## OCCASIONAL PAPER 3

# A Comprehensive Overview of Sudan's Legal Framework in Light of the Darfur Crisis

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## Summary

This paper will attempt to clarify Sudan's legal framework, both at the international and national level, in an effort to understand how it influences and impacts current developments in Darfur. Sudan's legal framework derives from an amalgamation of British, Muslim, and African influences, which results in a lack of predictability in the law and seems to leave great room for discretionary decisions. While the Government of Sudan (GoS) attempts to balance Islamic-influenced and human rights principles, Sudan's national law falls short of respecting its international human rights obligations. Moreover, the conflict in Darfur renders an already complicated judicial system highly inadequate. Sudanese criminal law serves as a good example to demonstrate how both legislation and the judiciary fail to provide for its population.

## Introduction

Sudan is the largest country in Africa and it is characterized by numerous ethnic groups, speaking different dialects, having different faiths, and originating from different socio-economic backgrounds. The disparity in the Sudanese population has been the root cause of many conflicts since the country gained its independence from Great Britain in 1956.[1] These conflicts have opposed many groups such as Muslim-Christian, Arab-African, nomad-sedentary, etc., as they have laid the ground to Sudan's development in all its forms, whether economic, social or legal.[2]

The rule of law has not escaped from the consequences of continuous conflicts. While laws are present, they prove to be incoherent at times, and their implementation remains a challenge. In substance, the Sudanese legal system is a melting pot of remedial British legacy, Arab-dominated government, tribal-specific traditions, military-dependent power, and complex regional and international influence. Still today, Sudanese legislation remains unstable as decrees are issued on a regular basis, overruling laws. Furthermore, legal texts are scarce and extremely difficult to find.[3] Consequently, establishing Sudan's legal framework constitutes, in many ways, a challenge that this report modestly attempts to overcome. In light of the ongoing United Nations – African Union Mission in Darfur (UNAMID) operating in the Darfur region of Sudan, and of the alarming situation regarding gender-based violence, this report will focus on relevant legal texts and judicial institutions, at both international and national levels.

## Relevant Applicable International Law

A state is bound by ratified treaties, customary and jurisprudential law.[4] It is unnecessary to proceed to an in-depth analysis of all customary and jurisprudential principles applicable to the Sudan, as they are broad and numerous. However, the country has accepted to commit to the respect of certain legal obligations that are pertinent to the current situation, and remains responsible for their violation. In order to comprehend the scope of the Government of the Sudan's (GoS) responsibility toward its population, it is necessary to understand the sources of these commitments.

Sudan has ratified treaties such as the International Covenant on Civil and Political Rights (ICCPR).[5] It is an agreement to the respect and promotion of individual human rights, which all members of the United Nations should strive to defend. Among others, the agreement guarantees the rights to life, freedom of opinion, and the abolition of slavery. However, section 4 of the Covenant foresees the possible derogation of these rights in situations of 'public emergency,'[6] with the exception of the peremptory *jus cogens* norms, rights that cannot legitimately be violated, under any circumstances such as the 'right of life.' Whether or not the current 'state of emergency' proclaimed by the GoS constitutes a 'public emergency,' is a matter that will be discussed later.

The permitted freedom of opinion, as guaranteed by the GoS, has been greatly criticized by many non-governmental organisations (NGOs) on the ground.[7] They deplore the media monopoly and constant surveillance as well as threat of detention for journalists.[8] Many interrogations and arrests have also been reported by NGOs in the past year, a situation which translates into a perceived lack of transparence.

Sudan has also ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR).[9] It is an agreement to the respect and promotion of collective rights, such as labour rights, education, democracy and healthcare. It is meant to be a common goal that guides development, and requires individual UN member states to report on the matter to the UN General Assembly.

The International Convention on the Elimination of All Forms or Racial Discrimination (ICERD)[10] is another instrument, ratified by the Sudan. While it strives to ensure people's equality before the law, the text does not address gender inequalities. A subsequent international convention was created to rectify the situation.[11] However, the Sudan has not yet ratified it and it is questionable whether or not it plans to do so. Women's rights are thus only protected by national legislation, which makes them vulnerable to interpretation based on Islamic tradition.

The Convention on the Rights of the Child (CRC)[12] was also ratified, but its implementation is questionable as children under the age of 18 are still being trialed and sentenced to what international law, and more specifically the CRC, considers to be 'cruel, inhuman and degrading punishment.' For example, there are still reports of children being sentenced to lashes and even death.[13]

The 4 Geneva Conventions, codified customary law, were also ratified by the Sudan without any reservations.[14] Both Additional Protocols referring to international armed conflict and non international armed conflicts have also been ratified without any reservation. However, their implementation remains to be demonstrated as many organisations report violations on a daily basis.

President Al Bashir has repetitively addressed the current situation as being under the government's control, and underlining the non international nature of the Darfur crisis.[15] Also, the Al-Bashir regime denies any reference to 'genocide' to describe the crisis, as this could open the gates to international involvement under the responsibility to protect.[16] However, these legal concerns are widely debated and their intricacy will not be fully discussed in this report, as they call upon very different considerations.

Unfortunately, these instruments are commonly violated by the GoS. For example, the displacement of people in areas where they lack the basic necessities is a clear infringement to the 'right of life.'[17] Such displacement does not respect the basic standard of living, protected under the ICESCR.[18] These examples, along with many others can be reported directly from individuals to the African Commission on Human and Peoples' Rights, since Sudan is part of the African Union.[19] However, the availability of such a process is not widely known and not a priority for internally displaced people.

This brief overview of ratified international instruments is helpful in determining part of Sudan's legal framework. However, perhaps more telling is Sudan's refusal to adhere to certain conventions. For instance, a great concern of the international community is the absence of recognition of the International Criminal Court (ICC). The GoS has not signed the Rome Statute,[20] thus denying the ICC's competence in Sudan. However, as more than half of the world's nations recognize the institution's jurisdiction,[21] and following the Security Council's referral of the situation in Darfur, under Resolution 1593, to the ICC and urging the country to cooperate,[22] the Sudan has been politically and diplomatically pressured into recognizing the court. These sustained efforts, however, remain in vain as the GoS continues to reject the ICC's jurisdiction, and is not complying with issued arrest warrants.[23] Despite constant and severe critiques by the international community, the Sudan reiterates its refusal to cooperate with what it considers to be an infringement of its sovereignty, stating that the country's legal and judicial systems suffice in guaranteeing due process.[24]

Furthermore, the ICC's Prosecutor Moreno Ocampo recently asked the court to indict Al-Bashir of multiple crimes, including crimes against humanity.[25] It is the first time in history that a head of State is undergoing such process, and it has created much turmoil within the international community. The ICC's decision has yet to be made.

# Relevant Applicable National Law

Contrary to international law, the sources of national legislation have a hierarchy. For instance, laws and decrees find their source in the constitution, while bylaws find their source in laws. In order for any law/bylaw/decree to be valid, they need to respect the norms they stem from. In the case of international ratified norms, these need to be implemented into national legislation. Otherwise, judges can only use them as interpretative tools. When a norm is unclear or in need of interpretation, it is common to proceed to its analysis in light of its source in order to remain coherent in a given system of law. As a result, the constitution becomes extremely important in understanding the basis and reasoning for any given legal framework.

### 1) Constitutional Texts

The GoS issued a new constitution in 1998.[26] The text was written as a response to the critiques of human rights breaches and was meant to reassure detractors of the former Constitution who believed that the country was too heavily influenced by Islam. Therefore, the new constitution tries to conciliate human rights and the Sharia'h (Islamic laws).[27] In reality, however, the Constitutional Act is very vague and specifically states that the main source of Sudanese law is the Sharia'h.[28] This direct reference to the majority's religious background as the interpretative source of the law has great impact in a court of law, and renders religiously neutral laws heavily influenced by the Sharia'h. In other words, declaring the Sharia'h the source of all Sudanese legal texts allows judges to refer to Islamic principles to enlighten them about the meaning and intention of the law. The Sharia'h thus becomes an interpretative tool that may be used loosely, depending on the judge.

Furthermore, the Constitutional Act does not make any mention of some basic rights, and does not address the application of international norms. Rights such as education and healthcare are not specifically protected, and the rights of women and children are only mentioned in directive principles which serve as a vague guide for judges rather than providing an effective legal basis. In addition, the right to a 'fair trial'[29] is not defined, allowing judges to develop their own guidelines. These are a few examples of deficiencies in the application of aforementioned ratified international norms.[30]

The 1998 Constitution also renders many powers to the President. The most significant refer to his capacity to declare a state of emergency "whenever there is [an] event that poses a threat to the state or any part of it …."[31] Such a declaration allows the President to forego existing legislation and some constitutional rights by issuing decrees without notice.[32] The required level of threat is not specified and is left open to interpretation. Again, it reveals much ambiguity and flexibility for the President to legislate. Compared to international norms, it is far more discretionary and easier to justify.

The President and his deputies' criminal liability require the permission of the National Assembly in order to be effective.[33] In other words, they are immune from any prosecution unless the political elite votes otherwise. One can only imagine how often such votes occur, as other politicians also want to keep their privilege of immunity and not defy the privilege of others.

Another norm worth mentioning is the possibility for the President to appoint members of the National Assembly in case of threat to the nation's security.[34] There seems to be no further explanation as to the type of threat that would warrant such action. It makes it quite easy to bypass elections, at least partially, and appoint political supporters in order to create a stronger coalition government. By avoiding voting in some regions, it also augments the percentage of supporting voters overall, therefore enhancing a government's legitimacy.

Finally, although the political process is meant to be public, the National Assembly can decide not to hold public sessions and/or not to keep public records.[35] This norm, which also lacks any further explanation, contributes to the GoS's reputation regarding its lack of transparency and fails to respect basic judicial principles, which require that a population be made aware of the laws to which it is subjected with sufficient notice.

In 1999, President Al-Bashir partially suspended the Constitution by declaring a State of Emergency.[36] This declaration came in the midst of a power struggle between Al-Bashir and the Speaker of the Parliament who was attempting to introduce a Prime Minister position, which would have diluted the President's powers.[37] While the State of Emergency was meant to be enforced for a period of three months, the suspension remains in force today in three regions of Sudan, including Darfur, allowing for *ad hoc* laws and judiciary. The presidential and ministerial decrees are issued on a sporadic basis, which adds to the confusion and instability of the Darfuri judicial system and overall rule of law.

## 2) Immunity

According to former Sudanese law, the military[38] and police[39] forces were legally immune from any prosecution, given their actions were viewed as "acts connected to [their] official work".[40] Such immunity could only be lifted by the director of the forces for the military, or the Minister of the Interior for the police. No further explanation was provided by the law, and circumstances that would lead to the lifting of one's immunity were unclear. The legal texts seemed to render this procedure discretionary. However, because of the continuous critiques this practice was under, it was amended by presidential decree.[41] Nevertheless, while the power of lifting the immunity no longer exists in written form, the decree finds little application and authorizations are still being solicited.[42]

In situations where an immunity provision was lifted, the Criminal Act 1991 offers an additional defence to both military and police. Article 11 of the Act states that:

> No act shall be deemed an offence if done by a person who is bound, or authorized to do it by law, or by a legal order issued from a competent authority, or who believes in good faith that he is bound or authorized so to do.[43]

This provision clearly contravenes international law as following superior orders do not justify crimes against humanity or genocide.[44] However, these crimes are not included in national law and as previously mentioned, the GoS has not yet ratified the Rome Statute. It remains to be seen if such a norm would be validated in a court of law.

## 3) Criminal Law

The applicable criminal law in Sudan is based on the 1991 Criminal Act and is heavily influenced by the Sharia'h. This is particularly apparent in the Act's treatment of gender-related crimes. For instance, rape is defined as "sexual intercourse, by way of adultery, or sodomy, with any person without his consent."[45] The definition of adultery and sodomy can be found in articles 145 and 148 of the same law. They refer to "the penetration of the whole gland, or its equivalent thereof in the vulva (or anus)."[46] These definitions create many problems with regards to victims' burden of proof. First, victims are required to admit to having had intercourse out of marriage. In other words, they need to admit to a crime before even attempting to establish they were a victim. In the event that they are not able to establish sufficient alternative proof, victims run the risk of being tried under the crime of adultery, which is punishable with execution by lapidation if

married, and 100 lashes if unmarried.[47] Victims could also be tried under article 114 for false accusation. They also might receive threat from their community because of cultural considerations.[48] Needless to say this translates into a great deterrent for victims to even attempt any prosecution.

Second, due to the lack of trained judges in Darfur, many judges have been appointed without having sufficient (or any) legal education.[49] It is even reported that many are recruited directly from the military.[50] The lack of guidelines issued by the Ministry of Justice also provides judges with great liberty in assessing cases. A judge's role is to interpret the law, without going beyond it. When analyzing any given legal texts, a judge needs to explain her/his his rationale, but s/he is free to interpret it in the way s/he deems reasonable. Hence, if there are no guidelines for the judges to follow and the law is written in a vague manner, judges need to clarify the text in light of interpretative principles such as intention, pragmatism, overall coherence, and/or the Sharia'h (as called for by the Constitution). As a result, some judges may choose to apply Islamic procedural principles such as the requirement that four adult males to testify as witnesses in the case of non-consensual sexual intercourse.[51] This burden of proof is not a myth, and while it is not explicitly incorporated in the Sudanese law, it may be justifiably applied by any judge. This burden, however, is rarely attainable as most rapes occur without witnesses. Furthermore, in the rare cases where four adult males have witnessed the crime, the victim would need to convince the men to testify accordingly. Also, because the crime of attempted rape does not exist in the Sudanese criminal code, the burden is 'all or nothing' as no other crimes requiring a lesser burden are included in the accusation of rape. In a culture where gender-based violence is taboo and often blamed on the victim, this is a burden that can seldom be met.

### 4) Criminal Procedure

Other challenges stem from the Criminal Procedural Act 1991. Indeed, article 48 of the law reads as follows: "The officer in charge, after submission of the record of enquiry, shall […] take the necessary steps to call the competent physician, to examine the injured person." The text leads to think that a person can only consult with a physician after they have reported the crime. Hence, some officers and judges still reject any medical proof gathered before the police was approached. Also, it is reported that some doctors refuse to give care if the victim does not have a 'Form 8'.[52] Furthermore, only pre-selected doctors can be consulted for examination for the medical documentation to be deemed valid in a court of law. Although this is not written anywhere, it seems to be an established practice, as many reports from other doctors are later rejected by conservative judges.[53]

In order to standardize reports, the use of the 'Form 8' was established for physicians to fill out when consulted after the report of a rape. 'Form 8' asks very general questions and does not allow for doctors to add specific comments that could serve as proof in an eventual trial. Furthermore, this form was in insufficient amounts in many places which meant few proceedings could be introduced. The procedure was thus lessened and the Minister of Justice permitted for copies of the form to be completed and still be valid. However, some police officers and judges still reject the use of these 'unofficial' forms.[54]

## Judiciary System

In descending hierarchal order, article 6 of the Criminal Procedural Act 1991 breaks down the criminal judicial system as follows:

(a) "Supreme Court
(b) Court of Appeal

(c) General Criminal Court
(d) First Criminal Court
(e) Second Criminal Court
(f) Third Criminal Court
(g) People's Criminal Court
(h) Any special criminal court, established by the Chief Justice."

The People's Criminal Court is a tribal court, presided by towns' elders rather than formal judges. Their competence depends on the decree that creates them,[55] but it can go as far as to cover all crimes. Rather than Sudanese law, they apply traditional norms and sentencing principles accepted by their community.

The First, Second and Third Criminal Courts are all district courts with initial jurisdiction. This means that there is a body present in all 133 districts of Sudan.[56] Their competence depends on admissible sentences, which is set by the Criminal Procedure Act 1991. The Third Court can hear cases about crimes of a lesser sentence, while the First Criminal Court can hear cases admissible to any penalty except for death.[57]

The General Criminal Court is one of either first appeal, or initial jurisdiction for crimes punishable with the death penalty. There is one in each of the 26 provinces of Sudan. The Court of Appeal is in Sudan's capital, Khartoum, and serves as a second possibility of appeal. Finally, the Supreme Court is the highest judicial institution of the country. It is competent for any types of law coming from all over the state,[58] including criminal.

A special court was also created by the Chief Justice to try for crimes against the state (under the State of Emergency). It is now called Specialized Courts. In 2005, following the Comprehensive Peace Agreement, a Special Criminal Court for the Events of Darfur (SCCED) was introduced. It has jurisdiction over any crimes in the Criminal Act 1991, any charges following the work of the National Committee of Inquiry on Darfur, as well as general international humanitarian law.[59] Unfortunately, the court seems to have been rather inactive since very few cases were heard since its creation. It seemingly serves as supporting the Sudanese claim of self-sufficiency vis-à-vis international instances.

This multiplicity of courts should help to enhance the judicial system's accessibility. However, the jurisdiction is often confused, the procedures of introduction of claims are different, and with the strong movement of population, people flee the cities, making it necessary to travel long distances to access the courts. Furthermore, the judicial system seems to lack independence from the Sudanese political makeup. For instance, the Chief Justice can appoint and fire judges without further explanation.[60] This constant threat alone greatly affects their image. It is also reported that many trained and competent judges have fled the country since the institution of the Al-Bashir government.[61]

Overall, the structure of the Sudanese judicial system is conventional and satisfactory. Indeed, on paper, it allows for a hierarchal verification, both specialized and generalized. Although the tribal courts might still stir debates, it allows for a culturally adaptable dispute resolution strategy that should serve this country's plethora of tribal groups, so long as there is a reporting process.

However, the closeness of the national courts with the current political regime raises high concerns regarding the system's legitimacy. Also, the multiplication of *ad hoc* courts contributes to the instability and inefficiency of the system. It is counteracting as the judicial system seems to be understaffed.

The portrait is just as questionable on the policing side. Some stations apparently refuse to file and pursue any type of investigation when it comes to rape or any gender-based crime. When cases are in fact inves-

tigated, it is reportedly done on the surface. Whether or not this is a result of lack of police officers, lack of knowledge, or lack of will is hard to determine, but this greatly affects women's trust in the police force.[62]

## Conclusion

In their 2005 report on gender-based violence in Sudan, the United Nations High Commissioner for Human Rights addressed the GoS in a way that is still very relevant today:

> In order to put an end to sexual violence, the Government of the Sudan needs to acknowledge the scope of the problem and to take concrete action to end the climate of impunity in Darfur. Only timely and credible investigations and prosecutions of sexual violence will make it clear to the perpetrators of sexual violence, who include members of the law enforcement and security forces and pro-Government militia, that sexual violence will no longer be tolerated. Arrest, harassment and intimidation of victims of sexual violence and their supporters must end.[63]

The problem seems to be so entrenched into the Sudanese society that a reform of its entire legal and judicial systems appears to be necessary. The laws have proven to be manipulated in such a way to appease some of the international pressure, and abuse the human rights of a considerate portion of its population. The focus needs to be put on the victims of this conflict. When questioned about the Sudanese peoples' perception of the law, a Sudanese legal aid attorney put it this way: "If I haven't seen an apple, then I won't know what an apple is. If I haven't seen a mango, then I won't know what it is. If I haven't seen rights, then I won't know what they are."[64] This is an unfortunate conclusion that calls for a reform. And it needs to come from all parts of Sudanese society.

Indeed, the rule of law is a mixture of social, economic, legal, judiciary, cultural, religious, geographic, political, etc., concerns that together create a society that is self sufficient. This legal framework is the result of many years of conflict that has led the country to where it is today. The law has served a downward spiral in Darfur, but it can still be used as a tool to help lift Darfur out of its current state, and gradually into one of sustainable peace.

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