) of the ICTR Statute and Article 8 (2) (a) (ii) and (iii) and 8 (2) (b) (xxii) of the Rome Statute. The ICTY has held in its jurisprudence in *Prosecutor v. Furundzija* that rape constitutes a grave breach under Article 2 of its statute<sup>31</sup> and the ICTR has ruled in several cases that rape is a war crime, such as in *Prosecutor v. Akayesu*, *Prosecutor v. Musema* and *Prosecutor v. Semanza*.<sup>32</sup>

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<sup>25</sup> See for the definition of genocide Article 2 of the Genocide Convention (Convention on the Prevention and Punishment of the Crime of Genocide) of 1948 to which Sudan is a signatory.

<sup>26</sup> *Prosecutor v. Gacumbitsi*, (Case No. ICTR-2001-64-T, Judgment, 14 June 2004), para. 291; *Prosecutor v. Musema*, (Case No. ICTR-96-13-A, Judgment, 27 January 2000), para. 933; and *Prosecutor v. Akayesu*, (Case No. ICTR-96-4-T, Judgment, 2 September 1998), para.508.

<sup>27</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, (UN Security Council Resolution 827, 25 May 1993, Annex: Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, and subsequent amendments).

<sup>28</sup> Statute of the International Criminal Tribunal for Rwanda, UN Security Council Resolution 955 of 8 November 1994.

<sup>29</sup> Rome Statute of the International Criminal Court, Rome (17 July 1998) (Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by proces verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002).

<sup>30</sup> *Prosecutor v. Furundzija*, (Case No. IT-95-17/1-T, Judgment, ICTY TC), 10 December 1998; *Prosecutor v. Delalic*, (Case No. IT-96-21-T, Judgment, 16 November 1998); *Prosecutor v. Akayesu*, (Case No. ICTR-96-4-T, Judgment, 2 September 1998); *Prosecutor v. Musema*, (Case No. ICTR-96-13-A, Judgment, 27 January 2000), and *Prosecutor v. Semanza*. (ICTR-97-20-T, Judgment, 15 May 2003).

<sup>31</sup> *Prosecutor v. Furundzija*, (Case No. IT-95-17/1-T, Judgment, ICTY TC, 10 December 1998), para.172 and paras. 270 et seq.

<sup>32</sup> *Prosecutor v. Akayesu*, (Case No. ICTR-96-4-T, Judgment, 2 September 1998); *Prosecutor v. Musema*, (Case No. ICTR-96-13-A, Judgment, 27 January 2000), and *Prosecutor v. Semanza*. (ICTR-97-20-T, Judgment, 15 May 2003).

## 4. States' obligations to prevent and respond to rape

### - Positive obligation of states to prevent and repress acts of rape

Under international law, states have a twofold obligation:

- (i) 'negative' - public officials to refrain from committing rape or contributing to it by means of instigation, consent or acquiescence;
- (ii) 'positive' - to prevent and respond to rape irrespective of the identity of the perpetrator(s).

A state may incur responsibility under international law for violating either of these obligations. In order to ensure compliance with its international obligations, a state must therefore take effective measures against rape. This entails the adoption of appropriate legislation and complementary measures to strengthen procedures for the prosecution and punishment of the perpetrators as well as access to justice and reparation for the victims of rape.

In a landmark judgment on the nature of positive obligations, *Velasquez Rodriguez v Honduras*,<sup>33</sup> the Inter-American Court of Human Rights held that states must exercise due diligence. This entails taking measures to protect victims from abuse. It also includes investigating, prosecuting and punishing anyone responsible for violations, irrespective of whether they are state agents or private actors.

In its *Declaration on the Elimination of Violence against Women*, the UN General Assembly specified that this positive obligation applies equally to violence against women, stating that states should:

“exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.”<sup>34</sup>

The Committee on the Elimination of the Discrimination of all Forms of Violence against Women (CEDAW), in its *General Recommendation No. 19 on Violence against women*, proclaimed that:

“Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men”

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<sup>33</sup> *Velasquez Rodriguez v. Honduras*, (Merits), Inter-American Court of Human Rights, Judgment of 29 July 1988, Series C No. 4 (1988).

<sup>34</sup> UNGA/RES 48/104.

and recalled the positive obligation of states

“to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”<sup>35</sup>

The Special Rapporteur on the Elimination of All Forms of Violence against Women recently elaborated upon this obligation in her report on ‘the due diligence standard as a tool for the elimination of violence against women.’<sup>36</sup>

### **- Duty of states to enact effective legislation against rape and sexual violence**

Regional and international human rights bodies have on a number of occasions affirmed states’ obligations to enact effective anti-rape and anti-sexual violence legislation.

In *M.C. v. Bulgaria*, the European Court of Human Rights found that Bulgaria’s rape laws had failed to provide adequate protection because they fostered impunity and held that

“states have a positive obligation ... to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.”<sup>37</sup>

CEDAW issued a number of specific recommendations to states parties, in particular that:

“(t) States parties should take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including, inter alia:

(i) Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including inter alia violence and abuse in the family, sexual assault and sexual harassment in the workplace...”<sup>38</sup>

CEDAW has applied these standards in its jurisprudence, finding states in breach for not having taken adequate steps effectively to protect women from rape and other violence, for example in *Ms. A.T. v. Hungary*.<sup>39</sup>

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<sup>35</sup> Committee on the Elimination of the Discrimination of all Forms of Violence against Women, in its General Recommendation No. 19 (11th session, 1992), para.9.

<sup>36</sup> Report by the Special Rapporteur on Violence against women, its causes and consequences, Yakin Ertürk, UN Doc. E/CN.4/2006/61, 20 January 2006

<sup>37</sup> *M.C. v. Bulgaria*, (Appl. No. 39272/98, Judgment of the European Court of Human Rights, 4 December 2003), para.153.

<sup>38</sup> *Ibid.*, para.24 (t) and (i).

<sup>39</sup> *Ms. A.T. v. Hungary*, Communication No.4/2004, UN Doc. CEDAW/C/36/D/2004, 29 August 2006.

International human rights treaty bodies have consistently called on individual states parties to adopt legislation providing for the effective criminalisation and prosecution of rape and other forms of sexual violence, including domestic violence.

For example, CEDAW recommended that India take the following steps with regards to the reform of rape legislation:

“While noting that consultations are under way to amend relevant legislation relating to rape, the Committee is concerned about the narrow definition of rape in the current Penal Code and its failure to criminalize marital rape and other forms of sexual assault, including child sexual abuse.

The Committee urges the State party to widen the definition of rape in its Penal Code to reflect the realities of sexual abuse experienced by women and to remove the exception for marital rape from the definition of rape. It also calls upon the State party to criminalize all other forms of sexual abuse, including child sexual abuse. It recommends that the State party consult widely with women’s groups in its process of reform of laws and procedures relating to rape and sexual abuse.”<sup>40</sup>

The UN Human Rights Committee recommended, in considering Libya’s state party report that:

“The State Party should take all necessary measures to effectively combat violence against women, including the enactment of appropriate legislation.”<sup>41</sup>

In 2007, the UN Human Rights Committee urged Sudan in 2007 to:

“undertake to review its legislation, in particular articles 145 and 149 of the 1991 Criminal Code, so that women are not deterred from reporting rapes by fears that their claims will be associated with the crime of adultery.”<sup>42</sup>

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<sup>40</sup> Concluding comments of the Committee on the Elimination of Discrimination against Women: India, UN Doc.CEDAW/C/IND/CO/3, 2 February 2007, paras.22, 23.

<sup>41</sup> Concluding observations of the Human Rights Committee: Libyan Arab Jamahiriya, UN Doc. CCPR/C/LBY/CO/4, 15 November 2007, para.10.

<sup>42</sup> Concluding observations of the UN Human Rights Committee: Sudan, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para.14 (b).

## 5. The right of rape victims to an effective remedy and reparation

Victims of rape, which constitutes both a gross violation of international human rights law (if committed by or with the involvement of state agents) and a serious violation of international humanitarian law (if committed in the course of an armed conflict), have the right to an effective remedy and reparation under international law. This right is recognised in article 2 (3) of the International Covenant on Civil and Political Rights (ICCPR) and articles 1 and 5 of the African Charter on Human and Peoples' Rights binding on Sudan.

According to the provisions of the landmark resolution on victims' rights, the *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*, victims have the right to:

“(a) Equal and effective access to justice; (b) Adequate, effective and prompt reparation for harm suffered; and (c) Access to relevant information concerning violations and reparation mechanisms.”<sup>43</sup>

The UN Human Rights Committee has elaborated on the nature of effective remedies under the ICCPR:

“Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. ...”<sup>44</sup>

States also have a positive obligation to provide effective remedies to victims of rape in other circumstances (if committed by private individuals) as a means of preventing and repressing rape. A right of access to justice and an effective remedy for such crimes is in particular recognised in the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by General Assembly resolution 40/34 of 29 November 1985.

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<sup>43</sup> The *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.

<sup>44</sup> UN Human Rights Committee, 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.15.

Remedies can only be considered to be effective if they provide victims with judicial and other avenues to have their complaints investigated and if they are capable of resulting in reparation. There must not be any legal or practical obstacles that unjustifiably hinder investigations and the pursuit of reparation claims.<sup>45</sup>

In the context of Sudan, a number of such obstacles have been identified, consisting in particular of: legislation that deters women from lodging complaints, out of a well-founded fear that they may be prosecuted themselves for adultery (zina) and/or unlawful accusation of adultery (quadf) if they cannot prove the accusation; immunities for officials; and evidentiary rules that make successful prosecutions and related suits highly unlikely.<sup>46</sup> Rape victims also face additional hurdles in accessing justice due to the stigma attached to rape, the absence of personnel trained in dealing with victims of sexual violence, and inadequate procedures for the taking of evidence, in particular medical examinations.<sup>47</sup> In addition to generic difficulties in accessing justice, these factors explain the fact that rape cases are grossly underreported.

The state, in cases where state agents are involved, and/or the individual perpetrators is obliged to provide adequate reparation. As stated by the UN Human Rights Committee:

“Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.”<sup>48</sup>

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<sup>45</sup> *Askoy v. Turkey*, (Case No.100/1995/606/694, 18 December 1996) para.95.

<sup>46</sup> As evident in the discussions during the two workshops organised by UNMIS, *The Law Reform for the Prosecution of Rape and other Sexual Offences*, 5 July 2006 and UNMIS in cooperation with National Assembly & Women Center for Human Rights, *Reform of Legal Provisions of Criminal Law 1991 and Evidence Law 1994 on Violence against Women*, 25 January 2007.

<sup>47</sup> *Ibid.* and United Nations High Commissioner for Human Rights, *Access to Justice for Victims of Sexual Violence*, 29 July 2005.

<sup>48</sup> UN Human Rights Committee, General Comment 31, *supra* n.44, para.16.

Ideally, relevant legislation should spell out the forms of reparation to which rape victims are entitled. This should include, in addition to compensation for material and moral damages, rehabilitation services and measures of satisfaction. Legislative changes should be accompanied by measures aimed at informing and sensitising the judiciary on how to handle cases of sexual violence and to award appropriate forms of reparation. The state should also consider setting up special mechanisms or committees vested with the power to recommend or award reparation for rape victims as has happened in a number of states.<sup>49</sup> As stipulated in the *Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation*: "All policies and measures relating to reparation must explicitly be based on the principle of non-discrimination" and should "be sensitive to gender, age, cultural diversity and human rights and must take into account women's and girls' specific circumstances, as well as their dignity, privacy and safety."<sup>50</sup> At the time of writing, no programmes were in place in Sudan that effectively provide victims of rape with reparation.

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<sup>49</sup> See *International, regional and national developments in the area of violence against women*, supra n.6. In a number of states, such as Sierra Leone, South Africa and Peru, Truth and Reconciliation Commissions have recommend reparation to be awarded to victims of sexual violence.

<sup>50</sup> *Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation*, 21 March 2007.



# IV. The Bill of Rights and rape

The Bill of Rights, which forms an integral part of the Interim National Constitution of 2005, contains a number of rights that enshrine a right to be free from rape and a right to have the states taking all possible steps to provide protection against rape. There is no established body of jurisprudence of the Constitutional Court as to how to interpret the rights granted in the Bill of Rights. However, relevant international standards, recognised as an integral part of the Bill of Rights in Article 27 (3), and comparative fundamental rights jurisprudence provide sufficient guidance to undertake an analysis of the nature and scope of the fundamental rights guaranteed in the Bill of Rights.

The right to life, dignity and the integrity of his/her person guaranteed in Article 28 must be read to encompass freedom from acts of rape, which can be life-endangering and are invariably a violation of the dignity and the sexual integrity of a person. This has been recognised in the jurisprudence of national courts, which held that rape constitutes a violation of the right to life and human dignity, such as by the Supreme Court of Bangladesh in *Al Amin & Ors v. the State*.<sup>51</sup> Notably, Article 28 stipulates that these rights should be protected by law, which imposes a positive obligation on the state to enact the requisite legislation to ensure that such rights are not violated, be it by state agents or private individuals. This is in line with the positive obligation under international law to prevent and repress sexual violence against women.

Similar considerations apply with regard to the right to be free from torture or cruel, inhuman or degrading treatment guaranteed in Article 33. This right entails that rape committed by or with the acquiescence of officials constitute a fundamental rights violation, and that the state authorities have to do their utmost to prevent such violations, including by enacting effective legislation.

Article 31 enshrines the right to equality before the law and equal protection of the law. This right arguably entails a duty to define the crime of rape and sexual violence, as well as evidentiary rules pertaining to it, such as the gender and number of witnesses. This should be done in such a way that women are treated equally and are not disadvantaged by the practical application of the law. Such interpretation is supported by the principles applying to the right to equality enunciated by international bodies.<sup>52</sup>

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<sup>51</sup> *Al Amin and others v. Bangladesh*, 51 DLR (1999) 154.

<sup>52</sup> UN Human Rights Committee, General Comment No.28: *Equality of rights between men and women* (article 3), UN Doc.CCPR/C/21/Rev.1/Add.10, 29 March 2000, in particular para.18.

Article 32 (5) imposes a duty on the state to “protect the rights of the child as provided in the international and regional conventions ratified by the Sudan.” The following obligations listed in the Convention on the Right of the Child are particularly important in this regard:

Article 19 (1):

“States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”

Article 34:

“States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.”

Article 39:

“States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.”

Article 35 of the Bill of Rights stipulates that “the right to litigation shall be guaranteed for all persons; no person shall be denied the right to resort to justice.” This right, if interpreted in light of international standards on the right to an effective remedy, entails a duty to provide effective access to justice and not to unduly hinder recourse to the courts, such as by way of immunity legislation or procedures that deter victims from exercising their rights.



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# V. Reform of legislation on rape and sexual violence in Sudan

## 1. Experiences of other countries

Repressing sexual violence is one of the core tasks of any criminal law in fulfilling its function of maintaining peace and order in a society and of protecting its members from harm. However, in many countries criminal laws on rape and sexual violence fail to provide for effective punishment and to act as deterrent. Such laws have also often not adequately protected certain groups of victims, such as minors or married women. The legislation governing the investigation, prosecution and trial of rape cases frequently results in victims of rape being exposed to further trauma in the course of proceedings. These shortcomings, coupled with a growing understanding of rape and sexual violence, its consequences and the difficulty of holding perpetrators accountable, has prompted many countries to initiate legislative reforms so that relevant laws better reflect these realities.

Reforms of legislation on rape and sexual violence have been undertaken in different legal systems and geographical areas of the world. In Africa, a number of states have enacted sexual offences acts, such as Lesotho, Liberia, Kenya, South Africa and Tanzania, a specific act to combat rape, such as Namibia, and amendments to criminal law, such as Botswana and Zimbabwe.<sup>53</sup> Similar reforms have been initiated and carried out in several states in Asia, Australia, on the American continent and in Europe.<sup>54</sup>

Countries with predominantly Muslim populations have also enacted legislation, such as the *Women and Children Repression Prevention Act*, 2000 [Amendment in 2003] in Bangladesh and the *Protection of Women (Criminal Laws Amendment) Act*, 2006, in Pakistan. The latter is particularly noteworthy for separating the criminal offence of rape from the hadd offence of adultery (zina) so as to enhance protection and combat impunity for rape more effectively.

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<sup>53</sup> See in particular comparative study contained in Legal Assistance Centre, *Rape in Namibia, An Assessment of the Combating of Rape Act 8 of 2000*, 2006, pp.539 et seq.

<sup>54</sup> See *International, regional and national developments in the area of violence against women*, supra n.6.

The United Kingdom enacted the Sexual Offences Act in 2003. The act came about as a result of a public debate, involving deliberations in parliament, reviews by the responsible ministries and the publication of consultation papers, a process triggered by the realisation that the then legislation had failed to protect victims against sex offenders and did no longer reflect realities.

In South Africa, public debates and reform initiatives brought about the introduction of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007*. The Act was the result of a well thought South African Law Reform Commission Discussion Paper and Report and strong civil society submissions on the proposals set out therein which lay down guidelines and suggestions for the direction of the new bill.<sup>55</sup>

## 2. Elements of the criminal offence of rape

### 2.1. Definition of rape

#### (i) The definition of rape in Sudanese law

The Sudanese Criminal Act defines rape as sexual intercourse without consent, recognising two types of such intercourse:

1. “Sexual intercourse [that] takes place by the penetration of the glans, or its equivalent into the vulva” (Article 145 (2) of the Criminal Act).
2. “...every man who penetrates his glans, or the equivalent thereof, in the anus of a woman, or another man’s, or permits another man to penetrate his glans, or its equivalent, in his anus” (Article 148 (1) of the Criminal Act).

#### (ii) International standards and state practice

The Sudanese Criminal Act criminalises vaginal rape and male rape. However, it does not extend to other forms of rape that have been recognised in international jurisprudence and national legislation. This includes in particular rape with objects and oral rape.

The International Criminal Tribunal for Rwanda defined rape in *Prosecutor v. Akayesu*:<sup>56</sup>

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<sup>55</sup> South African Law Reform Commission, Discussion Paper 102 (Project 107): *Sexual offences*, available at <http://www.doj.gov.za/salrc/dpapers.htm>.

<sup>56</sup> *Prosecutor v Akayesu*, (Case ICTR-96-4-T, Judgment 2 September 1998).

“While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.”<sup>57</sup>

The International Criminal Tribunal for Former Yugoslavia held in *Prosecutor v Furundzija* that rape included the following:

“(i) the sexual penetration, however slight:  
(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or  
(b) of the mouth of the victim by the penis of the perpetrator;  
(ii) by coercion or force or threat of force against the victim or a third person.”<sup>58</sup>

With regard to oral rape, it elaborated that:

“[F]orced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity. The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d’être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. [...] It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape.”<sup>59</sup>

The Elements of Crimes of the Rome Statute of the ICC<sup>60</sup> define rape as the act whereby:

“The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.”

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<sup>57</sup> Ibid. para. 597.

<sup>58</sup> *Prosecutor v Furundzija*, (Case IT-95-17/1-T, Judgment 10 December 1998), para. 185.

<sup>59</sup> Ibid. para. 183.

<sup>60</sup> Elements of Crimes of the Rome Statute of the ICC, adopted by the Assembly of States Parties. First session. New York, 3-10 September 2002. Official Records, ICC-ASP/1/3.

The thrust of the jurisprudence of the ICTR and ICTY has been shared by the Inter-American Court of Human Rights in its recent judgment in *Castro-Castro v. Peru*:

“Following the jurisprudential and legal criterion that prevails both in the realm of International Criminal Law as in comparative Criminal Law, the Tribunal considers that sexual rape does not necessarily imply a non-consensual sexual vaginal relationship, as traditionally considered. Sexual rape must also be understood as act of vaginal or anal penetration, without the victim’s consent, through the use of other parts of the aggressor’s body or objects, as well as oral penetration with the virile member.”<sup>61</sup>

The broader understanding of rape is reflected in recent legislation, such as in South Africa where sexual penetration is defined as including:

“any act which causes penetration to any extent whatsoever by-

- (i) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
- (ii) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person;
- (iii) the genital organs of an animal, into or beyond the mouth of another person.”

In the UK Sexual Offences Act 2003, the offence of rape is confined to penile penetration whereas sexual violence with objects is classified as Assault by Penetration.

- Rape:

“(1) A person (A) commits an offence if-

- (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
- (b) B does not consent to the penetration, and
- (c) A does not reasonably believe that B consents.<sup>62</sup>

- Assault by Penetration:

“(1) A person (A) commits an offence if—

- (a) he intentionally penetrates the vagina or anus of another person (B) with a part of his body or anything else,
- (b) the penetration is sexual,
- (c) B does not consent to the penetration, and

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<sup>61</sup> *Miguel Castro-Castro Prison v. Peru* (Merits, Reparations and Costs), Inter-American Court of Human Rights, Judgment of 25 November 2006, Series C No. 160, para.310.

<sup>62</sup> Part 1, section 1, UK, Sexual Offences Act 2003.

(d) A does not reasonably believe that B consents.”

### (iii) Recommendations

All Sudanese criminal laws to date have defined rape as sexual intercourse by way of penile penetration into the vagina or anus. Penile penetration into the mouth and penetration of the genital organs or the anus with objects fall outside the definition of rape, despite the fact that these acts can constitute similar harm, humiliation and degradation to the victims. Such acts can only be prosecuted as gross indecency, an offence that does not capture the seriousness of the crime of rape and carries inadequate punishments.

We propose that the definition of rape in Sudanese law be changed so as to include penile penetration into the mouth and penetration of the genital organs or anus with objects. Both of these acts constitute assaults that violate the sexual autonomy of the victim in the most serious manner similar to penile penetration into the vagina or anus. Broadening the definition of rape along these lines would bring it into conformity with international jurisprudence and legislation from other countries. In addition, it would extend protection to those who may fall victim of such forms of rape and, by so doing, would be an exercise of the positive obligation of the state to protect individuals from violations.

## 2.2. The relationship between rape and adultery

### (i) Article 149 of the Penal Code

Article 149 of the Penal Code of 1991 defines rape as:

“(1) There shall be deemed to commit the offence of rape, whoever makes sexual intercourse, by way of adultery, or sodomy, with any person without his consent.

(2) Consent shall not be recognized, when the offender has custody or authority over the victim.

(3) Whoever commits the offence of rape, shall be punished, with whipping a hundred lashes, and with imprisonment, for a term, not exceeding ten years, unless rape constitute the offence of adultery, or sodomy, punishable with death.”

The reference to the Shari’a crime of adultery (zina) in the definition of rape in article 149 of the Criminal Act renders the prosecution of rape difficult if not impossible.

The reference to adultery (zina) entails that:

- If rape cannot be proved, a woman or a man filing a complaint about rape may be prosecuted either for adultery carrying the death penalty for married women or punishment of a whipping of hundred lashes for unmarried women or for wrongful accusation of adultery (quadf) carrying a punishment of whipping of eighty lashes.
- Rape may need to be proved according to the rules of evidence applying to adultery, which require at least one of the following: (i) a confession (which is not retracted before the verdict); (ii) four male witnesses who have witnessed the actual penetration; (iii) pregnancy; (iv) an oath (repeated four times followed by saying ‘Allah’s curse is upon me if I am a liar’) by the spouse (husband or wife) (lian).<sup>63</sup> Prominent scholars have maintained that rape can be proved by circumstantial evidence<sup>64</sup> but available jurisprudence is inconclusive.<sup>65</sup>

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<sup>63</sup> See Article 62 of the Evidence Act, 1994. In case of lian, the other spouse can nullify the evidential value of the oath by denying the charge under oath four times followed by saying ‘Allah’s curse is upon me if I am a liar.’

<sup>64</sup> For example, Hafiz El-Sheik El-Zaki, former Chief Justice and former Dean of the Faculty of Law at Khartoum University, in a paper presented at a workshop on rape legislation, held in Khartoum on 15 June 2008. He argued, with reference to the judgment of the Supreme Court in the trial of Musa’ab Mohamed Ahmed (see next footnote) that the hadi evidentiary requirement of four male eye-witnesses does not apply in rape cases. According to his interpretation, the terms ‘adultery’ and ‘sodomy’ in article 149 (1) of the Criminal Code solely refer to the description of the act of sexual intercourse as an element of the crime and not to the legal qualification of the act (namely adultery, which would result in the applicability of the hadi evidentiary rules).

<sup>65</sup> In Supreme Court Criminal Case number 55/1985, (*Sudan government vs. al-Sir Muhammad al-Sanussi*9), the Court held that four witnesses or a confession were needed to prove rape as expressly stipulated in articles 316 and 317 of the 1983 Criminal Code. In the case of Supreme Court/Criminal Appeal 545/2000 (*Trial of Musa’ab Mustafa Ahmed*), Sudan Law Journal 2000, available at <http://sjsudan.org/searchoutput.php?id=2348>, the Court considered circumstantial evidence in a case of male rape of a child. Justice Abdelaziz Alrashid held that sexual intercourse with a child constitutes rape, which is not subject to the hadi evidentiary rules (article 62 of the Evidence Act, 1994). He did not expound on whether the same reasoning applies to non-consensual sexual intercourse between adults. Justice Abdallah Alfadil Eissa stressed that a perpetrator of rape should be punished for adultery where he is married (muhsin). The legal reasoning of the judges in this case illustrates the uncertainty over the legal nature of the crime of rape and the applicable evidentiary rules. The use of the phrase “by way of adultery, or sodomy” in article 149 (1) of the Criminal Act appears to imply that rape is a form of adultery. Even if the terms ‘adultery’ and ‘sodomy’ in article 149 (1) referred only to the act of sexual intercourse, the punishment stipulated in article 149 (3) is clearly based on the crime of adultery. The Supreme Court has not clarified the legal nature of rape in the trial of Musa’ab Mustafa Ahmed or in other cases. It is possible, or even likely, that courts will apply the hadi evidentiary rules in future rape cases.

The prospect of facing a prosecution for adultery or wrongful accusation constitutes a strong deterrent for any rape victim who considers bringing a complaint. Existing legislation thus runs counter to the principle that the legal framework should facilitate complaints and access to justice. The evidentiary rules applying to rape cases have a similar effect on would-be complainants because they militate against securing a conviction in the absence of a confession.

The evidentiary rules applying to adultery (zina) are based on the Shari'a rationale that there should be incontrovertible evidence for the drastic punishment envisaged for hadd crimes in the Qu'ran and the Sunna (sources of Shari'a law). If applied to rape, however, the evidentiary rules effectively contribute to impunity. It is near impossible to have four male witnesses testifying in rape cases (in the unlikely event that four male witnesses are present, their testimony would inevitably give rise to questions about their involvement in the rape itself, or at least the failure to prevent it) and valid confessions are the exception rather than the rule.

In the absence of sufficient proof, perpetrators of rape may still be prosecuted for gross indecency under article 151 of the Criminal Act, a ta'zir crime that may be proved by circumstantial evidence. However, the definition of the offence of gross indecency neither captures the heinous nature of rape nor provides for adequate punishment (the maximum punishment is whipping not exceeding eighty lashes, imprisonment of up to two years or a fine).

The legal consequences flowing from the definition of rape are not satisfactory from a criminal law perspective, as the current law fails to achieve the objective of repressing and punishing rape, and arguably falls short of Sudan's international treaty obligations in this regard.

The problematic nature of using adultery to define rape was recognised in Pakistan, which, in 2006, repealed the relevant provisions of The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979 that contained an offence of rape similar to the one stipulated in the Sudanese Criminal Act of 1991. The rationale underlying this reform in Pakistan is particularly instructive and merited the reproduction of the **Statement of Objects and Reasons for the Women's Protection Bill** (which replaced the Hudood Ordinance):

“One of the avowed constitutional objectives of the Islamic Republic of Pakistan is to enable Muslims to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as laid down in the Holy Qur'an and Sunnah.

The Constitution, accordingly, mandates that all existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Qur'an and Sunnah.

The object of this Bill is to bring the laws relating to zina and qazf, in particular, in conformity with the stated objectives of The Islamic Republic of Pakistan and

the constitutional mandate and in particular to provide relief and protection to women against misuse and abuse of law.

The offences of zina and qazf are mentioned in the Qur'an. The two ordinances relating to zina and qazf, however, make a number of other acts punishable in spite of the fact that the Qur'an and Sunnah neither define these offences nor has any punishment for them been prescribed. On no principle of qiyas can the punishments for zina and qazf or the procedure identified for their proof be extended to these offences.

Any offence not mentioned in the Qur'an and Sunnah or for which punishment is not stated therein is Ta'zir which is a subject of State legislation. It is for the State both to define such offences and to fix punishments for these. The exercise of such authority by the State is in consonance with Islamic norms which the State is authorised to both define and punish. Accordingly, all these offences have been removed from the two Hudood Ordinances and inserted in their proper places in the Pakistan Penal Code, 1860 (Act XLV of 1860) hereinafter "PPC".

The offences listed in sections 11 to 16 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (VII of 1979) hereinafter "Zina Ordinance" are Ta'zir offences. All these are being inserted as sections 365B, 367A, 371A, 371B, 493A and 496A of the Pakistan Penal Code, 1860 (Act XLV of 1860). Sections 12 and 13 of the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 hereinafter 'Qazf Ordinance' are being omitted. This is being done as the definition of qazf in section 3 of that Ordinance is wide enough to cover the qazf committed by printing or engraving or sale of printed and engraved material.

No change is being made in the language of the statutory definition of any of these Ta'zir offences or the punishment provided for these, save one. The punishment of whipping is being deleted (or these Ta'zir offences). As the Qur'an and Sunnah do not provide for any punishment with regard to these offences the State is authorised to make this change in conformity with the Islamic concept of justice. This is in accordance with the scheme of the PPC and the evolving standards of decency which mark the progress of a maturing society.

The Zina and Qazf Ordinances have been a subject of trenchant criticism by citizens in general and scholars of Islam and women in particular. The criticisms are many. These include the lumping of the offence of zina with zina-bil-jabr (rape) and subjecting both to the same kind of proof and punishment. This has facilitated abuse. A woman who fails to prove rape is often prosecuted for zina. The requirement of proof for the maximum punishment of zina-bil-jabr (rape) being the same as that for zina, it has made absolutely impossible to prove the former.

Where a prosecution for rape against a man fails but sexual activity is confirmed by medical examination or on account of pregnancy or otherwise the woman is punished for zina not as Hadd - four eye witnesses not being available - but as Ta'zir. Her complaint is, at times, deemed a confession.

A penal statute must be clear and unambiguous. It must mark the boundaries between the permitted and the prohibited with clarity. The citizens are, thus, put to notice. They can order their life and conduct by following these bright guidelines and steer clear of trouble. The vague definitions in these and related laws are, therefore, either being clarified and wherever that is not possible,

omitted. The object is to protect the unwary and unsuspecting citizens from unwittingly falling foul of penal laws.

There is no *hadd* for the offence of *zina-bil-jabr* (rape). It is a *Ta'zir* offence. The definition and punishment of rape is, therefore, being incorporated in the PPC in sections 375 and 376 respectively. The gender neutral definition is being amended to clearly provide that rape IS an offence committed by a man against a woman. As consent of the woman is a defence to the charge of rape it is being provided that such consent would not be a defence if the woman is less than 16 years of age. This accords both with the need to protect the weak, which the Qur'an repeatedly emphasizes, and the norms of international legal obligations."

## (ii) Recommendations

We propose that rape should not be defined with reference to adultery. Rape is a *ta'zir* crime. It is of an entirely different nature to the *hadd* crime of adultery. While both rape and adultery concern sexual intercourse that is considered unlawful, the latter *hadd* crime is, in contrast to rape, characterised by the consensual nature of the sexual act taking place between adults.

The reference to adultery in the rape definition seemingly results in the application of evidentiary rules pertaining to this *hadd* crime, namely the requirement of four male witnesses to the act of penetration or a confession, to what should be considered a *ta'zir* crime. The admissible types of evidence in *ta'zir* crimes are subject to the discretion of the legislature. In cases of rape, this may include the use of testimonies by the victim and other female witnesses where present, and of circumstantial evidence, such as forensic evidence. There is no apparent reason to subject the *ta'zir* crime of rape to the evidentiary rules of *hudud* crimes.

From a legal policy perspective, the current rape legislation has failed to provide adequate protection for women, which can be attributed to a large degree to the difficulties arising from the reference to adultery in the definition of rape. The step of separating the criminal offence of rape from adultery would increase the likelihood of women complaining about rape and the prospects of successful prosecutions because it would broaden the types of admissible evidence. In so doing, the state would be exercising greater diligence in seeking to fulfil its positive duty, arising both as a matter of constitutional law and international law, to repress and prevent violations such as rape.

## 2.3. Consent as an element of the definition of rape

### (i) Current Sudanese law

Article 149 of the Sudanese Criminal Act defines rape as sexual intercourse without consent. Pursuant to Article 3 of the Criminal Act, consent:

“means acceptance, and it shall not be deemed consent which is given by:-

- (a) a person under the influence of compulsion or mistake of fact, where the person doing the act knows that consent was given as a result of such compulsion or mistake; or
- (b) a person who is not an adult;<sup>66</sup> or
- (c) a person unable to understand the nature or consequence of that to which he has given his consent by reason of mental or psychological instability.”

According to article 149 (2) of the Criminal Act:

“consent shall not be recognised, where the offender has custody, or authority over the victim.”

### (ii) The meaning of consent in international jurisprudence and national practice

The word ‘consent’ in relation to rape cases was traditionally interpreted rather narrowly: a victim was deemed not to have consented where the perpetrator used physical force or where the victim was considered not to have the mental capacity to consent. International jurisprudence and recently enacted national laws adopt a broader definition of consent that reflects the circumstances under which the victim may have been coerced into the act.

In *Prosecutor v. Kunarac*, the ICTY held that:

“Force, threat of force or coercion are certainly the relevant considerations in many legal systems [...] the true common denominator which unifies the various systems may be a wider or more basic principle of penalising violations of sexual autonomy...”<sup>67</sup>

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<sup>66</sup> According to article 3 of the 1991 Criminal Act: “‘Adult’ means a person whose puberty has been established by definite natural features and has completed fifteen years of age. Whoever attains eighteen years of age shall be deemed an adult even if the features of puberty do not appear.”

<sup>67</sup> *Prosecutor v. Kunarac*, (Case IT-96-23-T/96-23/1-T, Judgment 22 February 2001), para. 440.

“Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances.”<sup>68</sup>

According to the Elements of Crimes of the Rome Statute, an “invasion” constitutes rape if it:

“...was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.”<sup>69</sup>

In national legislation, consent has been defined to mean “voluntary or uncoerced agreement” (South Africa) or “[a person consents if he] agrees by choice, and has the freedom and capacity to make that choice.” (United Kingdom).

There are, in spite of considerable variations in national laws, sufficient commonalities to identify widely shared standards with regards to the circumstances that result in the act of sexual penetration being non-consensual, including in particular:

1. the use of violence or coercion;
2. threat of use of force and intimidation;
3. taking advantage of a situation where a victim is incapable of giving genuine consent, such as a state of intoxication, psychological illness, physical disabilities that do not allow a person to articulate its consent, and being asleep or otherwise unconscious. The abuse of power is also increasingly recognised as a circumstance that makes sexual penetration non-consensual, such as in situations of detention;
4. the victim being under a certain age (see below).

National laws and statutes of international tribunals increasingly stipulate principles on the use of presumptions with regards to the existence or absence of consent. For example, proof of violence or threats prior to sexual intercourse rule out consent.<sup>70</sup> Conversely, consent cannot be inferred on the grounds of the silence, or lack of resistance by a victim against sexual violence.<sup>71</sup>

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<sup>68</sup> Ibid. para. 460.

<sup>69</sup> Article 7 (1) (g) -1- of the Elements of Crimes.

<sup>70</sup> Article 75 of the UK Sexual Offences Act of 2003.

<sup>71</sup> See for example rule 70 (c) of the ICC Rules on Procedure and Evidence, ICC ASP/1/3.

### (iii) Recommendations

We propose that the phrase “voluntary or uncoerced agreement” be used to define consent in Sudanese legislation.

The current understanding of consent, being defined in the Sudanese Criminal Act as “acceptance,” appears to be based on the concept of one party making an offer and the other party accepting the same. The concept of agreement implies a broader meaning of a shared understanding and of an act entered into mutually. The wording “voluntary or uncoerced agreement” would better capture the nature of genuine consent.

We propose that the circumstances in which consent is absent should be more clearly elaborated upon in Sudanese legislation.

The lack of consent should cover all situations in which a voluntary or uncoerced agreement is not present. The current definition of the lack of consent in the Sudanese Penal Code encompasses the elements of compulsion, mistake of facts, inability to give genuine consent and statutory rape. It also recognises that any acceptance of a victim in custody or under the authority of the offender is invalid. The definition of when sexual intercourse is non-consensual seemingly captures most circumstances. However, it would be beneficial to clarify further the situations where consent is lacking or invalid.

Sudanese law refers to situations where ‘consent’ is given “under the influence of compulsion or mistake of fact” or by “a person unable to understand the nature or consequence of [his or her consent] ... by reason of mental or psychological instability.” This definition in the Sudanese criminal act is misleading in so far as it implies that a victim has actually consented, albeit in a manner not recognised by law. Where a victim of rape is physically overpowered or asleep, she or he cannot be said to ‘consent’ at all. It may therefore be more appropriate to distinguish between acts of penetration that have been committed without the consent of the victim and those committed with the ‘consent’ of the victim, whereby the ‘consent’ is not deemed valid as a matter of law. The first category would comprise in particular the use of overwhelming force as well as the situation where the offender is taking advantage of the inability of the victim to give genuine consent (a state of intoxication, psychological illness, physical disabilities, being asleep or otherwise unconscious). Invalid consent would comprise in particular intimidation, threats, abuse of power, use of fraudulent means and the purported consent given by minors (see below).

## 2.4. Sexual intercourse with minors and rape

### (i) Current Sudanese law

The definition contained in Article 149 of the Criminal Code is generally understood to apply to the rape of children. Under the Sudanese Criminal Act, a minor under the age of fifteen is not capable of giving consent.<sup>72</sup> Hence, any sexual intercourse (including consensual intercourse) with a person under the age of fifteen constitutes rape. Sexual intercourse with a person between the age of fifteen to eighteen years constitutes rape only if the person has not reached the physical signs of puberty (or if it is non-consensual).<sup>73</sup>

### (ii) International standards and state practice

International standards do not prescribe a specific age of consent and state practice varies. However, the UN Convention on the Right of the Child spells out a number of specific duties to protect children (persons under the age of eighteen years, as defined in article 1 of the Convention) from all forms of sexual violence (see above), an obligation that is binding on Sudan qua its international treaty obligations and as a matter of Article 32 (5) of the Bill of Rights.

States have a positive obligation to take measures to protect children (under the age of 18) against sexual violence, which includes enactment of criminal laws. The laws of most if not all countries recognise the need to protect minors from sexual intercourse with adults. In most countries, children in the age range between 12-18 years are by law treated as being incapable of giving consent, for example the age limit for consent is sixteen in Pakistan and the UK and twelve years in South Africa. Hence, any sexual intercourse with such a child would automatically constitute rape or a similar serious sexual offence.

The laws of many countries stipulate specific offences of sexual abuse (other than rape) with minors who, while treated as being capable of giving consent, are still viewed as requiring legal protection from sexual advances by adults (normally between 16-18 years of age). The punishment for such offences is commonly lower than that for rape.

### (iii) Recommendations

We propose that the age of consent for sexual intercourse in Sudanese criminal legislation be set at 16 years of age irrespective of any signs of physical features of puberty, taking into consideration the definition of the child in article 1 of the UN

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<sup>72</sup> Article 3 Of the Criminal Act, 1991: Interpretation and Explanation.

<sup>73</sup> According to the definition of “adult,” *ibid*.

Convention on the Right of the Child and article 4 of the Sudanese Child Act of 2004. Any sexual intercourse with a person below that age would automatically constitute rape.

Defining the age of consent with reference to physical signs of puberty as done in the current Sudan Criminal Act raises a number of concerns:

- The objective of the law is to protect minors against sexual intercourse with adults. The state of a child's development depends on both physical and psychological factors. Using the physical signs of puberty as criterion for a person's capacity to give consent results in lesser protection for someone over the age of fifteen simply because he or she has the physical signs of puberty irrespective of his or her mental development. This is compounded by the absence of any other offence protecting persons over the age of fifteen who are considered to show physical signs of puberty from sexual intercourse with adults. It would thus be more appropriate to set a specific age applying to all minors.
- The reference to the physical signs of puberty introduces an element of legal uncertainty. Judges may interpret the visible state of development differently and defendants are likely to plead the existence of physical signs of puberty as a defence. The reference to a specific age of consent would remove this uncertainty.

## **2.5. Marital rape**

### **(i) Current Sudanese law**

Marital rape is not recognised as a criminal offence in the Sudanese Criminal Act. Acts of rape within marriage may be prosecuted as assaults but we are not aware of any such practice.

### **(ii) The question of marital rape**

The criminalisation of marital rape has been the subject of intense debates in recent decades because it is a widespread but often unacknowledged form of domestic violence in many if not all countries. Historically, the offence of rape excluded non-consensual sexual intercourse within marriage because one of the objectives of the punishment for rape was to protect family honour. In addition, there was an implicit understanding that marriage entailed a general consent to sexual intercourse irrespective of the actual will of the spouse, normally the wife, in any given situation.

This understanding of the nature of rape has undergone considerable changes around the world. As recognised in international jurisprudence and reflected in national laws, the offence of rape is now considered to protect the “sexual autonomy” of the victim. The legal bond of marriage does not remove the sexual autonomy of a spouse in any given situation with the result that the other spouse, usually the man, is not allowed to coerce sexual intercourse.

### (iii) International standards and state practice

The practice of international bodies provides ample evidence that states have a positive obligation to protect women (and men) from sexual violence, including in form of domestic violence.<sup>74</sup> This is not least in recognition of the serious suffering that women are subjected to in the domestic context, including various types of sexual violence, particularly rape.<sup>75</sup> Arguably, Article 31<sup>76</sup> and Article 32 (2) and (3) of the Bill of Rights<sup>77</sup> require the state to take effective measures to protect women from sexual violence irrespective of whether they are married or not.

Most of the recently enacted national anti-rape laws stipulate, either explicitly or implicitly, that non-consensual sexual intercourse within marriage constitutes rape.<sup>78</sup> There have been successful prosecutions in a number of countries, which show that the offence can be effectively prosecuted,<sup>79</sup> contrary to assertions that it would be impossible to distinguish between marital sexual intercourse that was consensual and that which was not. In addition, the mere fact that marital rape is considered to constitute a criminal offence is of important symbolic value because the state recognises the sexual autonomy of the spouses and their right to be protected against unwanted sexual intercourse.

### (iv) Recommendations

We propose that Sudanese legislation be amended to recognise that non-consensual sexual intercourse within marriage constitutes rape as a means of strengthening protection of women against sexual violence under all circumstances.

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<sup>74</sup> *The Due Diligence Standard as a Tool for Eliminating Violence against Women*, Report by the Special Rapporteur on Violence against women, its causes and consequences, Yakin Ertürk, UN Doc. E/CN.4/2006/61, 20 January 2006, paras.19 et seq.

<sup>75</sup> *Ibid.*, in particular paras.32 et seq.

<sup>76</sup> “All persons are equal before the law and are entitled without discrimination, as to race, colour, sex, language, religious creed, political opinion, or ethnic origin, to the equal protection of the law.”

<sup>77</sup> Article 32 (2): “The State shall promote woman rights through affirmative action;” (3): “The State shall combat harmful customs and traditions which undermine the dignity and the status of women.”

<sup>78</sup> Namibia, Zimbabwe, Lesotho, Swaziland, South Africa, UK.

<sup>79</sup> See, for example, *A legal first in Turkey in marital rape*, Turkish Daily News, Tuesday, April 22, 2008, reporting on the first conviction for marital rape following changes in Turkish criminal law in 2005.

## 3. Punishment for the crime of rape: Aggravating and mitigating circumstances

### 3.1. Current Sudanese law

Pursuant to article 149 of the Sudanese Criminal Act, a perpetrator of rape is liable to the punishment of whipping of a hundred lashes and of imprisonment of a maximum of ten years. A married offender is subject to the punishment of adultery, i.e. execution by lapidation, according to article 146 (1) (a).

### 3.2. International standards and state practice

International standards derived from the prohibition of torture and the positive obligation of states to protect individuals against sexual violence entail that acts of rape should be subject to punishment that is proportionate to the seriousness of the offence and effective in repressing the crime. Such standards are in line with general principles of criminal punishment according to which “punishment should fit the crime,” i.e. reflect the seriousness of the offence and do justice to the specific circumstances. These principles are largely reflected in national rape laws, such as in article 39 of the Criminal Act of 1991 with regards to Ta’zir penalties.

Criminal laws tend to apply one of the following models depending on the principles of sentencing, namely stipulating:

1. a minimum and/or maximum punishment for rape, leaving it to the discretion of the judge to determine the appropriate punishment in light of the circumstances of the case. This model is followed in Sudan and countries such as the United Kingdom;
2. a minimum punishment for the basic offence of rape, with a list of factors constituting aggravating circumstances that require the imposition of more severe punishments as specified. This is the model applied in most countries, such as Kenya, Namibia, Pakistan and South Africa.

The two models essentially differ on the extent of power given to the judge in determining the adequate punishment. Such powers are very broad in the first model, raising the possibility that sentencing will be inconsistent depending on the attitude and perceptions of the judge(s) concerned. In the second model, the legislature circumscribes applicable punishments more narrowly. The advantage of this approach is that it reflects the outcome of parliamentary debate and the range of punishments deemed appropriate. It may lead to more consistent and just sentencing, provided it

leaves the judge(s) concerned with sufficient discretion to take the circumstances of the individual case into consideration when determining punishment. A review of a number of domestic anti-rape laws shows that the following (non-exhaustive) circumstances may constitute aggravating factors:

- multiple rapes
- two or more perpetrators (gang rape)
- use of weapons
- causing bodily injury or death
- abuse of power
- vulnerability of victim (children, mentally and physically disabled)
- repeat offenders.<sup>80</sup>

Punishments in rape laws tend to range from a minimum punishment of two to thirty years imprisonment and a maximum punishment of ten years to life imprisonment. Recent reforms of rape legislation have been characterised by an increase in punishments as existing penalties were in many countries perceived to be inadequate in light of the seriousness of the offence of rape.<sup>81</sup> Many anti-rape laws now provide for life imprisonment as maximum punishment for rape.<sup>82</sup>

### 3.3. Recommendations

We propose that any newly introduced or amended offence of rape in Sudanese criminal law be subject to a minimum punishment of at least five years imprisonment. Any lower minimum punishment would not adequately reflect the seriousness of the offence of rape. If no minimum punishment was determined by law, judges would be free to impose more lenient sentences, which is bound to undermine the positive obligation to repress rape effectively.

Anyone found guilty of rape should be liable to a maximum punishment of life imprisonment. The law should specify the factors that constitute aggravating circumstances to guide the discretion of judges in determining adequate punishment. Alternatively, the law may stipulate the maximum punishment applicable to particular circumstances of rape, for example a maximum punishment of 15 years for rape by one or two persons or by persons in a position of authority, of 20 years for rape resulting in grievous bodily harm and of life imprisonment for rape resulting in death (the factors are illustrative only and not meant to be exhaustive).

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<sup>80</sup> See, by way of example, Section 3 of Namibia's Combating of Rape Act 8 of 2000; Section 376 of the Pakistan Penal Code; Article 266 (b) of the Revised Penal Code of the Philippines; Article 320 of the 1999 Senegalese Penal Code; and Article 102 of the Turkish Penal Code.

<sup>81</sup> For example in Namibia and South Africa.

<sup>82</sup> For example in Botswana, Kenya, Lesotho, Namibia, South Africa, United Kingdom and Zimbabwe.

## 4. Prosecution of rape

### 4.1. Immunities

#### (i) Current Sudanese laws

Members of the Sudanese police, security forces or armed forces are granted conditional immunity against any prosecution for any acts committed in the course of their duty, including rape.<sup>83</sup> The lifting of such immunity falls within the discretion of the head of the respective forces and is not subject to any established procedure of judicial review.<sup>84</sup>

#### (ii) International standards and state practice

Rape committed by or with the involvement of an official normally constitutes torture so that the relevant international standards pertaining to the prohibition of torture binding on Sudan apply. International human rights law imposes a clear duty on states to investigate allegations of torture, either following a complaint or *ex officio*, and to bring to justice the perpetrators.<sup>85</sup> This obligation flows from the duty to give effect to the rights enshrined in the respective treaties, in particular the right to an effective remedy. These rights are arguably reflected in the right to be free from torture (Article 33) and the right to litigation (Article 35) granted in the Bill of Rights.

The UN Human Rights Committee identified the following obligations of state parties in its General Comment 20 on the prohibition of torture (Article 7):

“Article 7 should be read in conjunction with article 2, paragraph 3, of the Covenant [right to an effective remedy]. In their reports, States parties should indicate how their legal system effectively guarantees the immediate termination of all the acts prohibited by article 7 as well as appropriate redress. The right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law.

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<sup>83</sup> Article 33 (b) of the National Security Forces Act, 1999; article 45 (2) of the Police Act, 2008; and article 34 (1) of the Armed Forces Act, 2007.

<sup>84</sup> Concluding observations of the UN Human Rights Committee: Sudan, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para.9.

<sup>85</sup> See General Comments 20 and 31 of the UN Human Rights Committee. See for a more detailed exposition of state’s obligations and state practice, REDRESS, *Taking Complaints of Torture Seriously, Rights of Victims and Responsibilities of Authorities*, September 2004.

Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective...”<sup>86</sup>

and, according to its General Comment 31:

“Where the investigations ... reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7)...”<sup>87</sup>

in particular:

“...where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties (see General Comment 20 (44)) and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility...”<sup>88</sup>

The Human Rights Committee has repeatedly found that immunity legislation is incompatible with the right to an effective remedy and the concomitant duty to investigate and prosecute torture,<sup>89</sup> including in the case of Sudan:

“It [the Human Rights Committee] is particularly concerned at the immunity provided for in Sudanese law and untransparent procedure for waiving immunity in the event of criminal proceedings against state agents.”<sup>90</sup>

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<sup>86</sup> UN Human Rights Committee, *General Comment 20 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7)*, 10 March 1992, para.14. See also UN Human Rights Committee, General Comment 31, supra n.44, on the implementation of the ICCPR where the Committee held that the Covenant requires the adoption of procedures: “to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.”

<sup>87</sup> *Ibid.*, para.18.

<sup>88</sup> UN Human Rights Committee, General Comment 31, supra n.44, para.18.

<sup>89</sup> Concluding observations of the UN Human Rights Committee: India, UN Doc. CCPR/C/79/Add.81, 4 August 1997, para.21: “The Committee notes with concern that criminal prosecutions or civil proceedings against members of the security and armed forces, acting under special powers, may not be commenced without the sanction of the central Government. This contributes to a climate of impunity and deprives people of remedies to which they may be entitled in accordance with article 2, paragraph 3, of the Covenant.”

<sup>90</sup> Concluding observations of the UN Human Rights Committee: Sudan, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para.9.

The laws of most states do not recognise any immunity for public officials for crimes committed, and states such as Turkey have repealed immunity legislation following concerns over its compatibility with recognised human rights standards.<sup>91</sup>

### (iii) Recommendations

We propose that the provisions in Sudanese laws granting conditional immunity to officials be repealed, in particular in so far as they relate to torture and rape constituting international crimes. This would help to bring Sudanese legislation in conformity with the Bill of Rights in the Interim National Constitution and applicable international standards.

## 4.2. Statutes of limitation

### (i) Current Sudanese laws

In current Sudanese law, no statutes of limitation apply as rape is treated as a hadd crime on account of the reference to adultery. However, if the offence of rape were to be made a Ta'zir crime, it would fall within the scope of article 38 (1) (a) of the Criminal Procedure Code, which has a maximum statute of limitation of ten years.

### (ii) International standards and state practice

Several international treaties provide for the non-applicability of statutes of limitation for international crimes, including torture, in particular where it constitutes a crime against humanity or a war crime.<sup>92</sup> The International Criminal Tribunal for the Former Yugoslavia (ICTY) held in the *Furundzija case*:

“It would seem that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption.”<sup>93</sup>

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<sup>91</sup> See Concluding Observations of the Committee against Torture: Turkey, UN Doc. CAT/C/CR/30/5, 27 May 2003, para. 4 c (positive aspects): “...the elimination of the requirement to obtain administrative permission to prosecute a civil servant or public official...”

<sup>92</sup> UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity; Convention on the lack of applicability of statutes of limitation in war crimes and crimes against humanity of the Council of Europe, Strasbourg, 1974, and Article 29 of the Rome Statute of the International Criminal Court.

<sup>93</sup> *Prosecutor v. Furundzija*, (Case IT-95-17/1, Judgment of 10 December 1998), para. 157.

The Human Rights Committee appears to suggest that statutes of limitation should not apply at all:

“Gross violations of civil and political rights during military rule should be prosecutable for as long as necessary, with applicability as far back in time as necessary to bring their perpetrators to justice.”<sup>94</sup>

In its General Comment 31, the Committee states that:

“Other impediments to the establishment of legal responsibility should also be removed, such as the defence of obedience to superior orders or unreasonably short periods of statutory limitation in cases where such limitations are applicable.”<sup>95</sup>

States are obligated to remove impediments to the prosecution of rape, irrespective of the context in which this crime has been committed.

The Human Rights Committee has not defined what is meant by ‘unreasonably short’ but it is clear from its practice that prescription periods must be substantial given the gravity of the crime of rape, if not abolished altogether.

In response to concerns that short statutes of limitation unjustifiably hinder the investigation and prosecution of rape cases, certain States have extended or abolished applicable limitation periods.<sup>96</sup>

### (iii) Recommendations

We propose that the offence of rape should not be made subject to any prescription. Rape is a crime that frequently leaves its victims severely traumatised. There are many instances, such as the rape of children or the rape of women in vulnerable positions, where the victims have been too afraid, ashamed or inhibited to bring a complaint about the incident out of fear for the expected repercussions. It may take years if not decades before a woman who has suffered rape to be willing to come forward and give testimony. The prosecution of rape cases after a long period of time poses unique evidentiary challenges. However, this is a practical difficulty that can be addressed in a given case. It should not be a consideration that denies victims access to criminal justice at the very time when they are finally capable of doing so. On

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<sup>94</sup> Concluding Observations of the Human Rights Committee: Argentina, 3 November 2000, UN Doc. CCPR/CO/70/ARG, 3 November 2000, para. 9.

<sup>95</sup> UN Human Rights Committee, General Comment 31, *supra* n.44, para.18.

<sup>96</sup> There are no limitation periods in countries such as Bangladesh and the UK for the criminal offence of rape and limitation periods have been abolished in places such as New York and many US states have no limitation periods for sexual offences committed against minors, see The National Centre for Victims of Crime, Criminal Statute of Limitations Sexual Offences (current throughout 2006), <http://corsal.org/06SOLNCVCCRIMSOL20061%5B1%5D.TBL.pdf>.

balance, the interest of society to repress rape and to prosecute the perpetrators years after the crime must override the objective of gaining legal certainty by precluding investigations after the passage of a fixed time.

## **5. The position of victims and witnesses in rape cases: Protection, counselling and victims' rights**

### 5.1. Current Sudanese laws

Article 4 (e) of the Criminal Procedure Code (CPC) provides that witnesses should not be subject to any injury or ill-treatment. Moreover, article 156 CPC imposes a duty on the courts to protect victims against intimidating or injurious questioning. However, this protection is qualified as it does not apply to questions relating to the substance of the case. There are no provisions in Sudanese laws that specifically provide protection measures for victims and witnesses of crimes, including in cases of rape. No laws or procedures exist that provide for the counselling of rape victims or provide them with procedural rights in the course of criminal proceedings.

### 5.2. International standards and state practice

States are obliged to provide protection to victims and witnesses in accordance with Article 2 (3) of the International Covenant on Civil and Political Rights. Such an obligation is also reflected in Articles 28 and 35 of the Bill of Rights in so far as a victim is seeking to exercise his or her rights.

The *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* recognise that States should, with a view to securing the right to access justice:

“Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims.”<sup>97</sup>

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<sup>97</sup> A/RES/60/147, 16 December 2005, Principle 12 (b).

The statutes of international criminal tribunals also recognise the need to provide protection for victims and witnesses of international crimes, which frequently include rape committed in the course of war or by government officials.<sup>98</sup>

As part of national reforms to provide protection to victims and witnesses of crime in general and/or of rape in particular, several states have enacted legislation, established procedures and set up programmes designed to protect and/or support victims and witnesses.<sup>99</sup> The best practices with regards to such legislation and programmes comprise:

- Complaints procedures that facilitate the lodging of complaints (hotlines, female units etc.);
- Protection measures following a complaint: direct lines; protection through escorts or bodyguards; provision of safe houses; relocation; identity change;
- Procedural protection: confidentiality and anonymity (withholding identity of victim and/or witness); in camera testimonies; close hearings; provision of video-link.

A closely related issue is the avoidance of re-traumatisation. Victims of rape are at an enhanced risk of being re-traumatised during all stages of judicial proceedings and beyond. It is therefore critical both to provide special assistance to rape victims, such as counselling, and to design facilities and procedures in such a way that they minimise the risk of re-traumatisation.

Some of the measures that have been used in national and international practice to this end are:

- Rape victims should be allowed to testify in camera or in closed hearings where there is a risk of re-traumatisation;
- Rape victims should only be questioned by specifically trained interrogators;
- There should be limits to the questioning of rape victims during investigations and in court, for example, a woman alleging rape should not be questioned about her sexual conduct prior or subsequent to the alleged rape.<sup>100</sup>

Further measures consist in strengthening the rights of rape victims during proceedings, which include the right to:

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<sup>98</sup> See in particular Rule 96 of the Rules of Procedure and Evidence of the ICTY and the ICTR, Article 68 of the ICC Rome Statute and Rule 71 of the Rules of Procedure and Evidence of the ICC.

<sup>99</sup> For example in Namibia, New Zealand, the Philippines, South Africa (Act No.32 of 2007) and Switzerland. See in particular relevant entries in *International, regional and national developments in the area of violence against women*, supra n.6.

<sup>100</sup> See in particular rules 70 and 71 of the ICC Rules of Procedure and Evidence.

- Participate in proceedings, either in person or through a legal representative, and exercise procedural rights;
- Make victim impact statements with regard to the consequences of the crime, which may be used when determining the appropriate sentence.

### 5.3. Recommendations

We propose that the legislation pertaining to rape provide for the establishment of special procedures and programmes to ensure victims' protection, and to provide counselling and medical treatment. The relevant law should provide for appropriate complaints mechanisms, specialised questioning, confidentiality, protective measures and evidentiary rules designed to avoid re-traumatisation.

Applicable procedures should also provide persons alleging rape with a right to participate in proceedings and to make victim impact statements.

## 6. Evidentiary issues

### 6.1. Current Sudanese law

Rape is seemingly subject to the rules of evidence applying to adultery. According to article 62 of the Evidence Act, adultery shall be proved by an express confession before a court, by the testimony of four male witnesses, pregnancy of an unmarried woman or lian (oath by the husband) but not the testimony of the victim or circumstantial evidence.

### 6.2. International standards and state practice

States must take effective measures to prevent and repress rape and the practical application of the legal system should be capable of bringing perpetrators to justice and not result in impunity. The applicable legal framework must not unduly hinder the full investigation and prosecution of rape cases where there are reasonable grounds to believe that an individual is guilty of the offence.

National judicial practice has undergone significant changes in recent years in recognition of the difficulty of proving rape, in particular with regards to the actual intercourse and the lack of consent. In several countries, the testimony of the rape victim may in and of itself be sufficient proof if credible and consistent. As held by the Bangladesh High Court in *Al Amin & Ors v. the State Bangladesh*:

“The testimony of a victim of sexual assault is vital, and unless there are compelling reasons which necessitate corroboration of her statement, the court should find no difficulty in convicting an accused on her testimony alone if it inspires confidence and is found to be reliable. Evidence on a point is to be judged not by the number of witnesses produced but its inherent truth; one credible witness outweighs the testimony of a number of other witnesses of indifferent character. It is also improper and undesirable to treat the victim’s testimony with suspicion and for her to be considered an accomplice.”<sup>101</sup>

In the majority of countries, forensic evidence constitutes an important piece of evidence in rape case. Such evidence may consist of physical evidence, in particular: (i) injuries that may prove the use of violence and the lack of consent; (ii) torn hymen where the victim was a virgin; and (iii) semen and bodily fluids of the offender. Psychological evidence, such as the diagnosis of clinical symptoms of post-traumatic stress disorder that can be attributed to sexual violence, is also highly valuable, particularly in the absence of physical evidence. In addition, several countries have recognised a set of principles and evidentiary rules pertaining to proof of consent, or the lack thereof. This consists of a number of presumptions that may be applied to infer lack of consent, such as where the person alleging rape was at the time of the rape or immediately before it: subjected to violence; threatened with violence; unlawfully detained; asleep or otherwise unconscious; unable to communicate to the person accused of rape because of a physical disability; given a substance which “was capable of causing or enabling the [person alleging rape] to be stupefied or overpowered...”<sup>102</sup>

### 6.3. Recommendations

We propose that the offence of rape should not be subject to the rules of proof applying to the crime of adultery, namely the requirement of four male witnesses to the act of penetration or a confession. The current evidentiary standard does not allow the prosecution to draw on valuable evidence, such as victims’ statements and forensic evidence which are the most typical evidence used in rape cases in other countries. The high evidentiary threshold for rape in Sudanese legislation is on the face of it detrimental to the effective prosecution of rape cases. In practice, there have been few convictions for rape and the current legal framework effectively has resulted in impunity.

In addition, the law should stipulate a set of evidentiary principles pertaining specifically to cases of sexual violence, which should include the validity of the victims’ testimony, the types of medico-legal evidence (the law should also facilitate access to the requisite medical examinations), and presumptions to be applied when

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<sup>101</sup> *Al Amin and others v. Bangladesh*, 51 DLR (1999) 154.

<sup>102</sup> See for example section 75 (2) of the UK Sexual Offences Act, 2003.

determining whether there was lack of consent, namely that consent cannot be assumed.

## 7. Right to an effective remedy and reparation for victims of rape

### 7.1. Current Sudanese law

There is no specific right to reparation for victims of rape in Sudanese law. A victim of rape may bring a claim for reparation as a supplementary civil suit in the course of criminal proceedings.<sup>103</sup> In case of bodily injury, he or she may bring a claim for diya (blood money), which is, however, meant to compensate for the bodily injury only and not for the rape as such.<sup>104</sup> In civil proceedings, a rape victim or his or her relatives can claim damages for tort, i.e. trespass against the person, under civil law.<sup>105</sup> Where the alleged perpetrator is an official, a civil suit may be instituted against the state but a suit against the perpetrator itself can only proceed if the head of the forces concerned lifts immunity.<sup>106</sup>

### 7.2. International standards and state practice

According to international standards, victims of rape should have effective access to justice and obtain reparation for the violation suffered. The latter comprises not only compensation but also rehabilitation, satisfaction and guarantees of non-repetition.<sup>107</sup>

National legislation and jurisprudence in many countries recognises the right to a remedy and reparation for victims of rape.<sup>108</sup> Article 35 of the Bill of Rights also recognises the right to litigation, which equally applies to rape cases.

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<sup>103</sup> Article 204 of the Criminal Procedure Act, 1991.

<sup>104</sup> Articles 42-45 of the 1991 Criminal Act.

<sup>105</sup> Article 153 (1) Civil Transaction Act, 1984 (hereinafter CTA).

<sup>106</sup> Article 33 (b) of the National Security Forces Act, 1999, article 45 (2) of the Police Act 2008 and article 34 (2) of the Armed Forces Act, 2007.

<sup>107</sup> See in particular *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.

<sup>108</sup> See with regard to rape as torture, REDRESS, *Reparation for Torture: A Survey of Law and Practice in Thirty Selected Countries*, May 2003.

Courts have ruled on the inapplicability of limitation periods in rape cases<sup>109</sup> and awarded compensation and other forms of reparation for rape victims.<sup>110</sup> National human rights institutions have been given the power to recommend reparation where rape constitutes a human rights violation.<sup>111</sup> Notably, several countries have established or financially supported centres providing services for victims of sexual violence, including treatment and rehabilitation. Where rape had been widespread in the course of armed conflict or other contexts, commissions have been set up mandated to establish the truth about the violations and to recommend or award reparation.<sup>112</sup>

### 7.3. Recommendations

We propose that victims of rape be provided with an effective remedy under Sudanese legislation. Existing laws do not constitute an effective avenue for claiming adequate reparation for human rights violations, including rape.<sup>113</sup> For this reason, statutory law should stipulate a specific right to reparation for such violations as a way of implementing the fundamental right to litigation (article 35 of the Bill of Rights) and the right to a remedy as provided in international law (article 27 (3) of the Bill of Rights).<sup>114</sup> Such law, which may take the form of an amendment to the Criminal Code or the Civil Transaction Act or a separate act, should vest victims with a right to adequate compensation, rehabilitation and other forms of reparation as appropriate. In addition, any barriers to effective access to justice for rape victims should be removed, in particular immunities. Suits in rape cases should not be subject to unduly short terms of limitation (less than ten years) or, ideally, any limitation periods.

The National Human Rights Commission to be established should be vested with the power to recommend compensation in rape cases falling within its mandate. The state should establish or financially support centres that provide treatment and rehabilitation for victims of rape.

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<sup>109</sup> See in particular the judgment of the House of Lords in *A v Hoare* [2008] UKHL 6 (30 January 2008).

<sup>110</sup> See, for example, in India, the judgment of the Supreme Court in *Delhi Domestic Working Women's Forum v UOI* (1995) 1 SCC 14, in which the Court laid down a number of guidelines and stipulated that compensation to victims must be awarded based on suffering, shock, pregnancy and loss of earnings amongst others.

<sup>111</sup> The Indian National Human Rights Commission has recommended compensation in a number of cases of rape and sexual violence, and has drafted guidelines on the speedy disposal of child rape case, see <http://nhrc.nic.in/>.

<sup>112</sup> See on the practice and experiences in Guatemala, Peru, Rwanda, Sierra Leone, South Africa and Timor-Leste, Ruth Rubio-Marín (ed.), *What Happened to the Women? Gender and Reparations for Human Rights Violations*, Social Science Research Council, 2006.

<sup>113</sup> See REDRESS/SOAT, *National and International Remedies for Torture, A Handbook for Sudanese Lawyers*, March 2005, pp.35 et seq.

<sup>114</sup> See Article 27 (4) of the Bill of Rights: "Legislation shall regulate the rights and freedoms enshrined in this Bill and shall not detract from or derogate any of these rights."

## 8. Other offences relating to sexual violence

### 8.1. Current Sudanese law

In addition to rape as well as adultery and sodomy, the 1991 Criminal Act recognises the sexual offences of incest, gross indecency, indecent and immoral acts, materials and displays contrary to public morality, practising prostitution, running a place for prostitution, seduction and false accusation of ‘unchastity.’<sup>115</sup> Criminal laws do not contain the offence of sexual harassment, trafficking and female genital mutilation.

### 8.2. International standards and state practice

In line with the positive obligation under international law to prevent and repress sexual violence, states should enact legislation that criminalises forms of sexual attacks other than rape.

Several countries have enacted legislation over the last decade that recognises a range of sexual offences, including sexual harassment, female genital mutilation and trafficking, as well as legislations specifically designed to protect vulnerable individuals against sexual violence.

### 8.3. Recommendations

We propose a comprehensive revision of the law on sexual violence that would bring Sudanese legislation in line with the Bill of Rights, international treaty obligations and best practices from other countries. To this end, such reforms should encompass a much broader set of offences. This would include, for example other forms of sexual assault, the protection of children, mentally disabled and other vulnerable persons from sexual violence, female genital mutilation and trafficking in human beings for use in the sex trade. The reform of rape provisions is important but would, if not complemented by other reforms in due course, be incomplete because it would not capture a number of other forms of sexual violence, which also need to be repressed.

In particular, we propose the enactment of new offences of sexual assault, which would cover a series of acts of sexual violence, such as non-consensual touching, as well as offences relating to sexual activities with children and mentally disabled persons.

The offence of gross indecency in article 151 of the Criminal Act that effectively serves as a catch-all offence for unlawful sexual acts not amounting to adultery,

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<sup>115</sup> Part XV of the 1991 Criminal Act.

sodomy or rape, is clearly inadequate because it does not sufficiently distinguish between various forms of sexual harassment. It also stipulates punishments of a maximum of eighty lashes or imprisonment of up to two year that are insufficient in cases of serious sexual assault or harassment that does not amount to rape.



# VI. Recommendations

Taking into consideration the provisions of the Bill of Rights, Sudan's obligations under international law and best practices from other countries, we propose that Sudanese legislation on rape and sexual violence be reformed. Such reforms may either take the form of an amendment to the criminal act (repealing and inserting the relevant new provisions) or the adoption of a separate anti-rape and sexual violence act. Such legislation would entail changes in the definition of the offence of rape and the insertion of new offences, such as sexual assault, sexual harassment and may also include the offence of trafficking, female genital mutilation, and sexual offences against children and mentally disabled persons.

We propose that the criminal offence of rape be changed as follows:

- There should be no reference to adultery in the definition of rape
- The act of rape should, in addition to sexual intercourse of a woman or man, include penile penetration of the mouth and penetration of sexual organs with an object
- The definition of consent should be clarified. Consent should be defined as a "voluntary and uncoerced agreement." The circumstances indicating lack of consent should include, without being limited to, situations where the victim is:
  - subjected to violence or threats at the time or immediately before the act;
  - in detention;
  - asleep or unconscious; or
  - intoxicated;
  - mentally or physically disabled and hence unable to communicate consent in a given situation.
- The punishment for rape should reflect the seriousness of the crime. To this end, we propose a maximum punishment of life imprisonment. Aggravating circumstances, such as abuse of authority, infliction of bodily harm, multiple rape, gang rape, vulnerability of the victim (children, mentally ill, physically disabled persons), should be specifically listed to guide the sentencing discretion of the judge.

We propose that the legislation governing criminal proceedings in rape cases be changed as follows:

- Immunity: abolishing legislation that grants conditional immunity to members of the armed forces, security forces and police forces
- Statutes of limitation: not to introduce any limitation periods for the criminal offence of rape

- Victims and Witness Protection: establish an effective system of victims and witness protection in rape cases
- Procedural position of victims: provide specific procedural rights for victims of rape in line with international best practice
- Evidentiary issues: permit the use of the victim's statement and circumstantial evidence as sufficient to secure a conviction for rape.

We propose that the legislation governing the rights of rape victims to an effective remedy and reparation be changed as follows:

- Right to reparation: recognising expressly victim's right to reparation for violations of human rights, including rape, which should comprise adequate forms of reparation
- Statutes of limitation: substantially extend existing statutes of limitation to provide victims with effective access to justice
- Special Commissions: set up commissions vested with the power to provide compensation and other forms of reparation to rape victims, particular for rape committed in the course of conflict
- Centres for the support of rape victims: Establish or financially support centres for rape victims.

In addition, we propose that a criminal offence of sexual assault be adopted that covers non-consensual physical acts of a sexual nature, such as touching and kissing, which fall short of the definition of rape. The offence should be subject to adequate punishments.

Furthermore, we propose that a criminal offence of sexual harassment be adopted that covers other acts of a sexual nature, such as stalking, which fall short of the definition of rape and sexual assaults. The offence should be subject to adequate punishments.



# APPENDIX I: Sudanese Legislation

## 1. Definition of rape in Sudanese criminal laws

### 1925 Penal Code

Article 316: A man is said to commit rape, who, save in the case herein after excepted, has sexual intercourse with a woman against her will or without her consent: Provided that a consent given by a women below the age of 16 years to such intercourse by her teacher, guardian or any other person entrusted with her care or education shall not be a consent within the meaning of this article.

*Exception.*- Such sexual intercourse by a man with his own wife is not rape, if she has attained to puberty.

*Explanation.*- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Article 316 A: Whoever has sexual intercourse with a girl not his wife who is under 16 years of age but not under 14 years of age shall be punished with imprisonment which may extend to two years or with fine or with both.

Article 317: Whoever commits rape, shall be punished with imprisonment for a term which may extend to fourteen years and may also be liable to fine.

Article 318: Whoever has carnal intercourse against the order of nature with any person without his consent, shall be punished with imprisonment for a term which may extend to fourteen years and may also be liable to fine.

Provided that a consent given by a person below the age of 16 years to such intercourse by his teacher, guardian or any other person entrusted with his care or education shall not be a consent within the meaning of this article.

*Explanation.*- Penetration is sufficient to constitute the sexual intercourse necessary to the offence described in this article.

### 1974 Penal Code

Article 316: A man is said to commit rape, who, save in the case herein after excepted in this article or and in article 316A, has sexual intercourse with a woman against her will or without her consent; Provided that a consent given by a women below the age of 18 years to such intercourse, shall not be a consent within the meaning of this article.

*Exception.*- Such sexual intercourse by a man with his own wife is not rape, if she has attained to puberty.

*Explanation.*- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Article 316 A: Whoever has sexual intercourse with a girl not his wife who is under 18 years of age but not under 16 years of age with her will, shall be punished with imprisonment which may extend to two years or with fine or with both.

Article 317: Whoever commits rape shall be imprisoned for ten years, which may extend to fourteen years and may also be liable to fine.

## 1983 Penal Code

Article 316: (1) whoever penetrated the whole his penis, glans, or its equivalent into the vulva or the anus of an adult person without lawful bond and whoever allows another to penetrate the whole of his penis, glans, or its equivalent into his valva or anus without lawful bond shall be deemed to have committed adultery.

(2) Adultery shall be proved by four eye witnesses to testify on the penetration of the penis into the vulva or the rectum, explicit unrevocable admission or by pregnancy.

Article 317: Whoever have an intercourse by the way described in Article 316 shall be deemed to have committed the offence of rape and shall be punished as stipulated in article 318.

Article 318: (1) Whoever commits the offence of adultery shall be punished with execution, where the offender is married (muhsan) or with one hundred lashes, where the offender is not married.

(2) The male, non-married offender shall be punished, in addition to whipping, with expatriation for one year.

(3) Any person whose heavenly religion stated another punishment for adultery shall not be punished with the penalties mentioned in para 1&2 above. In such a case he will be punished with that other punishment and if a punishment does not exists he will be punished with 80 lashes whipping and fine or with imprisonment for a term not les than one year.

## 1991 Criminal Act

Article 149:

(1) There shall be deemed to commit the offence of rape, whoever makes sexual intercourse, by way of adultery, or sodomy, with any person without his consent.

(2) Consent shall not be recognized, when the offender has custody or authority over the victim.

(3) Whoever commits the offence of rape, shall be punished, with whipping a hundred lashes, and with imprisonment, for a term, not exceeding ten years, unless rape constitute the offence of adultery, or sodomy, punishable with death.

Article 145:

(1) There shall be deemed to commit adultery:

(a) every man who has sexual intercourse with a woman, without there being a lawful bond between them;

(b) every woman, who permits a man to have sexual intercourse with her, without there being a lawful bond between them;

(2) Sexual intercourse takes place by the penetration of the glans, or its equivalent into the vulva.

(3) There shall not be deemed, to be lawful bond, marriage which, by consensus is ruled void.

Article 148 (1):

- (1) There shall be deemed to commit sodomy, every man who penetrates his glands, or the equivalent thereof, in the anus of a woman, or another man's, or permits another man to penetrate his glands, or its equivalent, in his anus.
- (2)
  - (a) whoever commits the offence of sodomy, shall be punished with whipping a hundred lashes, and he may also be punished, with imprisonment, for a term not exceeding five years;
  - (b) where the offender is convicted for the second time, he shall be punished with whipping a hundred lashes, and with imprisonment, for a term not exceeding five years;
  - (c) where the offender is convicted for the third time, he shall be punished with death, or with life imprisonment.

## 2. Definition of gross indecency in Sudanese criminal laws

### 1925 Penal Code

Article 319: Whoever commits an act of gross indecency upon the person of another without his consent or by the use of force or threats compels a person to join with him in the commitment of such act, shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine:

Provided that a consent given by a person below the age of sixteen years to such act when done by his teacher, guardian or any other person entrusted with his care or education shall not be a consent within the meaning of this article.

### 1974 Penal Code

Article 319: Whoever commits an act of gross indecency upon the person of another without his consent or by the use of force or threats compels a person to join with him in the commitment of such act, shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine:

Provided that a consent given by a person below the age of 18 years to such intercourse shall not be deemed to be consent within the meaning of this article.

### 1983 Penal Code

Article 319: Whoever commits an act of gross indecency upon the person of another or an animal or by the use of force or threats or compels a person to join with him in the commission of such act, or attempt to commit adultery, rape or indecent act upon the person or an animal shall be punished with whipping or fine or imprisonment.

### 1991 Criminal Act

Article 151:

(1): There shall be deemed to commit the offence of gross indecency, whoever commits any act contrary to another person's modesty, or does any sexual act, with another person not amounting to adultery, or sodomy, and he shall be punished, with whipping, not exceeding forty lashes, and he may also be punished, with imprisonment, for a term not exceeding one year, or with fine.

(2): Where the offence of gross indecency is committed in a public place, or without the consent of the victim, the offender shall be punished, with whipping not exceeding eighty lashes, and he may also be punished, with imprisonment, for a term not exceeding two years, or with fine.



# APPENDIX II: Legislation pertaining to rape from selected countries (extracts)

## 1. Pakistan

**Protection of Women (Criminal Laws Amendment) Act, 2006**  
<http://www.pakistani.org/pakistan/legislation/2006/wpb.html>

Insertion of new sections, Act XLV of 1860:

In the said Code, after section 374, the following new sections 375 and 376 under sub-heading "Rape", shall be inserted, namely:

Section 375: Rape:

A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions,

- (i) against her will
- (ii) without her consent
- (iii) with her consent, when the consent has been obtained by putting her in fear of death or hurt
- (iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes to be married; or
- (v) with or without her consent when she is under sixteen years of age.

*Explanation:* Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

## 2. Namibia

**Combating of Rape Act, 2000, Act No.8, 2000**  
<http://www.lac.org.na/laws/pdf/comrape.pdf>

**Rape**

Section 2:

- (1) Any person (in this Act referred to as perpetrator) who intentionally under coercive circumstances -
  - (a) commits or continues to commit a sexual act<sup>116</sup> with another person; or

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<sup>116</sup>Section 1 (1) of the Act defines sexual act as: "(a) the insertion (to even the slightest degree) of the penis of a person into the vagina or anus or mouth of another person; or (b) the insertion of any other part of the body of a person or of any part of the body of an animal or of any object into the vagina or anus of another person, except where such insertion to any part of the body (other than the penis) of a

- (b) causes another person to commit a sexual act with the perpetrator or with a third person, shall be guilty of the offence of rape.

(2) For the purposes of subsection (1) “coercive circumstances” includes, but is not limited to -

- (a) the application of physical force to the complainant or to a person other than the complainant;
- (b) threats (whether verbally or through conduct) of the application of physical force to the complainant or to a person other than the complainant;
- (c) threats (whether verbally or through conduct) to cause harm (other than bodily harm) to the complainant or to a person other than the complainant under circumstances where it is not reasonable for the complainant to disregard the threats;
- (d) circumstances where the complainant is under the age of fourteen years and the perpetrator is more than three years older than the complainant;
- (e) circumstances where the complainant is unlawfully detained;
- (f) circumstances where the complainant is affected by -
  - (i) physical disability or helplessness, mental incapacity or other inability (whether permanent or temporary); or
  - (ii) intoxicating liquor or any drug or other substance which mentally incapacitates the complainant; or
  - (iii) sleep,

to such an extent that the complainant is rendered incapable of understanding the nature of the sexual act or is deprived of the opportunity to communicate unwillingness to submit or to commit the sexual act;

- (g) circumstances where the complainant submits to or commits the sexual act by reason of having been induced (whether verbally or through conduct) by the perpetrator, or by some other person to the knowledge of the perpetrator, to believe that the perpetrator or the person with whom the sexual act is being committed, is some other person;
- (h) circumstances where as a result of the fraudulent misrepresentation of some fact by, or any fraudulent conduct on the part of, the perpetrator, or by or the part of some other person to the knowledge of the perpetrator, the complainant is unaware that a sexual act is being committed with him or her;
- (i) circumstances where the presence of more than one person is used to intimidate the complainants.

(2) No marriage or other relationship shall constitute a defence to a charge of rape under this Act.

### 3. South Africa

#### Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

<http://www.info.gov.za/gazette/acts/2007/a32-07.pdf>

#### Section 3 Rape

Any person (‘A’) who unlawfully and intentionally commits an act of sexual penetration<sup>117</sup> with a complainant (‘B’), without the consent of B, is guilty of the offence of rape.

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person or of any object into the vagina or anus of another person is, consistent with sound medical practices, carried out for proper medical purposes; or (c) cunnilingus or any other form of genital stimulation.”

<sup>117</sup> According to Section 1 of the Act, sexual penetration: “includes any act which causes penetration to

## Section 4 Compelled rape

Any person ('A') who unlawfully and intentionally compels a third person ('C'), without the consent of C, to commit an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of compelled rape.

## 4. United Kingdom

### Sexual Offences Act 2003

[http://www.opsi.gov.uk/Acts/acts2003/ukpga\\_20030042\\_en\\_1](http://www.opsi.gov.uk/Acts/acts2003/ukpga_20030042_en_1)

#### Rape

(1) A person (A) commits an offence if—

- (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
- (b) B does not consent to the penetration, and
- (c) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

(3) Sections 75 and 76 apply to an offence under this section.

(4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

#### Assault

##### 2 Assault by penetration

(1) A person (A) commits an offence if—

- (a) he intentionally penetrates the vagina or anus of another person (B) with a part of his body or anything else,
- (b) the penetration is sexual,
- (c) B does not consent to the penetration, and
- (d) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

(3) Sections 75 and 76 apply to an offence under this section.

(4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

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any extent whatsoever by - (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person; (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or (c) the genital organs of an animal, into or beyond the mouth of another person.”

# APPENDIX III: OTHER INTERNATIONAL RESOURCES

## 1. Selected UN Documents

### (i) UN Human Rights Committee

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

[www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.13.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument)

### (ii) UN Committee on the Elimination of the Discrimination of All Forms of Violence against Women

General Recommendation No. 19 (11th session, 1992): Violence against women

[www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19](http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19)

### (iii) UN Special Rapporteur on violence against women, its causes and consequences

*The Due Diligence Standard as a Tool for Eliminating Violence against Women*, Report by the Special Rapporteur on Violence against women, its causes and consequences, Yakin Ertürk, UN Doc. E/CN.4/2006/61, 20 January 2006

<http://www2.ohchr.org/english/issues/women/rapporteur/index.htm>

*International, regional and national developments in the area of violence against women, 1994 to 2003*, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution 2002/52, Addendum 1, UN Doc. E/CN.4/2003/75/Add.3, 27 February 2003.

<http://www2.ohchr.org/english/issues/women/rapporteur/index.htm>

### (iv) UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak, [focusing on protection of women from torture], UN Doc. A/HRC/7/3, 15 January 2008,

<http://www2.ohchr.org/english/issues/torture/rapporteur/index.htm>

### (v) UN General Assembly Resolution

The 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.

<http://www2.ohchr.org/english/law/remedy.htm>

## 2. Internet links to key bodies

### (i) United Nations

- [www.un.org](http://www.un.org) (main UN website), includes links to documents of UN Security Council and UN General Assembly
- [www.ohchr.org](http://www.ohchr.org) (Office of the High Commissioner for Human Rights), includes links to all UN human rights treaty bodies

### (ii) International tribunals

- <http://www.un.org/icty> International Criminal Tribunal for the former Yugoslavia
- <http://69.94.11.53/> International Criminal Tribunal for Rwanda
- [www.icc-cpi.int](http://www.icc-cpi.int) International Criminal Court

### (iii) Regional bodies

- <http://www.achpr.org/> African Commission on Human and Peoples' Rights
- <http://www.corteidh.or.cr/index.cfm?CFID=156581&CFTOKEN=74064370>  
Inter-American Court of Human Rights
- <http://www.echr.coe.int/echr/> European Court of Human Rights

## 3. National documents

(Namibia) Legal Assistance Centre, *An Assessment of the Combating of Rape Act 8 of 2000*, Summary Report, 2006

<http://www.lac.org.na/projects/grap/Pdf/rapsum.pdf>

South African Law Reform Commission, Discussion Paper 102 (Project 107): *Sexual offences*,  
<http://www.doj.gov.za/salrc/dpapers.htm>

United Kingdom, Home Office, *Protecting the Public: Strengthening protection against sex offenders and reforming the law on sexual offences*

<http://www.homeoffice.gov.uk/documents/protecting-the-public.pdf?view=Binary>

Scottish Law Commission, Discussion Paper on Rape and Other Sexual Offences, January 2006,

[http://www.scotlawcom.gov.uk/downloads/dp131\\_rape.pdf](http://www.scotlawcom.gov.uk/downloads/dp131_rape.pdf)