INTERNATIONAL
COMMISSION
OF JURISTS

# THE ADMINISTRATION OF JUSTICE IN SUDAN:

## *THE CASE OF DARFUR*

June 2007

This report was written by Saïd Benarbia. Federico Andreu-Guzmán and Nicholas Howen provided legal review and Jumana Abo-Oxa assisted in this production.

This Project has been made possible with the support of the Canadian Department of Foreign Affairs and International Trade

# THE ADMINISTRATION OF JUSTICE IN SUDAN: THE CASE OF DARFUR

## SUMMARY

*The Administration of Justice in Sudan: The case of Darfur*, a report by the International Commission of Jurists (ICJ), examines developments in the administration of justice in Darfur, Sudan, and the national legal framework within which courts in Darfur operate. The research carried out by the ICJ in Sudan demonstrates how recent investigatory bodies and courts set up by the Government to address human rights law in Darfur have not delivered justice. It shows how the courts are neither independent nor impartial, and how a range of national laws make the courts incapable of meting out justice in Darfur in a way that reflects the gravity of the crimes and international standards. The failure to address legal and structural obstacles underscores the lack of political will of the Sudanese Government to bring to justice state officials and members of the Janjaweed militia responsible for gross human rights violations in Darfur, and to address the rights of victims.

The report sets out urgent legal reforms that, with political will, would help to create an independent and impartial justice system in Darfur and would significantly advance the administration of justice in Sudan as whole.

Despite the signing of the 2006 Darfur Peace Agreement, the human rights situation in Darfur continues to deteriorate. The ongoing gross human rights violations and breaches of international humanitarian law also reflect how impunity for those responsible for these crimes continues to destabilise Darfur.

After failing for two years to take action on the armed conflict and the massive human rights violations in Darfur, the United Nations Security Council finally set up in September 2004 an International Commission of Inquiry to investigate violations of international humanitarian and human rights law in Darfur. The Commission concluded that the Sudanese justice system is unable and unwilling to address the situation in Darfur. Following the Commission's report and after protracted debates, the Security Council decided in a precedent-setting move in March 2005, to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court (ICC). On 2 May 2007, the ICC issued arrest warrants for a former Sudanese Minister of State for the Interior and the alleged Janjaweed militia leader to stand trial for war crimes and crimes against humanity.

The Government of Sudan has consistently criticised the UN's initiatives to investigate human rights violations in Darfur and has repeatedly refused to cooperate with the ICC, arguing that Sudan's judiciary is competent and willing to dispense justice.

On 7 June 2005, one day after the ICC Prosecutor announced that he was initiating investigations on Darfur, the Sudanese authorities established the Special Criminal Court on the Events in Darfur (SCCED).

So far the SCCED has tried eight cases, involving 30 defendants, 21 military or law enforcement officials and nine civilians. The charges against military and police personnel included murder of detainees, the killing of a student demonstrator, robbery and one case of rape. Five low-ranking officers were sentenced to prison and five others sentenced to death, out of which two were executed by hanging in May 2007 and another two released because of

an amnesty. Eleven other soldiers were acquitted. The SCCED has never addressed the criminal responsibility of senior-level Sudanese officials in relation to Darfur. The only higher-ranking official to be charged was acquitted because the court did not recognise his responsibility as a commander for the actions of his subordinates for a death in custody. No militia leader or member has been tried for human rights violations in Darfur. In the only case involving a charge of rape, the defendants were acquitted. Although the SCCED has dealt with a few cases of human rights violations, the trials do not even begin to reflect the gravity and magnitude of the war crimes and crimes against humanity committed in Darfur. The trials do not address the large scale attacks described by the International Commission of Inquiry and many NGO investigations before and since, involving the killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, conducted on a widespread and systematic basis.

The impunity of state officials and Janjaweed militia, reflected in the record of the SCCED, is underpinned by Sudanese law in at least four ways:

First, the failure to prosecute senior level officials is reinforced by Sudanese law not expressly recognising the responsibility of military commanders and civilian officials for the actions of their subordinates under the principle of superior (or command) responsibility.

Secondly, a sophisticated system of immunities, guaranteed by the Constitution and various laws, protects military, police and other government officials from prosecution for human rights violations.

Thirdly, when these immunities are insufficient, the President has stepped in to grant amnesties or pardons. When the SCCED sitting in El Fasher convicted two low-level officers for the murder of a 13-year old boy who died from torture while in custody, both of them were later released under the 2006 General Amnesty decree issued by the Sudanese President.

Fourthly, the defendants before the SCCED have been charged with ordinary crimes under Sudanese criminal law because Sudanese law does not criminalise most of the war crimes and crimes against humanity taking place in Darfur, and neither does it criminalise torture or enforced disappearance. Most of the 51 counts enumerated in the ICC's arrest warrants for two Sudanese are not criminalised by Sudanese law. This serious lacuna in Sudanese law means that the SCCED trials have not been able to address the gravity of the crimes in Darfur. Even after a November 2005 Decree broadened the jurisdiction of the SCCED to include international humanitarian law (under which concepts such as command responsibility could have been introduced) the Court still applied only the Sudanese *Criminal Act* 1991.

The SCCED does not meet international standards of independence and impartiality. It was established not by law but by the Chief Justice, who is himself appointed by and accountable to the President of Sudan, under a power given to the Chief Justice to set up courts and determine their jurisdictions and procedures. The SCCED also operates in a judicial environment in which historically, structurally and in practice, the courts are dependent on and compliant with the executive that has created laws to underpin its control of the judiciary. The independence and impartiality of the Sudanese justice system and its ability to tackle impunity and deliver fair trials has been further undermined by a web of military, security, police and other exceptional courts that do not comply with internationally accepted procedures, and assist in protecting state officials from being accountable under the law.

The SCCED remains inaccessible, with judges performing other duties in Khartoum whilst awaiting the commencement of trials in Darfur. Inadequate specialised expertise and

resources, as well as reliance on the existing limited infrastructure for investigations are also hampering the progress of the Court.

Other initiatives by the Sudanese Government to investigate human rights violations in Dafur, such as the Judicial Investigations Committee, the *Ad Hoc* Investigatory Committees, the Committees against Rape, the Special Prosecutor for Crimes against Humanity, have failed to produce any transparent findings or to lead to state and militia perpetrators being brought to justice.

Victims and witnesses in Sudan are reluctant to come forward with complaints because they are fearful of intimidation and harassment. This is particularly prevalent where rape is alleged. The lack of any mechanism in Sudan to protect witnesses is also a strong disincentive to complainants and presents a serious obstacle to effective criminal proceedings. Sudanese law does not protect the rights of victims. In particular, there is no law or mechanism that enables victims to receive reparations, including compensation, for the human rights violations they suffer.

The Sudanese Government has made numerous commitments to ending impunity in Darfur and has established a variety of courts and investigatory bodies it claims will ensure accountability. These mechanisms have been highly inadequate. The ICJ considers that the Government of Sudan continues not to have the political will, and the Sudanese justice system continues to be unable, to adequately prosecute perpetrators of gross violations of international human rights law and serious violations of international humanitarian law.

To demonstrate that it has the political will to respond to the international crimes being committed in Darfur, the Government of Sudan should remove the obstacles to justice identified in this report. Urgent steps by the executive, legislature and judiciary are also needed to ensure that the justice system in Darfur is independent, impartial and proactive in delivering justice, and that it cannot hide behind the weaknesses in Sudanese law.

The Government will need to reform the existing legal framework to bring it in line with the 2005 Interim National Constitution and international standards applicable in Sudan. Reforms include criminalising acts that amount to crimes under international law, including war crimes and crimes against humanity, torture and enforced disappearance; recognising superior (command) responsibility; repealing laws that shield state officials from legal proceedings; and amending the procedural rules of evidence to ensure that there are not insurmountable obstacles to allegations of rape leading to prosecutions and convictions. The SCCED must not be manipulated to promote any political agenda, and the Sudanese Government should cease all forms of undue interference in the judiciary to ensure that the latter is able to function independently and impartially, and that the human rights of the Sudanese people are protected and upheld.

The Sudanese Government must provide full reparations, including compensation and rehabilitation, to all victims of human rights violations in Darfur; ensure that victims and witnesses are not subjected to any reprisals, harassment or violence as a result of their testimonies before the courts; and facilitate their access to and cooperation with the ICC.

A list of detailed recommendations is set out at the end of this report. The ICJ considers that these recommendations could help not only to end impunity in Darfur, but could also be incorporated into any future legal and judicial reform process in Sudan. Their implementation would benefit all Sudanese and would help to institutionalise judicial independence, impartiality and respect for human rights in Sudan.

# TABLE OF CONTENTS

# THE ADMINISTRATION OF JUSTICE IN SUDAN: THE CASE OF DARFUR

## 1. INTRODUCTION

### The International Criminal Court and The Sudanese Justice System

Following the report of the United Nations International Commission of Inquiry on Darfur ('International Commission of Inquiry')[1] and after protracted debates, the United Nations Security Council, acting under Chapter VII of the UN Charter, decided in Resolution 1593[2] on 31 March 2005 to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court ('ICC').

The International Commission of Inquiry stated in its report[3] that the Sudanese justice system is unable and unwilling to address the situation in Darfur. The Government of Sudan rejected those conclusions and the Security Council resolution on grounds that the Sudanese judicial system is capable of prosecuting the perpetrators of alleged human rights violations in Darfur. A Ministry of Justice statement challenging the ICC's jurisdiction[4] made explicit reference to Article 17 of the Rome Statute which requires the ICC to reject a case as inadmissible if *"the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution"*.

Sudan's Chief Justice Jalal El-Din-Mohammed Osman stated that, *"the Sudanese judiciary, as always, is capable and desirous of fully shouldering its responsibility in earnest for doing justice and restoring rights to their owners, free of any partiality, fear or influence, so that no person who has committed an offence may escape punishment, whatever his position or rank*."[5] Sudanese authorities[6] have also repeatedly asserted that they will not cooperate with the ICC because Sudan is

[1] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004 (25 January 2005).
[2] United Nations Security Council, Resolution 1593 (2005). Adopted by the Security Council at its 5158th meeting, on 31 March 2005, SC/Res/1593 (2005).
[3] Report of the International Commission of Inquiry on Darfur, note 1 above, p. 5.
[4] A recent ruling by Pre-Trial Chamber I of the ICC has indicated that for a case to be held inadmissible, national proceedings must encompass both the person and the conduct, which is the subject of the case before the Court. (Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 (24 February 2006), para. 31.)
[5] Annex to letter from the Chargé d'affaires a.i. of the Permanent Mission of Sudan to the United Nations addressed to the President of the Security Council, 18 June 2005, UN Doc S/2005/403.
[6] Sudanese Justice Minister Mohamed Ali al-Mardi says: *"The court has no jurisdiction to try any Sudanese for any alleged crimes"*, 'Sudan rejects ICC jurisdiction, says one suspect held', Sudan Tribune, 27 February 2007, at http://www.sudantribune.com/spip.php?article20473.

capable of trying the cases in Darfur, and that the ICC only has jurisdiction to prosecute cases where a state's judicial system has collapsed.[7]

On 14 December 2006, the ICC Prosecutor, Luis Moreno-Ocampo, informed the Security Council that he had nearly completed an investigation into some of the worst crimes committed. On 27 February 2007, he submitted an application to the ICC's Pre-Trial Chamber I requesting the summons of Ahmed Muhammad Harun, former Minister of State for the Interior, and Ali Muhammad Ali Abd-Al Rahman (also known as Ali Kushayb), the alleged Janjaweed militia leader. The Prosecutor argued that evidence collected during the investigation lasting 20 months "*shows they acted together, and with others, with the common purpose of carrying out attacks against the civilian populations*", thus providing reasonable grounds to believe that they bear criminal responsibility for 51 counts of alleged war crimes and crimes against humanity.[8] On 2 May 2007, the ICC Pre-Trial Chamber issued warrants of arrest for war crimes and crimes against humanity for Ahmed Harun and Ali Kushayb.

Gross violations of international human rights and humanitarian law have been committed by both the Janjaweed armed militia supported by the Sudanese Government forces, and by the armed opposition groups, the Sudan Liberation Movement/Army ('SLM/A') and by the Justice and Equality Movement ('JEM'). The violations include: persecution of groups on the basis of ethnicity;[9] murder and wilful killing; rape and other forms of sexual violence; torture or cruel, inhuman or degrading treatment; arbitrary deprivation of liberty; intentional and indiscriminate attacks against the civilian population; collective punishment and pillage; illegal internal displacement of the population and forcible transfer. Some of these crimes committed in Darfur, as characterised by the International Commission of Inquiry[10] and by the ICC Prosecutor,[11] amount to war crimes and crimes against humanity.

This ICJ report examines whether the Sudanese justice system is capable of bringing to justice those responsible for gross human rights violations in Darfur and restoring the rights of victims. It explores developments in the administration of justice in Darfur and examines the national legal framework and court structure within which courts in Darfur operate. It asks whether investigatory bodies and courts set up by the Government of Sudan have been able to deliver justice in Darfur in a way that reflects the gravity of the crimes, and whether they are independent and impartial in accordance with international standards.

In analysing the administration of justice in Darfur, the report examines Sudan's legal framework; analyses the extent to which control by the executive of the judiciary, the use of exceptional courts, and the wide powers granted to the Chief Justice to set up such courts and determine their jurisdictions undermine the independence and

[7] 'Sudan: Judiciary challenges ICC over Darfur cases', IRIN, 24 June 2005, at http://www.irinnews.org/report.aspx?reportid=55068.
[8] International Criminal Court Office of the Prosecutor, 'Fact sheet: the Situation in Darfur, the Sudan'. 27 February 2007, at http://www.icc-cpi.int/library/organs/otp/ICC-OTP_Fact-Sheet-Darfur-20070227_en.pdf.
[9] "*Girls have been targeted in inter-ethnic conflicts as a deliberate form of humiliation of a group, and as a means of ethnic cleansing. Rape has been used to force displacement."* Report of the Secretary-General, on children and armed conflict in the Sudan, UN Doc S/2006/662 (17 August 2006), para. 34.
[10] International Commission of Inquiry on Darfur, note 1 above, para. 522.
[11] International Criminal Court Office of the Prosecutor, note 8 above.

impartiality of the judiciary as a whole; and evaluates the different mechanisms put in place by the Sudanese Government to dispense justice in Darfur. The report also examines how a sophisticated system of immunities and legal and procedural obstacles to justice prevent victims of human rights violations from accessing justice, truth and reparations.

The Government of Sudan established the Special Criminal Court on the Events in Darfur ('SCCED') on 7 June 2005, three months after Security Council Resolution 1593 and one day after the Prosecutor of the ICC announced that he was initiating investigations into the events in Darfur, in an apparent move to refute allegations of impunity for perpetrators associated with the Government.

The analysis in this report will show how the SCCED has failed to deliver justice because the Government of Sudan appears to be unwilling to address the situation in Darfur. Sudanese authorities are also taking advantage of the existing legal framework, which institutionalises the immunity of state officials from legal proceedings, fails to provide for any reparations mechanism for victims and fails to include a range of international crimes that are necessary to adequately ensure criminal accountability for the gross human rights violations committed in Darfur. The legal framework in Sudan also institutionalises the dependence of the judiciary on the executive, perverting basic international standards on the independence and impartiality of the judiciary.

Following extensive consultations and unsuccessful negotiations with the Sudanese Government, it became clear that the Government would not allow the ICJ to send an international expert mission to visit Sudan to engage in talks with the Government and to carry out research. The ICJ therefore conducted first-hand research for this report by working closely with local lawyers who interviewed judges, prosecutors, local NGOs and different actors from within the Sudanese judiciary, and obtained testimonies from victims in internally displaced person ('IDP') camps.

## Peace Agreements and Human Rights

On 9 January 2005, the Government of Sudan and the Sudanese People's Liberation Movement signed a Comprehensive Peace Agreement ('CPA'), officially ending 21 years of North-South conflict which cost the lives of an estimated two million people and created close to four million internally displaced persons,[12] The CPA was based on three pillars: security arrangements and wealth and power-sharing protocols. It created a complex system of national and regional transitional institutions, including the Government of South Sudan. The adoption in the same year of an Interim National Constitution ('INC')[13] sent a positive signal for peace and promised the beginning of a period of transition to democracy, respect for the rule of law and promotion of human rights.

[12] Amnesty International, 'Sudan: Who will answer for the crimes?', Report No. AFR54/006/2005, 18 January 2005, at http://web.amnesty.org/library/index/ENGAFR540062005.
[13] 'Interim National Constitution of the Republic of Sudan', Republic of the Sudan Gazette, Special Supplement, No. 1722, 10 July 2005.

The conflict in Darfur, however, remains a major threat to the country's stability. It erupted in early 2003 between Government forces backed by the Janjaweed armed militia[14] and the SLM/A backed by JEM. The armed opposition groups rose up against the Government to challenge the region's economic and political marginalisation, underdevelopment and ethnic discrimination. Since 2003, over 3.3 million people have been affected by the conflict, out of which 1.8 million have been internally displaced, and another 200,000 have fled to neighbouring Chad.[15] More than 200,000 people have been killed according to United Nations[16] and NGO reports.[17] Despite several peace initiatives, ceasefire agreements, the dispatching of an African Union monitoring mission and attempts to establish a UN mission, hostilities have continued and the Government has failed to disarm the militias, curb attacks on civilians and prosecute the perpetrators.

The Darfur Peace Agreement ('DPA') that was concluded on 5 May 2006 aimed to end the three-year conflict in Darfur. It was signed by the Government of National Unity and a faction of the SLM/A led by Minni Minawi after months of negotiations in Abuja, Nigeria. However, the DPA has exacerbated divisions among the armed insurgent groups, as the other parties to the peace negotiations, including the faction of the SLM/A led by Abdul Wahed and the JEM, officially rejected the agreement and argued that it did not provide sufficient individual compensation for the victims of the conflict, and did not grant Darfurians adequate political representation in Sudan.

One of the fundamental principles of the DPA is a commitment to respect and promote human rights in Darfur. Article 3 sets out a Bill of Rights for Darfur enumerating civil, cultural, economic, political, and social rights. It charges the National Human Rights Commission with monitoring the application of the rights and freedoms provided for in Article 3. However, various UN and NGO reports have highlighted that peace in the region continues to be threatened by the slow pace of implementation of the agreement, the lack of reform of the legal and security systems, and continued impunity for the perpetrators of ongoing violations of human rights and fundamental freedoms.

[14] The term "Militia/Janjaweed" refers to those forces that were mobilized, armed and funded by the Government of Sudan to fight the insurgency in Darfur.
[15] International Commission of Inquiry on Darfur, note 1 above, para. 325.
[16] http://www.un.org/apps/news/story.asp?NewsID=23564&Cr=sudan&Cr1=
[17] Human Rights Watch, 'Q & A: Crisis in Darfur', 29 January 2007, at www.hrw.org/english/docs/2004/05/05/darfur8536.htm.

# 2. THE SUDANESE LEGAL FRAMEWORK

The existing legal framework in Sudan prevents the judiciary from carrying out its functions in Darfur in conformity with international standards and in accordance with Sudan's obligations under international law. The current legislative framework infringes upon the basic human rights guaranteed by the 2005 Interim National Constitution ('INC') and the DPA, as well as regional and international instruments ratified by the Government of Sudan. Furthermore, the structure of Sudanese courts, as set out in the INC, compromises the independence and impartiality of the judiciary by institutionalising its dependence on the executive.

## National Legislative Framework

The legal framework of Sudan is a mosaic of legal systems that includes English common law enactments and precedents, legislation based on civil law and principles of Islamic law. In 1983, President Jafa'ar Nimeiri declared Sudan to be an Islamic state and imposed Islamic law, *Shari'a*, on the entire country. *Shari'a* was refined and strengthened with the adoption of the *Criminal Act* of 1991, and it is still the basis of law in Darfur.[18] According to the 2005 INC, "*nationally enacted legislation having effect only in respect of the states outside Southern Sudan shall have as its sources of legislation Shari'a and the consensus of the people*".[19]

The INC also contains a Bill of Rights,[20] which guarantees the following rights, amongst others: the inherent right to life; the dignity and integrity of the person;[21] the right to liberty and security of the person;[22] the right to equality before the law;[23] the right to equality between men and women;[24] the right to a fair trial;[25] the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment;[26] the right to freedom of expression and of the media;[27] the right to freedom of assembly and association[28] and the right to freedom of movement and residence.[29] The Parties to the DPA have reiterated[30] their commitment to respect and promote human rights and fundamental freedoms as detailed in the agreement[31] and in international human rights treaties ratified by the Government of Sudan.

Sudan is party to the following international and regional human rights treaties:

---

[18] In 1991, Shari'a law was applicable to the whole of Sudan with the exception of the southern region.
[19] Interim National Constitution, note 13 above, Article 5.
[20] Part II, Articles 27 to 48.
[21] Article 28.
[22] *"No one shall be subjected to arbitrary arrest or detention nor be deprived of his/her liberty except on such grounds and in accordance with such procedures as are established by law"*, Article 29.
[23] Article 31.
[24] Article 32.
[25] Article 34.
[26] Article 33.
[27] Article 39.
[28] Article 40.
[29] Article 41.
[30] Darfur Peace Agreement, Article 41.
[31] *Ibid.* Articles 23 to 43.

- African Charter on Human and Peoples' Rights;[32]
- International Covenant on Civil and Political Rights (ICCPR);[33]
- International Covenant on Economic, Social and Cultural Rights (ICESCR);[34]
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD);[35]
- Convention on the Rights of the Child (CRC);[36]
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict;[37]
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;[38]
- Convention on the Prevention and Punishment of the Crime of Genocide;[39]
- The four Geneva Conventions of 12 August 1949;[40]
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II);[41] and
- Convention for the Protection of Cultural Property in the Event of Armed Conflict.[42]
- On 4 June 1986, Sudan also signed, but did not ratify, the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.

According to the principle of *pacta sunt servanda*,[43] the Government of Sudan is bound to implement treaties and any obligation arising from them in good faith. A corollary of this general principle of international law is that the authorities of a particular country cannot escape their international commitments by arguing that domestic laws prevent them from doing so. They cannot cite provisions of their constitutions, laws or regulations in order not to carry out their international obligations or to change the way in which they do so.[44] International jurisprudence has also repeatedly shown that in keeping with this principle, judgments rendered by domestic courts cannot be put forward as a justification for not abiding by

[32] Ratification on 18 February 1986.
[33] Accession on 18 June 1986.
[34] Accession on 18 June 1986.
[35] Accession on 20 April 1977.
[36] Ratification on 24 July 1990.
[37] Ratification on 26 August 2005.
[38] Accession on 2 November 2004.
[39] Accession on 13 October 2003.
[40] Ratification on 23 September 1957.
[41] Accession on 13 July 2006.
[42] Ratification on 23 July 1970.
[43] (Latin: Agreements must be kept) The rule that agreements and stipulations, especially those contained in treaties, must be observed.
[44] Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (Advisory Opinion of 4 February 1932), Permanent Court of International Justice (Recueil des arrêts et ordonnances, Série A/B) No. 44; Greco-Bulgarian "Communities" (Advisory Opinion of 31 July 1930), Permanent Court of International Justice (Recueil des arrêts et ordonnances, Série A) No. 17; Applicability of the Obligation to Arbitrate (Advisory Opinion of 26 April 1988), International Court of Justice; Application of the 1909 Convention for regulating the guardianship of Minors (Netherlands/ Sweden) (Judgment of 28 November 1958) International Court of Justice; Notteböhm (2e. Phase) (Lichtenstein/Guatemala) (Judgment of 6 April 1955), Permanent Court of International Justice; and Decision by S.A. Bunch, Montijo (Colombia v United States of America), 26 July 1875.

international obligations.[45] The *pacta sunt servanda* principle and its corollary have been refined in Articles 26 and 27 of the Vienna Convention on the Law of Treaties. Given Sudan's ratification of the Vienna Convention on 18 April 1990, it is significant that the INC states that *"all rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill of Rights"*.[46]

Sudan is also bound by customary international law which obligates States to prevent war crimes and crimes against humanity; and to search for, prosecute, or extradite those responsible for these crimes. The Rome Statute of the ICC states that *"it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes"*.[47]

The following sections of this report show how, despite Sudan's obligations under international law, several pieces of its domestic legislation contradict the 2005 INC, are in violation of international human rights standards, and create structural obstacles to justice that contribute to the conclusion that the Sudanese justice system is not capable of delivering justice in Darfur.

Additionally, and despite the lifting of the emergency status in most regions of Sudan after the conclusion of the CPA and adoption of the INC, the state of emergency is still in force in Darfur and in Eastern Sudan. Many of the human rights violations that occurred in Sudan during the last 20 years were committed under the *Emergency Act* 1997 ('EA'). The language of the EA is vague and enables officials to interpret it subjectively and apply it arbitrarily. For example, Section 5 of the EA provides for very large powers of arrest *"of persons suspected of being participants in a crime related to the declaration of the State of Emergency"*. This vague provision has also been used by Sudanese authorities to arbitrarily limit other rights and freedoms such as the right to freedom of speech and the right to freedom of association and assembly, as well as to counter the activities of human rights defenders, trade unionists and its political opponents,[48] and to try them before special courts established by the Chief Justice in accordance with the EA. These courts are described and analysed in the following chapter. The ICCPR stipulates that certain rights are non-derogable even in states of emergency, and these include the right to life and the prohibition of torture or cruel, inhuman or degrading treatment or punishment amongst others. Other rights can only be suspended, during a legitimate state of emergency, only if such temporary measures are strictly required by the exigencies of the situation and are proportionate to the threat to the nation.

[45] Polish Upper Silesia (Sentence No. 7, 25 May 1923), Permanent Court of International Justice (Recueil des arrêts et ordonnances, Série A) No. 7; and Chorzow Factory (Germany/Poland) (Sentence No. 13, 13 September 1928), Permanent Court of International Justice (Recueil des arrêts et ordonnances, série A) No. 17.
[46] Interim National Constitution, note 13 above, Article 27.
[47] Rome Statute of the International Criminal Court, Preamble, para. 6.
[48] See Amnesty International, 'Sudan: Empty promises? Human rights violations in government-controlled areas', Report AFR54/036/2003, 16 July 2003, at http://web.amnesty.org/library/index/engafr540362003.

## Structure of the Courts

According to the 2005 Interim National Constitution, the national institutions of justice are:

- The Constitutional Court;[49]
- The National Judiciary structured as follows:[50]
    - National Supreme Court;[51]
    - National Courts of Appeal;[52] and
    - Other national courts or tribunals as deemed necessary and established by law; and
- The National Judicial Service Commission comprising:[53]
    - Prosecutor General and Advocacy;[54] and
    - Chief Justice of the Republic of the Sudan.[55]

The *Judiciary Act* 1986 sets out in general the structure of the lower courts. Sudan is divided into 26 states or *wilayat*, which are further subdivided into 133 districts. Each state has a judicial structure consisting of a Court of Appeal based in the state capital, general courts and district courts. The courts with primary jurisdiction over criminal matters are the district courts, whose powers are prescribed by the *Civil Procedure Code* 1983 and the *Criminal Procedure Code* 1991. There are three levels of district courts and their jurisdictions are defined in the *Criminal Procedure Code* according to the punishments they can impose:

---

[49] Interim National Constitution, note 13 above, Articles 119-121: The jurisdiction of the Court includes, *inter alia*, interpreting constitutional and legal provisions submitted by the President of the Republic, the National Government, the Government of Southern Sudan, a state government, the National Assembly, or the Council of States; claims from any aggrieved person to protect the freedoms, sanctities or rights guaranteed by the Constitution; claims of conflict of competence between federal and state organs; criminal procedures against the President of the Republic, the two Vice-Presidents, the two Speakers of the National Legislature, and the Justices of the National and Southern Sudan Supreme Courts; and review of the constitutionality of judicial procedures, orders and judgments. See also, Article 48, *"[The] Bill of human rights and fundamental freedoms shall be upheld, protected, applied and enforced by the Constitutional Court"*.

[50] *Ibid.* Articles 124-127.

[51] The National Supreme Court is the court of final review for cases arising under national laws, including all criminal cases in which the death penalty has been imposed *"The National Supreme Court shall: (a) be a court of review and cassation in respect of any criminal or civil matter arising out of, or under, law; (b) have criminal jurisdiction over the Justices of the Constitutional Court; (c) review death sentences imposed by any court in respect to matters arising out of, or under, national laws; and (d) have such other jurisdiction as determined by this Constitution and the law", Ibid*. Article 125.

[52] *"The number, competencies, and procedures of National Courts of Appeal shall be determined by law"*, *Ibid.* Article 126.

[53] According to Article 129 of the INC, the President of the Republic, in consultation with the Presidency, shall establish the National Judicial Service Commission to be in charge of the overall administration of the national judiciary. The law shall define its constitution and powers.

[54] *Ibid*. Articles 133 and 134. *"The profession of advocacy shall promote, protect and advance the fundamental rights of citizens. Advocates shall serve to fend off injustice, defend the legal rights and interests of their clients, seek conciliation between adversaries and render legal aid for the needy according to law"*, Article 134.

[55] *"The head of the National Judiciary shall be known as the 'Chief Justice of the Republic of Sudan' who shall be the President of the National Supreme Court and the Chair of the National Judicial Service Commission"*, *Ibid.* Article 129.

- The First level Criminal Courts may impose the death penalty or any other punishment provided by law;
- The Second level Criminal Courts may impose fines, custodial sentences not exceeding seven years' imprisonment, or whipping; and
- The Third level Criminal Courts may impose custodial sentences not exceeding four months' imprisonment and a maximum of 40 lashes.

Under the *National Judicial Service Commission Act* 2005, the President of the Republic is empowered to establish, following consultation with the Presidency[56], the National Judicial Service Commission which is composed of the Chief Justice as President of the Commission; his Deputies; the Ministers of Justice, Legal Affairs and Finance and National Economy; the official responsible for Legal Affairs in the Government of Southern Sudan; the Presidents of the Legal Committees in the National Assembly, the Council of States and the South Sudan Council; the Dean of the School of Law at the University of Khartoum; and two representatives from the Bar Association.

The Commission is responsible for the general administration of the national judiciary with regards to the approval of the budget and general policy of the judiciary; making recommendations to the President of the Republic with respect to the appointment of the Chief Justice and his Deputies, justices of the National Supreme Court and other judges within the judicial system; formal approval for the dismissal of judges upon the recommendation of the Chief Justice; judicial promotions; and any other function as may be prescribed by law.

The Commission holds a meeting every four months, and may hold an emergency meeting if it is called by the Chairman or one-third of its members. The Commission passes its decisions and recommendations by a majority vote, with the Chief Justice as President holding a casting vote. The majority of the members of the Commission are appointed by the President and are accountable to him, including the Chief Justice, his deputies and Ministers. The Commission is under the control of the executive. The ICJ is therefore concerned about the Commission's ability to compromise the independence of the judiciary in Sudan, especially with respect to the nomination and dismissal of judges, and in setting general policy directions of the judiciary and budgetary matters. In fact, Article 131 of the 2005 INC states that, "*the National Judiciary shall be answerable to the President of the Republic, through the National Judicial Service Commission*" despite other articles guaranteeing judicial independence.

[56] *"(1) The Presidency of the Republic shall consist of the President of the Republic and two Vice Presidents. (2) There shall be partnership and collegial decision-making within the Presidency in order to safeguard stability in the country and to implement the Comprehensive Peace Agreement"*, *Ibid.* Article 51.

# 3. EXCEPTIONAL COURTS AND THE LACK OF JUDICIAL INDEPENDENCE

The 2005 Interim National Constitution states in Article 128 that, "*the Judges of the National Supreme Court and all Judges of other national courts shall be independent and shall perform their functions without political interference*." The Sudanese judiciary, however, remains largely under the control of the executive. The lack of independence of the Sudanese judiciary is highlighted by the continued use of exceptional courts; the wide powers of the Chief Justice to set up such courts and to determine their jurisdictions; and the control by the executive of the judiciary.

## Exceptional Courts

Numerous special jurisdictions, special courts and specialised criminal courts have been set up by the Sudanese Government within the regular legal framework. Concerns continue to be raised regarding the justification for the establishment of such courts; their independence and impartiality; and their respect for the guarantees of fair trial recognised by international law. The existence of these courts also contributes to the systematic impunity enjoyed by state officials in Darfur and Sudan as a whole.

### ➢ Special military, security and police courts

Presidential Decree No. 2 of 1989 established the Revolutionary Security Courts and empowered them to try cases involving civilians and military personnel. Although Article 137(1) of the 1998 Constitution repealed all Constitutional Decrees, including Presidential Decree No. 2 of 1989. However, the Constitutional Court ruled in July 1999 that Sudanese military courts have jurisdiction to try cases involving civilians as well as military personnel. The decision as to whether or not, and when, to institute cases against civilians is left to the discretion of the Minister of Justice.

Sudanese military courts fail to meet with international standards of fairness. Military trials do not provide procedural safeguards or an effective appeal process from death sentences, and have sometimes taken place when legal representation was denied or when the defence lawyers were given only a day's notice prior to the commencement of a trial.[57]

In addition to these military courts, and according to Chapter Nine of the *Police Forces Act* 1999, members of the police forces who commit offences[58] that are

[57] Amnesty International, 'Justice? The Trial of Father Hillary Boma and 25 others', Report AFR54/003/1999, 22 February 1999.
http://web.amnesty.org/library/Index/ENGAFR540031999?open&of=ENG-300.

[58] "*Offences committed by members of the police forces that are considered crimes under the Criminal Act or other supplementary law include: use of force or assault; neglect of duties towards prisoners or detainees; failure to protect property under custody; appropriation of property in custody; failure to guard prisoners or detainees; causing riot within places of custody; disregarding superior orders; escaping from service; and other disciplinary and administrative offences."* Police Forces Act 1999, Chapter Nine.

considered crimes under the *Criminal Act* 1991 or other supplementary law can only be tried before Police Courts established by the President, unless the Commissioner of Police decides to refer them to ordinary courts. This rule applies to all cases, except for *huddud* or *qisas* crimes (special crimes in violation of *Shari'a* laws).

The *National Security Act* 1999 provides also for the creation of a special court, composed of security officers and with no participation from members of the ordinary judiciary, to exercise jurisdiction over cases of abuse of power by security agents.

Only civilian courts using accepted procedures provide the necessary independence and impartiality to ensure that civilians are protected and that the security forces are accountable. Ordinary crimes, including those that amount to human rights violations committed by military and law enforcement officials, should be tried in ordinary civilian courts using established procedures in line with international standards. In particular, crimes involving serious violations of international human rights and humanitarian law, including rape and other forms of torture, extrajudicial executions and enforced disappearances, should be heard in the ordinary courts and not military or other security force tribunals.[59] The European Court of Human Rights and the Inter-American Commission on Human Rights have both said that military judges cannot be considered independent and impartial because they are part of the hierarchy of the army.[60] The UN Working Group on Arbitrary Detention laid down clear rules on military justice when it concluded that "*if some form of military justice is to continue to exist, it should observe four rules:*

- *It should be incompetent to try civilians;*
- *It should be incompetent to try military personnel if the victims include civilians;*
- *It should be incompetent to try civilians and military personnel in the event of rebellion, sedition or any offence that jeopardizes or involves risk of jeopardizing a democratic regime;*
- *It should be prohibited from imposing the death penalty under any circumstances.*"[61]

The jurisdiction of military courts should be limited to offences of a strictly internal, military nature committed by military personnel, which largely means internal disciplinary measures.[62] Principle 29 of the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*[63] (the

[59] Principle No. 8, Draft Principles Governing the Administration of Justice through Military Tribunals (the "Military Justice Principles"), adopted by the Former United Nations Sub-Commission on Human Rights and forwarded to the Commission on Human Rights, E/CN.4/2006/58; also, The International Convention for the Protection of All Persons from Enforced Disappearance, A/HRC/1/L.2; Also, Human Rights Committee (HRC) Concluding Observations on Peru, UN Doc.: CCPR/C/79/Add.8, 25 September 1992, para. 8; UN Special Rapporteur on extrajudicial, summary or arbitrary executions surveyed a number of states where trials before military courts allowed accused to evade punishment because of 'an ill-conceived *esprit de corps* which generally results in impunity', UN Doc.: A/51/457, at para. 125, 6 October 1996.

[60] European Court of Human Rights, see Findlay v. The United Kingdom, judgment of the European Court of Human Rights of 25 February 1997, Series 1997-I and Incal v. Turkey, judgment of 9 June 1998, Series 1998-IV. Re Inter-American system, see Annual Report of Inter-American Commission on Human Rights 1997, OAS document OEA/Ser.L/V/II.98, Doc. 6, Chapter VII, Recommendation 1.

[61] Report of the Working Group on Arbitrary Detention, UN Doc.: E/CN.4/1999/63, para. 80.

[62] Principle No. 7, Military Justice Principles.

[63] These principles are the most up-to-date statement of international standards and thinking on how governments should prevent and end impunity. The principles were produced by an expert of the

'Impunity Principles') provides: *"The jurisdiction of military courts must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court."*

Exceptional courts, especially in the context of Sudan, exacerbate the issue of impunity for law enforcement officials and deny victims their rights to truth, justice and reparation. The United Nations Human Rights Committee, a group of 18 experts that oversees implementation of the ICCPR, has frequently reiterated that the "*wide jurisdiction of the military courts to hear all cases involving the trial of military personnel and their powers to decide cases that belong to the ordinary courts contribute to the impunity enjoyed by such personnel and prevent their punishment for serious human rights violations"*.[64] The UN Working Group on Enforced or Involuntary Disappearances has also said that once criminal jurisdiction has been assumed by the armed forces, the risk of impunity for serious human rights abuses increases markedly.[65] The reason why military courts exacerbate impunity is equally true for special tribunals set up within other security agencies.

### ➢ Emergency and Special Courts in Darfur 2001-2003

Besides the regular criminal courts, the *Emergency Act* 1997 and the *Judiciary Act* 1986 allow the Chief Justice to establish special criminal trial and appeal courts. These Special Courts have no fixed rules of procedures as "*the powers of each*" are provided for in the "*order of its establishment.*"[66]

Eight such Special Courts were established in Darfur following Presidential Order No. 31 of May 2001 to try offences of armed robbery, banditry, crimes against the State, acquisition, smuggling or sale of illegal arms, murder and crimes relating to drugs and public nuisance. These courts, which were composed of two military judges and one civilian judge appointed by the Sudanese Armed Forces, held trials without proper examination and cross-examination of victims and witnesses. Legal representation for the accused was also frequently denied. The Special Courts imposed sentences such as the death penalty, amputation and cross amputation, flogging and other cruel, inhuman, and degrading punishment there was no adequate right to appeal, as the appeal had to be submitted within seven days of the first judgment and was conducted without legal representation. According to reports received by the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions,[67] at least 14 men were executed by hanging in El-Fasher prison on May 2002 after being convicted by the special courts.

---

former United Nations Commission on Human Rights and were approved by the Commission in 2005. The Principles can be found in Addendum to the Report of the independent expert to update the Set of Principles to combat impunity, Diane Orentlicher, to the United Nations Commission on Human Rights, 61st session, E/CN.4/2005/102/Add.1, 8 February 2005.

[64] Concluding observations on Guatemala, UN Doc.: CCPR/CO/72/GTM, 27 August 2001, para. 10.

[65] Report of the UN Working Group on Enforced or Involuntary Disappearance, UN Doc.: E/CN.4/1992/18, para. 367.

[66] Criminal Procedure Code 1991, section 8.

[67] Report submitted to the 61st session of the Former UN Commission on Human Rights by Ms Asma Jahangir, the then Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Commission on Human Rights, 61st sess, UN Doc. E/CN.4/2005/7/Add.2 (2004).

Concerns continue to be raised about the objective and reasonable justification for the existence of such special courts, not only with regard to the principle of equality before the law and the courts, but also with regard to the courts' independence and impartiality. Even if there exist reasonable justification and objectives for the establishment of such jurisdictions, these courts must be independent from any interference by the executive and must respect all the guarantees to a fair trial as set out in Article 14 of the ICCPR.

In Sudan, these special jurisdictions are established either by the Chief Justice or by the President and not by the law, and are composed of a majority of military judges who are accountable to the executive. These jurisdictions contravene Article 14 of the ICCPR and paragraph 5 of the *UN Basic Principles on the Independence of the Judiciary*, which provide that everyone has the right to be tried by ordinary courts or tribunals according to established legal procedures. They are in violation of the basic right to a fair trial guaranteed by international standards, as cases before such Special Courts are heard summarily, their decisions immediately executed, and appeals against convictions must be made to the District Chief Justice within seven days.

The UN Human Rights Committee has repeatedly expressed its concern at the use of special courts[68] and has, on several occasions, recommended that such courts be abolished.[69] For example, the Committee recommended that Nigeria repeal "*all the decrees establishing special tribunals or revoking normal constitutional guarantees of fundamental rights or the jurisdiction of the normal courts*".[70] In the case of Nicaragua, the Committee also found that "*proceedings before* the Tribunales Especiales de Justicia *[Special Ad Hoc Tribunals] did not offer the guarantees of a fair trial provided for in article 14 of the Covenant*".[71] The Committee is also of the view that the abolition of special courts is a positive step in achieving national implementation of the ICCPR.[72]

The ICJ is concerned that the different security and exceptional courts have been set up to shield state officials, particularly military and security personnel from legal accountability for their actions. The effect is therefore to entrench the problem of systematic impunity.

---

[68] Communication No. 328/1988: Nicaragua (Views adopted on 20 July 1993), UN Doc. CCPR/C/51/D/328/1988, 18 August 1994. See also: Concluding Observations of the Human Rights Committee on Nigeria, UN Doc. CCPR/C/79/Add.65 and UN Doc. CCPR/C/79/Add.64; Concluding Observations of the Human Rights Committee on Morocco, paras. 48-79, UN Doc. A/47/40 and para. 18, UN Doc. CCPR/C/79/Add.113; Concluding Observations of the Human Rights Committee on France, para. 23, UN Doc. CCPR/C/79/Add.80; Concluding Observations of the Human Rights Committee on Iraq, para. 15, UN Doc. CCPR/C/79/Add.84; and Concluding Observations of the Human Rights Committee on Egypt, para. 706, UN Doc A/48/40.

[69] See for example: Concluding Observations of the Human Rights Committee on Gabon, para. 11, UN Doc. CCPR/CO/70/GAB, 10 November 2000.

[70] Preliminary Concluding Observations of the Human Rights Committee on Nigeria, para. 11, UN Doc. CCPR/C/79/Add.64, 3 April 1996.

[71] Communication No. 328/1988: Nicaragua, note 68 above, para. 4.

[72] See for example: Concluding Observations of the Human Rights Committee on Guinea, para. 3, UN Doc. CCPR/C/79/Add.20, 29 April 1993; and Concluding Observations of the Human Rights Committee on Senegal, para. 3, UN Doc. CCPR/C/79/Add.10, 28 December 1992.

### ➢ Special Criminal Courts in Darfur

The Special Courts in Darfur described above were abolished by Presidential Decree on 31 March 2003 and were replaced by Special Criminal Courts created by a decree of the Chief Justice in April 2003. These courts follow similar procedures to the Special Courts with some aspects improved. The Special Criminal Courts are headed by civilian judges and legal representation is allowed. However, the right of appeal is not allowed except for appeals against sentences such as the death penalty, amputation and life imprisonment, which must be made within seven days (normal Sudanese procedure allows for two weeks) to the Chief Justice of South Darfur State. His decision is final, which means that such sentences are no longer reviewed by a higher tribunal such as the Supreme Court or the Constitutional Court of Sudan. As court records and grounds for appeal have to be prepared before filing of an appeal can be completed, the time restrictions are incompatible with international standards. The right to appeal should also not be limited to the sentences mentioned above.

Under international standards, every person convicted of a criminal offence has the right to have the conviction and sentence reviewed by a higher tribunal.[73] The African Commission on Human and Peoples' Rights has stated that "*[...] to foreclose any avenue of appeal to competent national organs in criminal cases [...] clearly violates Article 7 (1)(a) of the ACHPR, and increases the risk that severe violations may go unredressed.*"[74]

The Special Criminal Courts also follow special rules of evidence: fingerprint evidence is sufficient to convict an accused without further supporting evidence. If the accused withdraws his confession, the Court will nevertheless take it into account as evidence against him. The ICJ is especially concerned about the rules of evidence concerning confessions, given reports it receives of confessions extracted under torture or ill treatment. Defence lawyers have claimed that despite being allowed to represent on accused before the Special Criminal Courts, they were not able to visit their clients in detention prior to trial. This violates international standards that grant to every person the right to a defence and to the defence counsel of their own choice,[75] not only at the trial itself but also at all stages of the proceedings.[76]

---

[73] ICCPR, Article 14(5).

[74] Constitutional Rights Project (in respect of Zamani Lakwot and 6 others) v Nigeria (87/93); Constitutional Rights Project v Nigeria (in respect of Wahab Akamu, G. Adege and others) (59/91), African Commission on Human and People's Rights, 8th Annual Activity Report of the ACHPR: 1993-1995, ACHPR/Rpt/8th/Rev. 1.

[75] UN Basic Principles on the Role of Lawyers, Principle 1; ICCPR, Article 14 (3)(d); African Charter on Human and Peoples' Rights, Article 7(1)(c).

[76] Principle 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides: *" The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order."* Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Adopted by General Assembly resolution 43/173 of 9 December 1988. http://www.ohchr.org/english/law/bodyprinciples.htm

## Powers of the Chief Justice

Articles 130 and 120 of the Interim National Constitution state that the President appoints the Chief Justice of the Republic of the Sudan, judges of the National Supreme Court, judges of the Constitutional Court and all other judges within the Sudanese judiciary. Article 129 states that "*The head of the National Judiciary shall be known as the 'Chief Justice of the Republic of Sudan' who shall be the President of the National Supreme Court and the Chair of the National Judicial Service Commission"*. He is also the President of the Supreme Judicial Council and he exercises his powers pursuant to the *Judiciary Act* 1986, the *Civil Procedure Code* 1983 and the *Criminal Procedure Code* 1991. The Chief Justice is the person who is primarily responsible for the administration of justice in Sudan.

The wide powers accorded to the Chief Justice *"to set up special courts and determine their jurisdictions"* [77] violate international standards, which require any tribunal hearing a case to be established by law and to use established procedures. A tribunal established by law may be established by the Constitution or other pieces of legislation passed by the law-making authority, or created by common law. The Human Rights Committee urged States in its General Comment No. 13 to *"specify the relevant constitutional and legislative texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent*".[78]

Courts established by the Chief Justice violate the basic right to a fair trial as cases are heard with undue haste and judgments executed immediately, thus violating the right to appeal to higher courts as provided for in Article 14 of the ICCPR, Article 28 of the INC and Article 25 of the DPA.

Courts established by decree of the Chief Justice seem to be driven more by political motivations than by objective considerations. In fact, after having failed for more than two years to address gross human rights violation in Darfur, the Chief Justice established the SCCED one day after the ICC Prosecutor announced that he was starting investigations into the events in Darfur. The record of special courts set up in Darfur is examined in section 4 below.

## Control by the Executive

The independence of the judiciary is technically guaranteed by the 2005 Interim National Constitution. Article 123(2) provides that "*the national judiciary shall be independent of the legislature and the Executive, with the necessary financial and administrative independence."* Article 128(1) further states that "*the Justices of the National Supreme Court and all Judges of other national courts shall be independent and shall perform their functions without political interference."*

Even though the INC explicitly upholds judicial independence, the judiciary is subject to the control of the executive. The Chief Justice, justices of the National Supreme Court, justices of the Constitutional Court and all judges in the Sudanese judiciary are

[77] Judiciary Act 1986, section10(e); and Criminal Procedural Code 1991, sections 6(h) and 14.
[78] UN Human Rights Committee, General Comment No. 13 para. 3.

appointed by the President pursuant to Articles 130(1) and 120(1) of the INC. Article 132 of the INC also provides for the appointment of Justices (judges of Southern Sudan Supreme Court) and other Judges in Southern Sudan by the President of the Government of Southern Sudan.[79]

The Sudanese *Judiciary Act* 1986 authorises the President of the Republic, pursuant to section 22, to appoint judges. Section 30 empowers the President to appoint any experienced and qualified person of his choice as a judge. Section 36 further provides that the non-promotion of a judge can be based on reasons other than professional incapacity. This violates principles 10 and 13 of the *UN Basic Principles on the Independence of the Judiciary*, which provide that the selection and promotion of judges should be based on objective factors, in particular ability, integrity and professional experience.

Although international law does not lay down specific rules regarding judicial appointment procedures, it is preferable that the selection of judges is entrusted to an independent body so that political considerations do not intrude. Generally, it is preferable for judges to be elected by their peers or by a body that is independent from the executive and the legislature. The UN Human Rights Committee has previously expressed its concern at "*attacks on the independence of the judiciary, in violation of article 14, paragraph 1, of the Covenant*" and drew attention to the fact that such independence would be "*limited owing to the lack of any independent mechanism responsible for the recruitment and discipline of judges, and to the many pressures and influences, including those of the executive branch, to which judges are subjected.*"[80]

The *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* support the idea of an independent body entrusted with selecting judicial officers, but allow for other bodies, including other branches of government, to perform this function as long as they comply with certain criteria: "*The process for appointments to judicial bodies shall be transparent and accountable and the establishment of an independent body for this purpose is encouraged. Any method of judicial selection shall safeguard the independence and impartiality of the judiciary.*"[81]

The independence of the judiciary in Sudan has been seriously undermined since the 1989 *coup d'état*. In July 1989, the Revolutionary Command Council for National Salvation[82] issued Decree No. 3, which gave the President the power to appoint and dismiss all judges. Under the authority of this decree, President Bashir dismissed many judges because they were allegedly not sufficiently committed to applying the

---

[79] "*Notwithstanding Article 130(1) herein, and within one week from the adoption of Interim Constitution of Southern Sudan, the President of Government of Southern Sudan shall appoint the President and Justices of Southern Sudan Supreme Court, Courts of Appeal and Judges of other courts as shall be determined by that Constitution and the law.*", Interim National Constitution, note 13 above, Article 132.

[80] Concluding Observations of the Human Rights Committee on the Congo, para. 14, UN Doc. CCPR/C/79/Add.118, 27 March 2000.

[81] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A, para. 4(h).

[82] It was established by the leaders of the 1989 military coup and consisted of 15 members, all of whom were military officers. It was the highest decision-making body of the State.

*Shari'a* in their decisions and replaced them with supporters of the regime. One of the most egregious judicial dismissals occurred in September 1990 when the tenures of more than 70 judges were terminated.[83] The effect of these actions was to make the judiciary compliant with the President. This was later reinforced by Article 133 of the 2005 Interim National Constitution: "*The National Judiciary shall be answerable to the President of the Republic.*"

A consequence of this is that the justice system suffers severely from a lack of public confidence and widespread mistrust. In its January 2005 report, the International Commission of Inquiry reported that, "*the judiciary appears to have been manipulated and politicized during the last decade. Judges disagreeing with the Government often suffered harassment, including dismissal*".[84]

[83] Benaiah Yongo-Bure, 'Sudan's Deepening Crisis', Middle East Report, No. 172 (Sept - Oct 1991), pp. 8-13.
[84] International Commission of Inquiry on Darfur, note 1 above, para. 432.

# 4. INVESTIGATIONS AND COURTS ON THE EVENTS IN DARFUR

The Government of Sudan has announced a number of initiatives in the face of growing international criticism over the lack of rule of law and fair administration of justice, and allegations of impunity for the perpetrators of grave human rights abuses in Darfur.

## National Investigations & Inquiries on the Events in Darfur

A National Commission of Inquiry was established in May 2004 by the President of Sudan to investigate human rights violations committed by armed groups in Darfur. The Commission made significant efforts and is reported to have met over 65 times and listened to 228 witnesses, including during a number of visits to Darfur. The Commission recommended further investigations into more specific incidents in the West, South and North of Darfur. However, and as mentioned in the International Commission of Inquiry report,[85] the National Commission was "*under enormous pressure to present a view that is close to the government's version of events.*" The report *"attempt[s] to justify the violations rather than [seek] effective measures to address them"* and provides a "*glaring example of why it is impossible under the current circumstances in Sudan for a national body to provide an impartial account of the Situation in Darfur, let alone recommend effective measures."*

A Judicial Investigations Committee (JIC) was also established by Presidential Order on 19 January 2005. It is headed by Justice Mohamed Abdel Rehim and is mandated to investigate the incidents identified in the reports of the international and national commissions of inquiry. The JIC has focused on incidents alleged to have taken place in the areas of Buram and Kass (South Darfur); Kutum, Mallit, Tawila and El-Fasher (North Darfur); and Kulbus, Garsila/Wadi Saleh (West Darfur). The ICJ is aware that the JIC questioned victims and that it was authorized to recommend appropriate prosecutions to the Special Criminal Court on the Events in Darfur (SCCED). The JIC has not been able to investigate a sufficient range of incidents as it operates only in the northern Darfur city of El Fasher. ICJ research suggests that victims are not generally aware of its existence.

*Ad Hoc* Investigatory Committees were also established in Darfur in response to international criticism of the Sudanese Government. In September 2005, a fact-finding mission headed by Justice Dafaala El Rady was set up. However, the mission put victims and witnesses at severe risk. It reported the names of victims and witnesses, exposing them to risk of reprisals, harassment and violence due to their testimonies.

Committees Against Rape (CAR) were established by decree of the Minister of Justice in July 2004 for the three Darfur states of North, South and West Darfur, to look into the issue of rape and sexual violence in Darfur. The CAR, composed of women judges, police officers and legal consultants, travelled to each Darfur State to

[85] International Commission of Inquiry on Darfur, note 1 above, para. 462.

carry out their research. So far these investigations of cases related to rape or other sexual violence have not led to prosecutions.

Mohamed Ali El Mordi, in his capacity as Minister of Justice, issued a decree in September 2005 appointing a Special Prosecutor for Crimes against Humanity. The Special Prosecutor was tasked with exercising the prescribed powers in the *Criminal Procedure Code* of 1991. He was to investigate breaches of international humanitarian law, international conventions to which Sudan was party, and any other relevant law in relation to crimes against humanity, and any other crime stated in any other law and which infringes upon (and constitutes a threat to) the security and safety of humanity. He has jurisdiction to cover the entire Sudan and his headquarters is in the state of Khartoum.

To date, the local mechanisms established by the Government to investigate human rights violations in Darfur have failed to produce any transparent findings, and have not resulted in perpetrators associated with the state being brought to justice.

## The Special Criminal Court on the Events in Darfur (SCCED)

Although the national court system in Sudan is functioning and has jurisdiction over human rights violations perpetrated in Darfur, the courts have not been able to address these violations. The Government announced the setting up of the Special Criminal Court on the Events in Darfur (SCCED) in June 2005 with jurisdiction to try serious crimes. The framework of the SCCED and the law applied by the Court have contributed to its failure both to protect the rights of victims and to adequately prosecute State and militia perpetrators of human rights violations committed in Darfur.

### ➢ The SCCED's legal and procedural framework

The SCCED was established to prosecute the perpetrators of crimes related to the conflict in Darfur and was set up by a decree of the Sudanese Chief Justice Galal El-Din Mohamed Osman on 7 June 2005. This decree was issued under the Sudanese *Criminal Procedure Code* 1991, which allows the Chief Justice to establish Special Criminal Courts and to specify their judicial powers,[86] and under the Sudanese *Judiciary Act* 1986, which states that: *"Any other court established by the Chief Justice upon a foundation order should detail the formation, place and jurisdiction"*.[87]

On 11 June 2005, the Chief Justice appointed Supreme Court Judge Mohammed Mahmoud Saeed Abkam as President of the Court, and Court of Appeal Judges Inshirah Ahmed Mukhtar and Awad El Kareim Osman Mohammed as its members. The Court was originally established as a single court that would sit in El Fasher, the capital of North Darfur, and would travel throughout Darfur. The decree establishing the SCCED states that its jurisdiction covers:

[86] Criminal Procedural Code 1991, sections 6(h) and 14.
[87] Sudanese Judiciary Act 1986, section 10(e).

I. *Acts which constitute crimes in accordance with the Sudanese* Criminal Act *and other penal codes;*

II. *Any charges submitted to it by the Committee established pursuant to the decree of the Minister of Justice No. 3/2005 of 19 January 2005 concerning investigations into the violations cited in the report of the Sudanese Government's Commission of Inquiry; and*

III. *Any charges pursuant to any other law, as determined by the Chief Justice.*[88]

Article 7 of the Decree provides for the right to defence by a lawyer, who is allowed to meet with the accused, to address the Court, and to examine and cross-examine witnesses "*within the evidence which they adduce"*.

The Court takes decisions by majority.[89] Those convicted by the Court can appeal to "*the competent Court of Appeal constituted by the Chief Justice*" and any subsequent appeal of the Court of Appeal's judgment is made to "*a circuit of five Federal Supreme Court Judges constituted by the Chief Justice*".[90]

The Decree refers to the *Criminal Procedure Code* 1991 and to the *Evidence Act* 1994 with regard to the rules of procedure and evidence. A few of these provisions specify certain rights to be guaranteed to the accused, such as: the right to be informed of the charges at least 72 hours before trial;[91] the right to a public hearing except when the nature of the proceedings requires the court to order the exclusion of the public or of any particular person;[92] the right to call witnesses for the defence if they are mentioned in a list handed over to the court within 72 hours from the date of address and reply of the charge;[93] and the right to cross-examine witnesses called by the prosecution and to call witnesses after the conviction. The Attorney General's office is responsible for carrying out investigations, bringing charges and prosecuting cases.

An amended decree issued in November 2005 broadened the SCCED's jurisdiction to include international humanitarian law and established three permanent seats for the Court in El Fasher, Nyala and Geneina, which are the capitals of North Darfur, South Darfur and West Darfur respectively.[94]

The first sitting of the Court took place on 18 June 2005. According to the 29 July 2005 report of the UN High Commissioner for Human Rights on access to justice for victims of sexual violence in Darfur, in the first case heard by the Court, "*the victim, her lawyers and the Office of the Prosecutor were only informed about the hearing on the morning of 18 June*". In addition, the Chief Justice refused the lawyers' request to

[88] Decree Establishing the Special Criminal Court on the Events in Darfur, June 7, 2005, Article 5, reproduced in UN Doc. S/2005/403.
[89] *Ibid.* Article 16.
[90] *Ibid.* Article 20.
[91] *Ibid.* Article 6.
[92] *Ibid.* Article 8.
[93] *Ibid.* Article 12.
[94] Amendment of the Order for the Establishment of the Criminal Court of Darfur's Incidents, 10 November 2005.

adjourn the case to the following day, "*arguing that as it was a special court, 'even five minutes notice' would be considered enough*".[95]

[95] 'Access to Justice for Victims of Sexual Violence' Report of the United Nations High Commissioner for Human Rights, para. 72, 29 July 2005, at www.huachen.org/english/press/docs/20050729Darfurreport.pdf.

### ➢ Cases before the SCCED

The ICJ examined the eight cases that have been brought to the SCCED to date. The cases related to common crimes such as premeditated injury and murder, looting of property, intentional wounding, illegal possession of weapons, joint criminal acts, armed robbery, receipt of stolen goods, and rape. The Court only accepted charges brought under the Sudanese *Criminal Act*.

**Nyala SCCED**

| | First Hearing Date | Law and Charges (All charges brought under the provisions of the Sudanese Criminal Act 1991 unless otherwise stated) | Defendants | Verdict |
|---|---|---|---|---|
| **Nyala SCCED** | 18 June 2005 | Section 175 (looting of property and armed robbery)<br>Section 149 (rape) | Two soldiers and eight members of the Popular Defence Forces | All defendants acquitted of all charges on 27 August 2005. |
| **Nyala SCCED** | 23 June 2005 | Section 168 (armed robbery of a transport vehicle) | Four civilians, including one minor | Three defendants sentenced to between five and seven years imprisonment; The minor sentence to three years in a rehabilitation school. |
| **Nyala SCCED** | 25 June 2005 | Sections 168 and 139 (armed robbery, intentional wounding and illegal possession of weapons) | One civilian | The accused convicted for possession of unlicensed weapons, but acquitted of armed robbery and intentional wounding. |
| **Nyala SCCED** | 15 February 2006 | Sections 21 and 174 (joint criminal acts)<br>Section 175 (robbery)<br>Article 8 of Rome Statute of the ICC (pillage as war crime) | Two members of the Military Border Intelligence Service and one civilian | The two military officers convicted of joint criminal acts and sentenced to three years imprisonment; the civilian found guilty of theft and sentenced to two years imprisonment. Accused were acquitted of war crimes |

**El Fasher and EL Geneina SCCED**

| | First Hearing Date | Law and Charges (All charges brought under the Sudanese Criminal Act 1991 unless otherwise stated) | Defendants | Verdict |
|---|---|---|---|---|
| **EL Fasher SCCED** | 3 July 2005 | • Section 168 (armed robbery)<br>• Section 175 (looting)<br>• Section 181 (receiving stolen monies) | Three soldiers and three civilians | The three soldiers found guilty of armed robbery and sentenced to five years' imprisonment; one civilian found guilty of receiving stolen property; two other civilians acquitted. |
| **EL Fasher SCCED** | 5 July 2005 | • Sections 130 (murder) and 139 (premeditated injury) for the killing of a young boy who died from torture while in custody. | A lieutenant in the Sudanese Armed Forces named Asfi Mohamed Salih and another regular soldier | Both convicted and sentenced to death. Shortly after, the Government offered the family of the deceased a financial compensation (*Diyya*), which induced them to give up their special rights. The convicted persons were then sentenced to two years' imprisonment in Shala Prison for the crime committed against the community. Both were ultimately released under the amnesty decree issued by the Sudanese President in 2006. |
| **EL Fasher SCCED** | 9 August 2005 | • Section 130 (premeditated murder) for the death (from torture) in custody in March 2005 of Adam Idris Mohamed, a 60-year-old rebel suspect at the Kutum military camp | Two soldiers from the Sudanese Military Intelligence Apparatus, Bakhit Mohamed Bakhit and Abdel Malik Abdalla, and the Chief of Military Intelligence at Kutum military base | The two soldiers were convicted and sentenced to death in 2005 and were hanged in May 2007; the third accused, the Chief of Military Intelligence at Kutum military base and the only command-level officer to be charged by the SCCED to date, was acquitted of the charges. |
| **EL Geneina SCCED** | | • Section 130 (premeditated murder) for the murder of a student who demonstrated with others in December 2005 to protest an attack on a nearby village by the Arab militia | A Central Reserve Police Officer | The Police Officer found guilty on 23 March 2006 and sentenced to death. |

In the eight cases described above, thirty defendants were prosecuted under different provisions of the Sudanese *Criminal Act,* nine civilians and 21 military or police personnel. Of the 21 military or police personnel, five low-ranking officers were

sentenced to prison; five others were sentenced to death, including two executed by hanging in May 2007 and two others released upon an amnesty decree issued by the Sudanese President in 2006. Eleven other soldiers and military officers were acquitted.

The ICJ welcomes that the charges against 21 military or police personnel, in six cases, appear to have related at least partially to human rights violations committed in Darfur. The ICJ welcomes that in two cases resulting in convictions, military personnel were prosecuted for murder in relation to the torture and deaths in custody of a 13-year old boy and a 60-year old suspected member of a rebel group, respectively. These cases echo the reports received by the ICJ of torture being used against detainees, and the conclusion of the International Commission of Inquiry that *"many people have been arrested and detained, and many have been held incommunicado for prolonged periods and tortured"*.[96] In a third case, a police officer was convicted of the murder of a student demonstrator. However, the ICJ unconditionally opposes the imposition of the death penalty in these three cases, as it does in any criminal case anywhere in the world. It is also not clear to what extent the procedures followed by the SCCED ensured a fair trial for the accused, with an impartial determination of guilt or innocence.

Although six cases before the SCCED have addressed human rights violations, these trials touch on no more than a few discrete cases and do not by themselves indicate that the Sudanese justice system is able to deliver justice in Darfur. They do not even begin to reflect the scale and nature of the war crimes and crimes against humanity committed in Darfur, which have led to the death of 200,000 civilians and the forced displacement of two million civilians, both inside and outside Sudan. The trials do not address the large scale attacks described by the International Commission of Inquiry and many NGO investigations before and since, involving the killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, conducted on a widespread and systematic basis.

The Chief of Military Intelligence at Kutum Military base, the only higher-ranking official to be charged by the SCCED to date, was acquitted of the charge of premeditated murder, as the SCCED did not recognise he had any command responsibility for the death (from torture) in custody of Adam Idris Mohamed.

No militia leader or member alleged to be responsible for gross human rights violations has been prosecuted to date.

In the only case related to rape, the defendants were acquitted of the charges. The International Commission of Inquiry confirmed reports of widespread rape and other serious sexual violence committed against women and girls. According to these reports, the women were often gang-raped and were subjected to other severe forms of violence, including beating and whipping. "*In most of the cases, the involvement of the Janjaweed was reported. In many cases, the involvement of soldiers was also reported*".[97]

[96] International Commission of Inquiry on Darfur, note 1 above, p. 3.
[97] International Commission of Inquiry on Darfur, note 1 above, para. 335.

### ➢ The SCCED and the applicability of Sudanese law and international law

Despite the November 2005 Decree,[98] which broadened the SCCED's jurisdiction to include international humanitarian law, and the 2005 Interim National Constitution,[99] which provides a basis for the application of international law in Sudan under Article 27, the SCCED applied only the *Criminal Act* in the eight cases before it. Those provisions include sections 130 (premeditated murder),[100] 139 (premeditated injury),[101] 167 (*Haraba*),[102] 175 (looting of property),[103] 149 (rape), and 181 (receiving stolen monies).[104] Sudanese law does not include a wide range of crimes under international law identified as having been committed in Darfur. While the Government could begin to bring perpetrators to justice by actively applying the existing crimes, the fact that most relevant crimes are not criminalized in Sudanese law seriously compromises the ability of prosecutors and the courts to ensure that the charges and punishments reflect the gravity of human rights violations. In the one case in which the ICC statute was invoked and a defendant was charged with pillaging, the judges dismissed the charge because it was not found in the Criminal Act.

In agreeing to the issue of an arrest warrant for Ahmed Harun and Ali Kushayb, the Pre-Trial Chamber I of the ICC found that there are reasonable grounds to believe that

---

[98] Order of the Establishment of Criminal Court for Darfur's Incidents, seated in Nyala, 16 November 2005, by Jalal Al-Din Mohamed Osman, Chief Justice. Article 5(a), "*The Court's jurisdictions shall cover the following areas: Actions which constitute crimes pursuant to the Sudanese Criminal Act, other penal laws and the international humanitarian law."*

[99] "*All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of Sudan shall be an integral part of this bill and that legislation shall regulate the rights enshrined in this bill and shall not detract or derogate any of these rights*." Article 27, the Interim National Constitution, 2005.

[100] "*Premeditated murder is committed where the act carried out was deliberate, and death was an expected outcome of such action. A person found guilty of premeditated murder shall be executed, unless parity of punishment is dropped, in which case the accused shall be sentenced to ten years imprisonment, in addition to the victim's family claim to Diyya*." Sudanese Criminal Act, 1991, Article 130.

[101] "*Parity of punishment shall be meted out to those found guilty of committing premeditated injury. If parity punishment cannot be carried out or is dropped, the accused shall be sentenced to three years' imprisonment and/or subject to a fine, in addition to the victim's family claim to Diyya*." Sudanese Criminal Act, 1991, Article 138.

[102] Haraba in Islamic Sharia is the crime (committed by armed group) of terrorizing, looting, raping and killing those inside the Islamic society. "*The crime of Haraba is committed when the act is carried out: (i) outside inhabited areas with no rescue available for the victims; and (ii) using any instrument that causes or threatens to cause harm. Those found guilty shall be: executed and/or crucified if the victim was killed or raped; amputated of the right hand and left foot if the crime committed resulted in serious harm (including looting requiring the application of Hodoud); and sentenced to seven years imprisonment or exile in other relevant cases.*" Sudanese Criminal Act, 1991, Article 167.

[103] "*Those who steal others' money by force or threat during or after a crime shall be considered looters. Those found guilty shall be sentenced to a maximum of three years' imprisonment, in addition to any other punishment for crimes as a consequence of the looting".* Sudanese Criminal Act, 1991, Article 175.

[104] *"Stolen monies are those held by someone as a result of robbery, blackmail, breach of trust or fraud. Those who knowingly received, aided in hiding or used stolen monies shall be sentenced up to three years' imprisonment and/or fined. Those found guilty of the crime for the third time shall be sentenced for a maximum of seven years and/or fined."* Sudanese Criminal Act, 1991, Article 181.

both suspects are criminally responsible for war crimes and crimes against humanity committed in Darfur. ICC prosecutors collected evidence over a period of 21 months from investigations in 17 different countries that Ahmed Harun and Ali Kushayb committed 51 alleged war crimes and crimes against humanity, including: persecution constituting a crime against humanity; murder of civilians constituting a crime against humanity and war crime; attacks against the civilian population constituting a war crime; destruction of property constituting a war crime; forcible transfer of civilians constituting a crime against humanity; rape constituting a crime against humanity; inhumane acts constituting a crime against humanity; pillaging constituting a war crime; murder of men constituting a crime against humanity and war crime; imprisonment or severe deprivation of liberty constituting a crime against humanity; torture constituting a crime against humanity; and outrage upon personal dignity constituting a war crime.

Furthermore, the International Commission of Inquiry established in its report that the Government of Sudan and the Janjaweed are both responsible for other serious violations of international human rights and humanitarian law amounting to crimes under international law, including enforced disappearances, destruction of villages and deliberate and indiscriminate attacks directed at civilians.[105] Although it concluded that the Government of Sudan did not pursue a policy of genocide, the Commission recognised that "*in some instances individuals, including Government officials, may commit acts with genocidal intent. Whether this was the case in Darfur, however, is a determination that only a competent court can make on a case by case basis.*"[106]

The *Sudanese Criminal Act* 1991 ('SCA') has not been amended to include war crimes and crimes against humanity. In fact, the SCA does not criminalise the acts mentioned above in the report of the International Commission of Inquiry, nor most of the 51 war crimes and crimes against humanity alleged to have been committed by Ahmad Harun and Ali Kushayb. Although crimes such as rape and murder, which can be components of war crimes and crimes against humanity, are prohibited under the SCA, prosecuting them as discrete, ordinary crimes does not adequately take into account the grave context in which they occur, and also means that many other acts carried out cannot be considered a crime by Sudanese courts. The fact that these crimes are committed as part of an armed conflict, and that they may form part of a larger, more organised policy or campaign targeting civilians also cannot be taken into account by the Sudanese courts.

Furthermore, the SCA does not criminalise torture, even though it is prohibited under the 2005 Interim National Constitution[107] and the DPA.[108] On the contrary, evidence obtained by illegal means is admissible in court pursuant to subsections 10(1) and 10(2) of the 1994 *Evidence Act.* These provisions have the effect of legalising torture in the context of court proceedings.

---

[105] International Commission of Inquiry on Darfur, note 1 above, p. 3.
[106] International Commission of Inquiry on Darfur, note 1 above, p. 4.
[107] "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*", Article 33, Interim National Constitution of the Republic of Sudan, note 13 above.
[108] *"No person shall be subjected to torture or undergo cruel, inhumane or degrading treatment or unlawful punishment"*, Article 29, Darfur Peace Agreement.

Not only does the SCA not provide for the criminalisation of crimes mentioned above, its definitions of other crimes violate the rights of victims. For instance, rape is defined in the SCA[109] as *"sexual intercourse with any person, by way of adultery or sodomy, without his or her consent"* and *"whoever commits the offence of rape, shall be punished, with whipping a hundred lashes, and with imprisonment, for a term, not exceeding 10 years, unless rape constitutes the offence of adultery, or sodomy, punishable with death."* No connection should be established between the provision that deals with rape and the one that deals with adultery. Rape victims are constantly required by police forces and during judicial proceedings, to prove that they did not commit adultery. The requirement of multiple witnesses to corroborate victim testimony for rape also deters victims from pressing charges and makes it very difficult to obtain a conviction. Judges have refused to convict in the absence of four witness testimonies, despite corroborating medical reports.[110]

The ICJ is concerned that the SCCED, or any other Sudanese court, is not capable of adequately delivering justice in Darfur by applying current Sudanese law. In an apparent attempt to defuse the situation following the ICC decision to prosecute Ahmed Harun and Ali Kushayb, Sudanese authorities have named Ali Kushayb as one of three[111] men scheduled to stand trial imminently in the Geneina SCCED. At the same time, Sudanese newspapers have published government statements that vow to "slit the throats" of anyone who apprehends "their compatriots" to the ICC. The Sudanese Interior Minister, Zubair Bashir Taha, has lashed out at the ICC prosecutor, Luis Moreno-Ocampo, vowing not to hand over any Sudanese citizen. The Minister has reportedly stated that Luis Moreno-Ocampo is nothing but a *"junior employee doing cheap work"*.[112] As such, the ICC currently does not have access to the two accused Sudanese unless they leave Sudan. On 4 and 5 June 2007, the ICC's Pre-Trial Chamber I issued requests to the Arab Republic of Egypt, the State of Eritrea, the Federal Democratic Republic of Ethiopia and the Great Socialist People's Libyan Arab Jamahiriya; and to China, the Democratic Republic of Congo, Indonesia, Qatar, Russia, and the United States, for the arrest and surrender of Ahmad Harun and Ali Kushayb.

## 5. IMMUNITY AND IMPUNITY IN DARFUR

Sudan has a comprehensive system of immunities, guaranteed by the Constitution and other pieces of domestic legislation, which protects officials from prosecution for acts that amount to human rights violations. The scale and magnitude of the crimes committed in Darfur underscore the fact that not only those who carried out or

[109] Article 145 (2) of the Criminal Act, 1991 makes "penetration" essential to constitute the act of "sexual intercourse". Article 149 defines rape as an act of sexual intercourse committed on other person without her/his consent. Where the victim is in the custody or under the authority of the offender, consent shall not be relevant.
[110] OHCHR, *"Access to Justice for Victims of Sexual Violence"*, Report of the United Nations High Commissioner for Human Rights, para. 51, 29 July 2005.
[111] The other two men are Security Services Captain Hamdi Sharaf ul-Din and Abdul Rahaman Dawood Humaida.
[112] 'ICC Prosecutor is a junior employee doing cheap work: Sudan', Sudan Tribune, 11 June 2007. www.sudantribune.com/spip.php?article22313

participated directly in the crimes should be prosecuted, but also that those in command responsibility should be held responsible for the actions of their subordinates. No amnesty or pardon should be granted to protect perpetrators of human rights and humanitarian law violations.

## Immunity from Legal Proceedings

Various pieces of Sudanese law shield officials and law enforcement officers from legal proceedings, unless the head of the relevant state agency to which the person belongs allows the proceedings to be instituted. Section 41 of the *Security Apparatus Act* 1990 states that no one is authorised to compel any member of the security forces to testify about any information in any court, or to institute any civil or criminal proceedings against any member of the security forces without the prior permission of the chief of the security apparatus. The same provision also states that no court is authorised to handle any civil or criminal proceedings against any member of the security forces for any physical or material damage that took place as a consequence of carrying out orders.

Section 46 of the *Police Forces Act* 1999 ('PFA') states that no one is authorised to institute criminal proceedings against any police unless the officer is caught committing a crime and prior permission is granted by the Minister of Interior or the Police Commissioner. Furthermore, Police Courts have jurisdiction over subjects who come under the PFA for any offence committed during the officer's term of service, except for *Huddud* crimes. Similar wording can be found in section 33 of the *Security Forces Act* 1999, which states that "*no civil or criminal proceedings shall be instituted against a member, or collaborator, for any act connected with the official work of the member, save upon approval of the Director of the National Security Organisation*."

Section 11 of the SCA provides yet another means for law enforcement officers to avoid accountability by creating a defence of *"performance of duty or exercise of right"* by stating that no act shall be deemed an offence if done by a person who is bound, or authorised to do so by law, or by a legal order issued by a competent authority, or who believes in good faith that he is bound or authorized to carry out the act.

No civil or criminal proceedings can be brought against any law enforcement officer for actions *"connected with his official work"* without the authorisation of the commanding superior. The superior has sole discretion to determine whether or not the action complained of is considered to be connected to the official work of the law enforcement officer.

States are required to adopt domestic laws and safeguards that prevent the use of legal rules in a way that shields from justice the perpetrators of serious human rights violations. Principle 22 of the *Impunity Principles* stipulates that states must prevent the use of rules relating to *"prescription, amnesty, ...* non bis in idem*, due obedience, official immunities, repentance, the jurisdiction of military tribunals ... that fosters or contributes to impunity"*. The web of Sudanese legal provisions described above violates these standards and entrench the impunity of state officials.

The provisions that prevent proceedings against officials for acts carried out in the course of official duties or work or as a consequence of carrying out orders also reinforce impunity and violate international law. International standards provide that the fact that an official is performing official duties or following orders can never be used as an excuse not to prosecute an official, or as an excuse to acquit. At the most, a court can take into account all the circumstances surrounding the crime when it decides on the punishment of an accused found guilty.

## Lack of Superior Responsibility in Sudanese Law

The international law doctrine of superior (or command) responsibility is codified in Additional Protocol I to the 1949 Geneva Conventions, under Article 87 (Duty of Commanders). A superior is responsible for the criminal acts of his subordinates if he or she knew or had reason to know that his or her subordinates were about to commit such acts or had done so, and the superior failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators.[113]

According to international standards[114] and international jurisprudence,[115] the principle of command responsibility has three essential elements:

(i) The existence of a superior-subordinate relationship of effective control between the accused and the perpetrator of the crime;
(ii) The knowledge, or constructive knowledge, of the accused that the crime was about to be, was being, or had been committed; and
(iii) The failure of the accused to take the necessary and reasonable measures to prevent or stop the crime, or to punish the perpetrator.

The principle that those hierarchically superior can be criminally responsible for actions of their subordinates originated in the laws of war, and was applied to military

[113] Article 7(3) of the ICTY Statute states that the fact that the crimes *"were committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators."*

[114] Article 28 of the Rome Statute of the International Criminal Court; Article 6 of the Draft Code of Crimes of the International Law Commission (UN Doc. A/51/10, 1996); International Convention for the Protection of All Persons from Enforced Disappearance, Article 6 (1,b).

[115] This principle has been recognized by jurisprudence since the Second World War. The Tribunal of Nuremberg did so in its judgment of 11 October 1946, in the case of Frick, concerning euthanasia practiced in hospitals and other centers under his control. The principle was broadly developed by the Tokyo Tribunal in its judgment of 12 November 1948, especially with regard to the responsibility of superior officers for crimes committed against prisoners of war. The principle was also applied in the judgment relating to the following cases: Re Yamashita (Supreme Court of the United States, 4 February 1946); Homma v. United States (1946); Von Leeb - "German High Command Trial" (United States Military Tribunal, Nuremberg, 28 October 1948); Pohl et al. (United States Military Tribunal, Nuremberg, 3 November 1947); and List- "Hostage Trial" (United States Military Tribunal, Nuremberg, 19 February 1948). Likewise the International Criminal Tribunal for the Former Yugoslavia has reiterated this principle in its judgment of 16 November 1998, Case No. IT-96-21-T, Prosecutor v. Z Delalic and others, para. 734; of 3 March 2000, Case No. Prosecutor v. Blaskic - "Lasva Valley", paras. 289 ff.; of 20 July 2000, Case No. IT-96-21, Prosecutor v. Delalic - "Celibici Camp"; of 26 February 2001, Case No. IT-95-14/2, Prosecutor V. Dario Kordic & Mario Cerkez - "Lasva Valley", paras. 366 to 371 and 401 ff. See, also, the work of the International Law Commission on the Draft Code of Crimes against the Peace and Security of Mankind, in United Nations documents Supplement No. 10 (A/46/10), p. 262, and Supplement No. 10 (A/51/10), pp. 22 to 30.

officers. Nevertheless, it is also applicable to civilians placed in clear positions of hierarchical command. Civilians also carry a duty to prevent and punish the offences of their subordinates. However, the scope of the application of the principle of individual criminal responsibility to civilians remains contentious under international law.[116] As pointed out by the International Criminal Tribunal for the former Yugoslavia (ICTY), *"the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders."*[117] Justice Röling in the case of *Hirota*, noted that the "*responsibility (of civilians under the principle of commander responsibility) should only be recognized in a very restricted sense*".

The International Commission of Inquiry identified *"[a] number of senior Government officials and military commanders who may be responsible, under the notion of superior (or command) responsibility, for knowingly failing to prevent or repress the perpetration of crimes*". It also named *"members of rebel groups […] suspected of participating in a joint criminal enterprise to commit international crimes, and possibly responsible for knowingly failing to prevent or repress the perpetration of crimes committed by rebels."*[118]

Pre-Trial Chamber I of the ICC found that there were *"reasonable grounds to believe"* that Ahmed Harun and Ali Kushayb bear responsibility for persecution, rape, attack and killing of civilians in Darfur. The prosecutor argued that Ahmed Harun (a civilian government official) is responsible because he participated directly in the crimes and also on the basis of superior responsibility. The Sudanese Government developed a "*unified strategy*"[119] which was implemented at the national level through the "Darfur Security Desk" (known also as the "Darfur Security File") and which was managed by Ahmed Harun. The Pre-Trial Chamber I found that Ahmed Harun did not only *"[coordinate] the efforts of various Government bodies involved in the counter insurgency"*, but that he was also *"able to participate personally in key activities of the Security Committees, namely the recruiting, arming and funding of Militia/Janjaweed in Darfur."* The Court found that there are reasonable grounds to believe that Ahmed Harun ordered the recruitment of Militia/Janjaweed, promised to deliver, and did deliver arms to the Militia/Janjaweed, and that the Governors, State and Locality Security Committees, who either directly or indirectly reported to him, were primarily responsible for distributing the salaries of the Militia/Janjaweed.[120]

It is clear that Ahmed Harun, by reason of his position at the Darfur Security Desk, and through his overall coordination of the Government Strategy at the national and

---

[116] Tokyo Tribunal, Case of Hirota (former Foreign Minister of Japan), opinion of Judge Röling; Nuremberg Military Tribunals Under Control Council Law, France v Roechling et al; ICTY, Judgment of 16 November 1998,Case No. IT-96-21, Prosecutor v. Delalic - "Celibici Camp"; ICTR, Judgment of 2 September 1998, N° ICTR-96-4-T, The Prosecutor v. Jean Paul Akayesu; ICTR, Judgment of June 7, 2001, No. ICTR-95-1A-T The Prosecutor v. Ignace Bagilishema.

[117] Judgment of 16 November 1998, Case No. IT-96-21-T, Prosecutor v. Z Delalic and others, para. 378.

[118] International Commission of Inquiry on Darfur, note 1 above, p. 5.

[119] International Criminal Court, Pre-Trial Chamber I, Situation in Darfur, Sudan. Decision on the Prosecution Application under Article 58(7) of the Statute. No.: ICC-02/05-01/07, 27 April 2007. para. 65. http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-1_English.pdf.

[120] International Criminal Court, Pre-Trial Chamber I, Situation in Darfur, Sudan, note 119 above. Paras. 80 to 94.

local levels, and his effective control over civilian and military representatives of the Government and of the Janjaweed, was in a real position of command, even as a civilian. On this issue, the International Criminal Tribunal for Rwanda (ICTR) pointed out that *"[a] position of command is a necessary condition for the imposition of command responsibility, but the existence of such a position cannot be determined by reference to formal status alone […]*."[121] Similarly, the ICTY pointed out that: *"[i]n determining questions of responsibility it is necessary to look to effective exercise of power or control and not to formal titles […] the absence of formal appointment is not fatal to a finding of criminal responsibility"*.[122]

Such effective exercise of power over the Janjaweed by Ali Kushayb was described by the Pre-Trial Chamber I. According to the 58-page court decision, there is evidence that Ali Kushayb led attacks and mobilised, recruited, armed and provided supplies to Janjaweed militia that were under his command. Moreover, the Court found that there are reasonable grounds to believe he *"implemented the counter-insurgency strategy that resulted in the commission of war crimes and crimes against humanity such as the persecution, rape and killing of civilians and attacks of towns and villages in Darfur"* and he *"participated with the Militia/Janjaweed under his command in the attacks against civilians in Darfur."*[123]

Sudanese courts have failed to prosecute any person who might be responsible for violations on the basis of superior (or command) responsibility. As indicated above, the charter of the SCCED empowers the Court to invoke international law. The ICJ therefore considers that the principle of command responsibility should be applied by the SCCED even though it is not set out in the SCA. To the contrary, as described above, Sudanese law guarantees the immunity of military officers from prosecution by Sudanese courts for acts carried out in the course of duty.[124]

The SCCED has not applied the principle of superior responsibility to civilians; and in the only case relevant to military command responsibility – the trial of the Chief of Military Intelligence at Kutum military base and two soldiers, who were subordinate to him, for the murder of a 60-year-old detainee who died from torture in custody, the Chief was acquitted and the two soldiers were convicted and sentenced to death in 2005, and were subsequently executed by hanging in May 2007. The SCCED failed to consider the extent to which the Chief knew or would be presumed to have known, that torture was about to be, was being, or had been committed; and failed to take necessary and reasonable measures to prevent or stop the crime.

---

[121] Judgment of June 7, 2001, No. ICTR-95-1A-T, The Prosecutor v. Ignace Bagilishema paras. 39 and 44. See also ICTY judgments on Cases Celebici (Trial Chamber, para. 370), Blaskic (para. 301) and Aleksovski (Trial Chamber para. 76); U.S. Military Tribunal, U.S. v. Wilhelm von Leeb et al ("High Command case").

[122] Appeal Chamber, Judgment of 20 February 2001, Case No. IT-96-21, Prosecutor v. Delalic - "Celibici Camp", para. 197.

[123] International Criminal Court, Pre-Trial Chamber I, Situation in Darfur, Sudan, note 119 above. Paras. 97 and 98.

[124] National Security Force Act 1999, Art. 33. Police Forces Act 1999, Art. 46. For the Armed Forces, Temporary Decree issued on 4 August 2005 by President Bashir. It is unknown whether the decree was enacted into law.

## Amnesties and Pardons

Article 58 of the INC empowers the Sudanese President, as Head of State and of the Government, to grant pardons and remit convictions or penalties.

On 11 June 2006, the President of Sudan issued Presidential Decree No. 114 on General Amnesty. The amnesty provides immunity from domestic criminal prosecution to members of armed movements that signed the DPA, parties that participated in Government-endorsed tribal reconciliation processes in Darfur, and to those who supported and committed themselves to the DPA. The Presidential Decree is phrased very broadly and there is no definition for crimes covered by the amnesty. It prevents the prosecution of many militia leaders and personnel responsible for gross human rights violations in Darfur.

Thirteen individuals in North Darfur, including two former Military Intelligence officials who were convicted by the SCCED for the murder of a 13 year-old boy who died from torture, were pardoned on 27 June 2006.

Amnesties and similar measures that shield perpetrators of gross human rights violations including war crimes and crimes against humanity, from responsibility, perpetrate impunity. International standards[125] reject amnesties for these crimes and recognise that protecting the perpetrators of serious human rights and humanitarian law violations contravene the state's duty to prosecute and punish them, and are manifestly incompatible with victims' right to justice.

The Human Rights Committee stated in *General Comment No. 20 concerning the prohibition of torture and cruel, inhuman or degrading treatment or punishment* that *"[a]mnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future.*"[126] Furthermore, it has commented in its observations to States Party reports, and in individual cases, that it considers amnesty laws for gross violations of human rights to be incompatible with the ICCPR.[127] It has also

[125] Control Council Law No.10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity of 20 December 1945, Article II (5) *("In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect to the period from 30 January 1933 to 1 July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment."*); The Rome Statute of the International Criminal Court, article 17; Statute of the Special Court for Sierra Leone provide, Article 10 (no amnesty can bar the prosecution of crimes under its jurisdiction, i.e. crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian law.) Vienna Declaration and Programme of Action, para. 60; Declaration on the Protection of All Persons from Enforced Disappearance, Article 18; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Principle 19.

[126] General Comment No 20 on Article 7, 13 March 1992, HRI/GEN/1/Rev.7, para. 15.

[127] Concluding Observations on Uruguay, 5 May 1993, CCPR/C/79/Add.19, para. 7; Concluding Observations on Chile, 30 March 1999, CCPR/C/79/Add.104, para. 7; Concluding Observations on Lebanon, 1 April 1997, CCPR/C/79/Add.78, para. 12; Concluding Observations on El Salvador, 18 April 1993, CCPR/C/79/Add.34, para. 7; Concluding Observations on Haiti, 3 October 1995, A/50/40, paras. 224-241, at 230; Concluding Observations on Peru, 15 November 2000, CCPR/CO/70/PER, para. 9; Concluding Observations on France, 4 August 1997, CCPR/C/79/Add.80, para. 13;

rejected amnesties for human rights violations committed during armed conflicts, including internal armed conflicts.[128]

International jurisprudence has also rejected amnesties for perpetrators of war crimes and crimes against humanity, even after the conclusion of peace agreements. The Special Court for Sierra Leone decided in the case of *Kallon* that a national amnesty would be contrary to the very purpose of the tribunal.[129] The possibility of overruling the amnesty provision in the Lomé Agreement by the Statute of the Special Court was challenged by the defendant in the case of *Prosecutor v Morris Kallon.*[130] The Appeals Chamber of the Special Court held that the Statute was "*consistent with the developing norm of international law*".[131] It held that the amnesty granted in the Lomé Agreement was "*ineffective in removing universal jurisdiction to prosecute persons accused of such crimes that other states have by reason of the nature of the crimes. It is also ineffective in depriving an international court such as the Special Court of jurisdiction.*"[132]

---

Concluding Observations on Argentina, 5 April 1995, CCPR/C/79/Add.46, para. 146 of 3 November 2000, CCPR/CO/70/ARG, para. 9; Concluding Observations on Croatia, 4 April 2001, CCPR/CO/71/HRV, para. 11; Concluding Observations on Guatemala, 27 August 2001, CCPR/CO/72/GTM, para. 12; Case Hugo Rodríguez v Uruguay, Views of 9 August 1993, CCPR/C/51/D/322/1988, para. 12.4 [torture]; Case Celis Laureano v Peru, Views of 16 April 1996, CCPR/C/56/D/540/1993, para. 10 [disappearance].

[128] Concluding observations on El Salvador, 18 April 1993, CCPR/C/79/Add.34, para. 7; Concluding Observations on Yemen, 4 February 1996, A/50/40, paras. 242-265, at 252; Concluding Observations on Lebanon, 1 April 1997, CCPR/C/79/Add.78, para. 12; Concluding Observations on Congo, 27 March 2000, CCPR/C/79/Add.118, para. 12; Concluding Observations on Croatia, 30 April 2001, CCPR/CO/71/HRV, para. 11; Concluding Observations on Colombia, 25 March 2004, CCPR/CO/80/COL, para. 8.

[129] Appeals Chamber, Prosecutor v Morris Kallon, Case No. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, para. 88; see also Y. Naqvi, Amnesty for war crimes: Defining the limits of international recognition, IRRC, Vol. 85, September 2003, p. 583, at 615.

[130] Appeals Chamber, Prosecutor v Morris Kallon, Case No. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004.

[131] *Ibid.* para. 63; also para. 82.

[132] *Ibid.* para. 88.

# 6. RIGHTS OF VICTIMS AND PROTECTION

In researching this report, the ICJ received testimonies from many victims of human rights abuses perpetrated by both Sudanese security personnel and militia members in Darfur. The testimonies of rape and torture victims illustrate how Sudanese law makes many violations more likely to occur and entrenches impunity. The removal of safeguards for detainees, the absence of any witness protection programme and the lack of any reparations mechanism, all compromise victims' access to justice, and consequently deny them their rights to truth, justice and compensation.

## Rape

The ICJ received testimonies from victims living in IDP camps in Nyala, El-Fasher and El-Guenina, including testimonies from women who reported that members of the Janjaweed militia and Sudanese armed forces had raped them. These testimonies confirmed the patterns of rape documented, after extensive fact-finding, by other organizations.

One woman reported to the ICJ that both Janjaweed and military attacked her village of Terga at the beginning of 2003. She stated that many women were raped during the attack and that five men raped her. She was threatened with being shot if she did not obey. She described her feeling of terror and said that she would never forget the faces of the men.

Another woman communicated to the ICJ that she was raped with 13 other women in July 2006 when they left the Kalama IDP camp in the state of Nyala while fetching firewood. She said that they were beaten, tied, blindfolded and then raped by members of the Janjaweed militia over a period of about one hour.

In most cases, victims told the ICJ that they had not told anyone of their ordeals due to fear and shame and because they knew that those responsible would not be prosecuted.

Sudanese law requires police to provide all seriously injured persons, including rape victims, with a document called "Form 8" to record the findings of any medical examination, which would then be used as evidence. Rape victims in Darfur are required by law to fill out and file a "Form 8" at the police station before they are permitted to receive medical treatment. A circular (Criminal Circular 1/2004) issued by the Minister of Justice on 11 August 2004 stating that medical treatment can be provided to a person prior to completing "Form 8" in cases of emergency, has not been complied with and "Form 8" still takes the place of medical documentation in criminal prosecutions.

The ICJ received reports that even when rape victims presented the police with a completed "Form 8", they were often unable to convince the police to open criminal files against the alleged perpetrators. Victims who come forward to report cases of rape could themselves be accused of engaging in illegal sexual activities.

Victims and local lawyers also reported that there were no procedures for collecting and identifying biological material such as semen, and that even when such samples were obtained, the only laboratories capable of performing DNA analyses are situated in the capital city of Khartoum.

The rules of evidence in rape cases are also an obstacle to women reporting rape and prosecutions being successful. Under the *Evidence Act*, pregnancy is evidence of crimes such as adultery, rape or sexual assault. According to *Shari'a* law, there are three types of evidence used in establishing such crimes: a confession, the testimonies of four male witnesses, or establishing that the woman is pregnant. When a woman has become pregnant as result of being raped, she must prove that the pregnancy was a result of her being raped and not her having committed adultery. Furthermore, it is usually impossible for a rape victim to provide four male witnesses to support the charge that she was raped.

Another procedural obstacle to justice is the inadequacy of a woman's testimony. One woman's testimony is insufficient under Sudanese law to establish a fact and at least two women and one man, or four women, must corroborate the facts.

## Torture

The ICJ also received reports of the torture and ill treatment of detainees on the premises of the National Security Service, police stations, prisons, and what are known as "ghosts houses" in Sudan.

In cases investigated by the ICJ, the families of victims who died after being tortured in custody were pressured by the authorities to accept *Diyya* (financial compensation according to *Shari'a* law). Under Sudanese law, if the families accept *Diyya*, the authorities are able to avoid punishing those suspected of committing the crime. The authorities applied such pressure on the families in the two cases of death in custody tried before the SCCED, one relating to the death of 60-year old Adam Idris and the other relating to the death a 13-year old boy.

The International Commission of Inquiry also confirmed the systematic use of torture, cruel, inhuman and degrading treatment by the National Security, the Intelligence Service and the military intelligence on detainees in their custody. Most of these detainees were *"repeatedly beaten, whipped, slapped and, in one case kept under the scorching sun for four days. Three of the persons were suspended from the ceiling and beaten, one of them continuously for ten days.*"[133]

In this report, the ICJ has examined how a range of Sudanese laws violate international standards and have in practice weakened the courts and perpetuated impunity. The creation of an environment in Darfur, and elsewhere in Sudan, in which torture of detainees is possible and continues, begins with a set of laws that grant security personnel sweeping powers of arrest and detention, removing fundamental safeguards of detainees. These provisions violate international standards that are based on experience around the world about how to prevent torture.

[133] International Commission of Inquiry on Darfur, note 1 above. Para. 369.

Sudanese laws empower law enforcement officials to arrest and detain persons without any judicial supervision or regard to the rights and freedoms guaranteed under the INC and various human rights instruments ratified by Sudan. These wide powers encourage torture, particularly when combined with laws that protect security personnel from prosecution by providing a defence of following superior orders and procedural laws that allow the admission of illegally obtained evidence.

The *National Security Act* 1999 ('NSA') grants wide powers to members of the National Security Organisation ('NSO') to search, interrogate, arrest and detain without charge or trial for long periods of time. In fact, the NSA allows NSO members to circumvent ordinary procedures for arrest and custodial detention, and grants them and their collaborators immunity for acts done *"in the course of duty"*. Section 30 of the NSA authorises NSO members, with an order from the Director of the NSO ('the Director'), to extend the period of detention of a person for up to 30 days for the purposes of interrogation and inquiry. The Director is empowered to order the renewal of a person's detention for a maximum of 30 days where there are indications, evidence or suspicions that the detainee has committed an offence against the state, provided that the competent prosecuting attorney is notified. Experience in Sudan and elsewhere shows that torture is more likely when detainees are held by security officials for interrogation, without access to family, lawyers and doctors and without supervision by independent courts.

It is worth noting that not only is there no judicial supervision exercised over detention procedures, but the period of detention can be extended for more than four months without charging or bringing the detainee before a court. Prior to the introduction of the *Criminal Procedure Code* 1991 ('CPC'), an independent magistrate was charged with supervising pre-trial proceedings. Following the CPC's enactment in 1991 and pursuant to section 19, pre-trial supervision was shifted from the courts to the Prosecutor General's Office. This means that the issuance of search warrants and warrants of arrest are now carried out by the Prosecutor General's Office. In addition, section 20 provides that the Attorney General may grant investigative powers "*to any person or committee*" that he believes will maintain justice. How, and under what conditions, the person or committee is able to maintain justice, and whether or not they are qualified to carry out criminal investigations is at the sole discretion of the Attorney General. This provision is *prima facie* contrary to international law as it grants "*any person or committee"* large criminal investigatory powers and consequently interferes with the privacy of suspected persons, which is guaranteed by Article 26 of the Interim National Constitution[134] and Article 17 of the ICCPR.

Torture is also encouraged by Sudanese rules of evidence that give a court the discretion to accept evidence that has been obtained by unlawful means, such as torture. Section 10 of the *Evidence Act* 1994, provides:

[134] "*The privacy of all persons shall be inviolable; no person shall be subjected to interference with his or her private life, family, home or correspondence, save in accordance with the law*", Interim National Constitution, note 13 above, Article 26.

*"(1) Without prejudice to the provisions on inadmissible evidence, evidence shall not be rejected merely because it has been obtained by unlawful means whenever the Court is satisfied with the authenticity of its substance.*
*(2) A court may, whenever it deems it appropriate to achieve justice, not convict on the basis of the evidence mentioned in sub-section (1) unless it is supported by other evidence."*

The failure to clearly and absolutely prohibit the use in any legal proceedings of evidence obtained through torture or other ill-treatment and other unlawful means, violates international standards[135] and creates an environment in which torture is tolerated.

## Witnesses Protection

A serious obstacle that prevents access to justice and which also increases distrust in the SCCED, is the lack of any witness protection programme for victims and witnesses. A few provisions in Sudanese law provide some minimum and qualified guarantees for witnesses who testify, but do not in practice provide any effective protection. For example, section 156 of *Criminal Procedure Code* 1991 states only that: *"The court shall never ask the witness any questions that are not related to the criminal case and shall also protect them from any phrase or comment that may intimidate or hurt them. Witnesses shall also not be asked questions of a flagrant or offensive nature unless it is related to the core nature of the criminal case."*

Sudanese law does not include any provision for witness protection and such a programme is not in place. The lack of protection is a strong disincentive to those who would otherwise seek to report human rights violations and provide testimonies, thus even further limiting the possibility of investigating violations in Darfur. While continued insecurity makes it difficult to establish an effective protection system, such a programme in Darfur is vital and is the responsibility of the Sudanese Government.

A comprehensive witness protection programme must have as its aim the taking of all necessary measures to ensure the security and the safety of a witness who gives evidence before, during, and after his/her appearance in court. It should also provide psychological support to victims and witnesses who testify and ensure that they are not prosecuted, detained or subjected to any other restriction on their liberty as a result of legitimately giving evidence.

With the establishment of the ICC, victims are able to participate directly in criminal proceedings. Learning from the experiences of the two *ad hoc* International Criminal Tribunals, Article (6) of the Rome Statute states that the Registrar shall set up a Victims and Witnesses Unit within the Registry. Article 68(4) of the Statute specifies that this Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counseling and assistance as referred to in Article 43(6). This Unit will provide, in consultation with the Office of the Prosecutor, counseling and other appropriate assistance to victims and witnesses who appear

[135] See Article 15, The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.

before the Court and others who are at risk on account of the testimonies given by such witnesses, as well as plan protective measures and security arrangements for them.

## Reparations

International standards recognise that victims should be treated with compassion and respect for their dignity, and that measures should be put in place to improve their access to justice and ensure prompt redress by restitution, compensation and rehabilitation for the harm they have suffered.

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*[136] provide in Principle 3 that those who claim to be victims of a human rights or humanitarian law violation should have equal and effective access to justice, irrespective of who might ultimately be responsible for the violation, and that effective remedies to victims, including reparation, should be made available.

According to Principle 11, remedies for gross violations of international human rights law and serious violations of international humanitarian law should include the victim's right to the following as provided for under international law:
Equal and effective access to justice;[137]
Adequate, effective and prompt reparation for harm suffered[138]; and
Access to relevant information concerning violations and reparation mechanisms.

Principle 18 states that "*in accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian*

[136] Adopted by General Assembly. December 2005.
[137] "*Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should: (a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law; (b) 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; (c) Provide proper assistance to victims seeking access to justice; (d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law."* 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, C.H.R. res. 2005/35, U.N. Doc. E/CN.4/2005/ L.10/Add.11, Principle 12, VIII. (Access to Justice), 19 April 2005.
[138] *Ibid*. Principle 15, IX, *"Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim."*

*law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, […] include the following forms: restitution*[139]*, compensation*[140]*, rehabilitation*[141]*, satisfaction and guarantees of non-repetition*." The ICC has also established principles for reparations to victims, including restitution, compensation and rehabilitation.[142]

In Sudan, there is no reparations mechanism to provide victims of crime with compensation. Because the SCCED applied only the 1991 *Criminal Act*, the only way in which any kind of compensation might be obtained is to claim *Diyya*, which is detailed in the law in cases of murder, injury or amputation of victims. According to the *Criminal Procedure Code* 1991, the *Diyya* to be paid to victims depends on the gravity of the crime. Section 42 of the *Criminal Procedure Code* states that: *"(1) Diyya can be a hundred camels or its equivalent according to what the Chief Justice determines after consulting the concerned authorities; (2) It is not permitted to claim, along with Diyya, any other compensation for injury or killing"*.

[139] *Ibid*. Principle 19, *"Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property."*

[140] *Ibid*. Principle 20. *"Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: (a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services."*

[141] *Ibid.* Principle 21 *"Rehabilitation should include medical and psychological care as well as legal and social services."*

[142] The Court is entitled to determine the scope and extent of any damage, loss and injury to victims, and to order a convicted person to make reparations directly to victims or through a trust fund. The ICC's Trust Fund provides victims with help and compensation to enable them to rebuild their lives, which in many cases have been shattered by war.

# 7. RECOMMENDATIONS

The following recommendations addressed to the Government of Sudan are based on the fact-finding and legal research carried out by the ICJ in Sudan, international standards and the ICJ's comparative experience around the world. If implemented, they could help to end impunity in Darfur by ensuring the delivery of independent and impartial justice. The recommendations also set out the beginning of an agenda for reform of the administration of justice in Sudan as a whole, which would aim to institutionalise judicial independence, impartiality and respect for human rights.

## Reform the Legal Framework

1. Reform the existing legal framework to address deficiencies and ensure the compatibility of domestic legislation with the 2005 Interim Constitution and with international standards and to foster a culture of accountability.

2. Criminalise in Sudanese Law:

    a. War crimes, crimes against humanity and genocide.
    b. Enforced disappearance.
    c. Torture and cruel, inhuman or degrading treatment or punishment.

3. Recognise in law the responsibility of commanders and other superiors responsible for human rights violations committed by their subordinates.

4. Prohibit the persecution of any identifiable group based on political, racial, national, ethnic, cultural, religious, gender, or on any other grounds universally recognized as unacceptable under international law.

5. Dismantle the system of immunities for state agents regardless of their official status or function by revoking all immunity laws, especially s 41 of the *Security Apparatus Act* 1990 (amended 2001) regarding immunity of the Security Apparatus' members; s 46 of the *Police Forces Act* 1999 regarding immunity of police officials; s 39 of the *Armed Forces Act* 1986 regarding armed forces' immunity; s 17 regarding immunity under the 1998 *Law of Domestic Rule*; s 33 of the *National Security Act* 1999 regarding immunity of the National Security Organization; and Criminal Decree No. 84/108.

6. Ensure institutional and legislative reform of the National Security Organisation in accordance with international standards. The sweeping powers of arrest and detention provided in sections 31 and 33 of the *National Security Act* 1999 should be amended or repealed.

7. (i) Repeal section 145 of *Criminal Act* 1991 to ensure that it is prohibited to take a person's allegation of rape as a confession of adultery.

    (ii) Amend the definition of rape in section 149 of *Criminal Act* 1991 so that there is no connection between the provision that deals with rape and those that deal with extra-marital sexual intercourse and sodomy.

8. Repeal all provisions of the *Criminal Act* 1991 and the *Public Order Act* 1996 that discriminate against women, and put an end to abuses and crimes committed by the security forces and militias against women.

9. Repeal section 10 of the *Evidence Act* 1994 which authorises judges to accept evidence obtained through illegal means and which in effect legalises torture, and introduce a provision prohibiting the use of evidence in any proceeding of statements made as a result of torture, except against a person accused of torture as evidence that the statement was made.

10. Repeal all provisions allowing the death penalty, amputation and all other forms of cruel inhuman and degrading corporal punishment.

11. Ensure that law enforcement officials such as police officers and prison guards are adequately equipped and trained to carry out their responsibilities with respect for the international guidelines and codes of conduct for law enforcement officials; be made to understand that summary executions, arbitrary detentions, enforced disappearances and torture are illegal and will not be tolerated; be made aware that those crimes can amount to war crimes and crimes against humanity; and that that those responsible for such offences and crimes will be investigated and brought to justice, and that any immunities will be waived.

12. Repeal or amend section 5 of the *Emergency Act* 1997 and ensure that the Act is not used to grant security agencies broad powers of arrest and to restrict freedom of movement, assembly and expression.

13. Ensure that the Law Reform Committee that was established in late October 2005 by the Ministry of Justice and mandated to review the compatibility of domestic legislation from 1901 to 2005 with the Interim Constitution, begins its review of domestic legislation and international human rights without delay, by making amendments to provisions in domestic legislation that discriminate against women, violate the freedom of expression and association, grant wide powers of arrest and detention, and those that grant immunity to high levels state agents.

14. Repeal Presidential Decree No. 114 on General Amnesty.

## Reform the Judiciary

15. Take all necessary steps to guarantee the competence, independence and impartiality of the judiciary in Sudan, and especially in Darfur.

16. Take all necessary steps to ensure that the administration of the justice system is in conformity with international standards relating to recruitment, promotion, discipline, dismissal and training.

17. Abolish the wide powers of the Chief Justice to set up special courts and determine their jurisdictions.

18. Stop all forms of interference in the judiciary by the executive which compromises the independence and impartiality of the courts.

19. Ensure that the Sudanese judiciary acts with independence and with deference for human rights, and that the courts are not manipulated for political reasons.

20. Ensure that the SCCED is reformed in accordance with international standards, and is adequately financed and staffed.

21. Bring to justice military and civilian state officials, Janjaweed/militia and others who carried out, ordered or acquiesced in violations of international human rights or humanitarian law in Darfur, and not grant them amnesties or pardons.

22. Ensure that there are sufficient numbers of trained prosecutors to meet the demands of justice in Nyala, El Fasher and Geneina, which are the capitals of South Darfur, North Darfur and West Darfur respectively.

23. Make public the findings of investigation committees and refer these findings to the courts when there is evidence that a crime may have been committed.

24. Ensure that law enforcement in Darfur is reformed in accordance with international standards and that the various institutions are adequately funded and staffed.

## International Law and International Organisations

25. Ratify
    a. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
    b. The International Convention for the protection of all persons from Enforced Disappearance.
    c. The Convention on the Elimination of all forms of Discrimination of Women.
    d. The Rome Statute of the ICC.
    e. The First Optional Protocol to the ICCPR. and
    f. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

26. Comply with all the relevant UN Security Council Resolutions especially resolution 1706 relating to the sending of an international peace force to stop the ongoing human rights violations in Darfur and to pave the way for restoring peace and stability. and resolution 1593 referring the investigation of the situation in Darfur to the ICC.

27. Fully cooperate with the ICC in its investigations and prosecutions for crimes committed in Darfur.

28. Arrest and surrender to the ICC Ahmed Harun and Ali Kushayb who are suspected of being criminally responsible for war crimes and crimes against humanity committed in Darfur.

## The Rights of Victims

29. Compensate and rehabilitate all victims of gross violation of international human rights law and serious violations of international humanitarian law in Darfur.

30. Develop programmes to provide victims with psychological and physical treatment to help them rebuild their lives.

31. Ensure that victims and witnesses are not subjected to any reprisals, harassment or violence due to their testimonies in court.

32. Establish a witness protection programme to protect victims and witnesses and to facilitate their access to justice.

33. Facilitate victims' cooperation with and access to the ICC.


INTERNATIONAL COMMISSION OF JURISTS (ICJ)
P.O. BOX 91, 33 RUE DES BAINS,
CH - 1211 GENEVA 8, SWITZERLAND
OFFICE: + 41 22 979 3800
FAX : + 41 22 979 3801
E-MAIL : INFO@ICJ.ORG
WEBSITE : WWW.ICJ.ORG