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COMMENTS ON THE PROPOSED AMENDMENT OF THE SUDANESE CRIMINAL ACT

Position Paper

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REDRESS and KCHRED who are partners in implementing the Criminal Law Reform Project in Sudan[1] welcome the timely initiative of the Government of Sudan to amend the Criminal Code in order to incorporate the international crimes of genocide, crimes against humanity and war crimes, make female genital mutilation (FGM) a criminal offence and provide for compensation by the state in cases of diya (blood money). This Position Paper has been prepared to support the reforms of implementing key international standards and adopting best practices. To this end, it seeks to provide guidance for all those involved in the law-making process, and the public at large, on the standards contained in the Bill of Rights and in international law that are binding on Sudan and should be implemented in legislation. The Position Paper examines the conformity of the proposed amendment with the Bill of Rights and applicable international standards. This is with a view to formulating specific recommendations as to how individual provisions and/or the amendment as a whole could be changed so as to fully meet the objective mentioned above.

Given the importance of the proposed changes and related reforms, it is of utmost importance that the governmental bodies involved in the law-making process consult widely with legal experts and civil society at large. Such a step

1 The Criminal Law Reform Project is a joint initiative of REDRESS and KCHRED aimed at advancing the process of bringing Sudanese law into conformity with the National Interim Constitution and international standards as stated in article 27 of the Sudanese Bill of Rights. For any information on the project and/or this position paper, please contact: **Ms. Ishraga Adam, Project Coordinator; Khartoum Center for Human Rights and Environmental Development, Aldeim, South West Corner of the Saha Shaabia, Khartoum, Sudan, Email: ishragha_adam@yahoo.com, Mobile: + 249 122 341652**.

will help in ensuring that any amendments made reflect existing concerns as well as applicable standards and best practice.

I. Recommendations

Based on the examination of the draft of the proposed amendment (see II.-V. below), KCHRED and REDRESS propose the following changes to be made:

1. International Crimes (Chapter 18 of the proposed amendment)

- The offences of genocide, crimes against humanity and war crimes should cover all internationally recognised elements of the respective crimes as follows:
- Section 188: The definition of genocide should be in conformity with the definition contained in the 1948 Genocide Convention, which has been generally recognised and incorporated in the statutes of international criminal tribunals, so-called mixed or hybrid tribunals and many national laws;
- Section 187: The crime against humanity of rape should be changed to cover all acts of penetration and to specify the forms of coercion and lack of consent;
- Section 189: The following war crimes that are not included in the proposed amendment should be added to the proposed list: (i) sexual slavery; (ii) making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious physical injury; (iii) the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all parts of the population of the occupied territory within or outside its territory. The war crime of rape should be changed so as to bring the definition in line with the crime against humanity of rape (see notes on section 187 above);
- Punishments: Life imprisonment should be the maximum punishment in line with the practice of international courts and mixed tribunals. Minimum punishments should be specified that adequately reflect the seriousness of the offences.

- The following complementary changes should be made in order to ensure justice and accountability for international crimes:
- Commanders or superiors should bear criminal responsibility for any international crimes committed by their subordinates where a commander or superior fails to prevent crimes he knew or should have known about even though he could or should have stopped those crimes;
- There should be no immunities for officials for any criminal offences, in particular not in relation to international crimes;

- International crimes should not be subject to any statutes of limitations;
- Victims of international crimes and other serious violations should be provided with the right to an effective remedy and reparation;
- The definition of international crimes in the Armed Forces Act 2007 should be brought in conformity with the proposed changes.

2. Female genital circumcision (section 145 of the proposed amendment)

- The definition of female genital circumcision in the proposed section 145 may be made more specific to cover relevant acts
- The criminal responsibility of parents or guardians for inciting, aiding or abetting female genital mutilation should be explicitly stated
- Under section 145 (3) of the proposed amendment, the word "may" should be changed to "shall" have his or her professional licence revoked

3. Compensation (section 45 of the proposed amendment)

- State liability to pay compensation should cover all international crimes and serious violations of human rights
- State liability to pay compensation should cover acts committed by members of security forces
- The duty should not be confined to the payment of compensation but should cover other forms of reparation as well
- The state should as a rule reclaim any compensation paid from individual perpetrators found guilty of having committed international crimes or other serious offences

4. Other serious violations that should be criminalised in line with international standards and best practice

- The Criminal Code should be amended further so as to adequately criminalise serious violations in conformity with international standards and best practices from other countries. This should include the crimes of extrajudicial, summary or arbitrary executions; torture; enforced disappearances; and gender-based violence, such as rape, committed in circumstances may not constitute genocide, crimes against humanity or war crimes.

II. International Crimes (Chapter 18)

1. Definition of crimes

The incorporation of the international crimes of genocide, crimes against humanity and war crimes in the Sudanese Criminal Code is an important step toward combating impunity for such crimes more effectively. These crimes are

recognised in international criminal law, having lately been included in the statutes of the ad hoc tribunals for the former Yugoslavia and Rwanda,[2] the Rome Statute of the International Criminal Court (ICC),[3] hybrid or mixed courts[4] and in national implementing legislation.[5] There is also a growing body of national and international jurisprudence on the definition of each of the three crimes mentioned above. The following examination of the international crimes in the proposed amendment draws on these sources in discussing whether the definitions used are in line with relevant standards and whether any changes should be made.

Genocide

We propose that the criminal offence of genocide should be defined in conformity with the definition of genocide in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter 1948 definition) and the statutes of the international ad-hoc tribunals and the ICC:

> "Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group."

The proposed definition of genocide in section 188 of the proposed amendment reads:

> "There shall be punished with death penalty, life imprisonment or any other lesser punishment whoever commits, attempts or abets the commitment of the offence or the offences of homicide against an individual or individuals of a national, ethnic, racial or religious group upon that entity with the intention of exterminating it or destroying it partially or totally in the context of a systematic and widespread conduct directed

2 Articles 2-5 of the Statute of the International Criminal Tribunal for the former Yugoslavia (1993) and articles 2-4 of the Statute of the International Tribunal for Rwanda (1994).
3 Articles 5-8 of the Rome Statute of the International Criminal Court (1998).
4 Section 4-6 UNTAET Regulation 2000/15 (East Timor); Articles 4-8 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, as amended, 2004; and articles 2-5 of the Statute of the Sierra Leone Special Court.
5 See for example sections 6-12 of the Act to Introduce the Code of Crimes against International Law of 26 June 2002. See for further information the database of the Human Rights Centre of the University of Nottingham on national implementing legislation, http://www.nottingham.ac.uk/law/hrlc/international-criminal-justice-unit/implementation-database.php.

against that group and commits in the same context any of the following acts:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group."

The definition of genocide in section 188 is only partially in line with the 1948 definition. Whereas the 1948 definition stipulates that "any of the following acts" constitutes genocide, section 188 makes "homicide" the essential act that constitutes genocide if the other elements of the crime are present. The reference to homicide appears to narrow the definition and is bound to create confusion. The relationship between the act of homicide and the other five acts listed at the end of section 188 is not clear. A literal interpretation of the definition seems to suggest that they are cumulative, i.e. that there needs to be the act of homicide as well as any of the five enumerated acts.

In the 1948 definition, the five acts are clearly distinct from homicide as genocide is characterised by the intent to destroy a protected group by the enumerated means. Only one of the five acts concerns homicide; the other four acts do not need to result in the death of the targeted members of the group even though the ultimate intention must be to destroy the protected group, in whole or in part.[6] The 1948 definition thus recognises that there are a number of means in addition to homicide that can bring about the destruction of a group; making homicide an essential element of the crime of genocide as section 188 does would not fully capture the nature of the crime of genocide. It would also possibly result in both a lack of protection and in impunity where the act of homicide cannot be proved. In such a case, a person would seemingly not be guilty of genocide even where he or she has committed one or several of the other acts listed in both definitions (namely (b)-(e)).

Crimes against Humanity

We propose that the definition of the crime against humanity of rape in section 187 be revised so as to reflect the understanding of rape in international statutes and jurisprudence. The proposed definition of rape as a crime against humanity in section 187 appears to cover all types of penetration. However, being more specific on the types of penetration would make section 187 clearer and would enhance protection. This could

6 See William A. Schabas, *Genocide in International Law*, Cambridge University Press, 2000, pp.151 et seq.

be done by drawing on the international jurisprudence on rape with objects, which is not confined to vaginal or anal penetration but also encompasses oral rape and penetration with objects.[7]

It might also be advisable to specify the meaning of coercion so as to provide prosecutors and judges with guidance in the interpretation of the elements of the crime, drawing on jurisprudence that has specified the nature of coercion and the definition of consent.[8]

In terms of drafting, we propose to include in section 187 a name for each of the listed crimes against humanity as a heading, such as murder, enslavement or torture, and to place the definition of the crime below the heading. This would make the section on crimes against humanity clearer and would help in the categorisation of the acts that constitute crimes against humanity.

War Crimes

We propose that the following acts should be added to constitute war crimes under the proposed section 189: (i) sexual slavery; (ii) making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious physical injury; (iii) the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all parts of the population of the occupied territory within or outside its territory. We also propose that the definition of rape be amended as discussed in the preceding section.

The proposed list of war crimes in section 189 includes most offences recognised in the context of armed conflicts. However, it lacks the specific offences of sexual slavery, making improper use of a flag of truce and population transfer by an Occupying Power that have been recognised in international criminal statutes.[9] There is no apparent reason why these offences should not be included in a section designed to comprehensively criminalise war crimes.

Terminology

Crimes against humanity require the existence of a “widespread or systematic attack directed against any civilian population” and war crimes require the

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7 *Prosecutor .v Akayesu*, (Case ICTR-96-4-T, Judgment 2 September 1998), para.597; *Prosecutor v. Furundzija*, (Case IT-95-17/1-T, Judgment 10 December 1998), para. 185 and *Miguel Castro-Castro Prison v. Peru* (Merits, Reparations and Costs), Judgment of the Inter-American Court of Human Rights, 25 November 2006, Series C No. 160, para.310.

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

9 See for the war crime of sexual slavery, article 8 (2) (b) (xxii) and 8 (e) (vi) of the Rome Statute; of making improper use of a flag of truce or distinctive emblem, article 8 (2) (b) (vii) ibid.; and of population transfer by an Occupying Power 8 (2) (b) (viii) ibid.

existence of an "[international or non-international] armed conflict." These terms have been defined in international jurisprudence or in elements of crimes, i.e. documents designed to assist the tribunal in question in interpreting and applying international crimes. It may be beneficial for the guidance of Sudanese judges and others concerned to include these definitions in article 3 of the Criminal Code given that international crimes are a new concept in Sudanese criminal law.

2. Punishments

The proposed amendment stipulates the punishment of the death penalty, life imprisonment or any other lesser punishment for all three crimes.

We propose that life imprisonment should be the maximum punishment in line with the practice of international courts and mixed tribunals.[10] We also propose laying down minimum punishments that adequately reflect the seriousness of the offences. Such minimum punishments have been stipulated in section 189 of the proposed amendment for war crimes against property and other entitlements as well as for war crimes against humanitarian assistance (twenty years imprisonment) but not for other offences. It would be advisable to introduce minimum punishments for other offences as well to give an indication of their seriousness and to provide adequate guidance for the judiciary, a practice that has also been followed by countries that have adopted implementing legislation.[11] If no such minimum punishments were to be established, judges may impose short prison sentences or even fines that are clearly inadequate given the serious nature of the offences, thereby undermining the intended objective of effectively combating impunity for international crimes.

3. Essential complementary amendments to ensure justice and accountability for international crimes

We propose that the draft amendment be complemented by the recognition of other principles and standards integral to the effective application of international criminal law. States should not only proscribe certain acts as international crimes but take steps to effectively prosecute and punish those guilty of any breaches.[12] This is in line with the overall objective of international criminal law, namely to combat impunity and to prevent the recurrence of the most serious crimes through effective measures. The following principles and rules have been developed in the jurisprudence and practice of international and national courts and bodies and are widely recognised.

Criminal responsibility, in particular command/superior responsibility

10 See Article 24 (1) ICTY Statute, Article 23 (1) ICTR Statute, and Article 77 of the Rome Statute.
11 See for example sections 6-12 of the Act to Introduce the Code of Crimes against International Law of 26 June 2002.
12 Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, p.15.

We propose inserting a provision in the Criminal Code that recognises criminal liability on the grounds of command/superior responsibility.

Sudanese Criminal Code recognises criminal liability for those who directly commit an offence and for anyone who orders, aids and abets an offence, as well as for those who engage in criminal conspiracy in relation to certain offences.[13] However, Sudanese criminal law does not recognise liability for command or superior responsibility. The Armed Forces Code of 2007 has recognised command responsibility to some degree but this form of liability should not be confined to the conduct of armed forces as it has a broader scope of application.

Command or superior responsibility is a well-established mode of criminal liability in international criminal law and national legislation pertaining to international crimes.[14] It recognises that an active commission need not be proved where a commander or superior fails to prevent crimes he or she knew or should have known about even though he or she could or should have stopped those crimes.[15] The superior-subordinate relationship could be either a formal or informal hierarchy of command and need not be a strict military command style structure.[16] The accused must possess effective de jure or de facto control over the subordinates in a military or civilian capacity.[17] Command or superior responsibility is important because it imposes an obligation on commanders and superiors to prevent crimes and does not allow them to turn a blind eye on serious crimes committed by their subordinates if they had the opportunity to prevent such crimes.

No immunities for officials

We propose that any immunity for officials under current Sudanese legislation be abolished in relation to criminal offences, in particular international crimes. International crimes can and arguably have been committed by both state and non-state actors, such as armed rebel groups. Criminalising genocide, crimes against humanity and war crimes without removing immunity legislation for officials is bound to result in partial impunity for which there is no objective justification and which runs counter to the rationale of the proposed amendment.

Under Sudanese law, police officers, security force personnel and members of the armed forces are granted conditional immunity, i.e. they can only be the

13 Part III, Chapter 2 of the Criminal Code.
14 Article 7 (3) ICTY Statute, Article 6 (3) ICTR Statute and Article 28 of the Rome Statute.
15 See Article 28 of the Rome Statute.
16 *Prosecutor v. Mucic et al.*, IT-96-21 (Appeals Chambers), (20 February 2001), paras. 248 et seq.; *Prosecutor v. Semanza*, ICTR-97-20 (Trial Chamber), (15 May 2003), paras. 401.
17 *Prosecutor v. Kordic and Cerkez*, IT-95-14/2 (Trial Chamber), (26 February 2001), para.416; *Prosecutor v. Bagilishema*, ICTR-95-1A-T, (Trial Chamber), (7 June 2001), para.45.

subject to a full investigation, prosecution and trial if the head of the respective forces explicitly lifts their immunity.[18]

International criminal law does not recognise the validity of such immunities for international crimes because they are by their very nature so serious that no-one should be exempt from prosecution. This principle is stipulated in the statutes of international tribunals and national legislation.[19] There is a consistent practice of the United Nations, international tribunals and national courts of refusing to recognise the validity of any immunity or amnesty that might free a person or a category of persons from legal responsibility for international crimes.[20]

This principle is also recognised as a matter of international human rights law according to which states are obliged remove immunities for serious human rights violations (that may and often do amount to international crimes). The Human Rights Committee, in its General Comment 31, stated that:

> "…where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties (see General Comment 20 (44)) and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility..."[21]

In its practice, the Human Rights Committee has repeatedly found immunity legislation to be incompatible with the right to an effective remedy and the concomitant duty to investigate and prosecute officials for serious violations,[22] including in the case of Sudan:

> "It [the Human Rights Committee] is particularly concerned at the immunity provided for in Sudanese law and untransparent procedure for waiving immunity in the event of criminal proceedings against state agents."[23]

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18 Section 45 (1) of the Police Act 2008, section 42 (2) of the Armed Forces Act 2007, AND section 33 (b) of the National Security Forces Act 1999

19 Article 7 (2) ICTY Statute, Article 6 (2) ICTR Statute, Article 27 (2) Rome Statute.

20 See in particular Application of REDRESS to intervene in the case of T*he Prosecutor against Morris Kallon* [Case No. SCSL -2003 -07], Sierra Leone Special Court, (Amicus Brief on the Legality of Amnesties under International Law) (24 October 2003), http://www.redress.org/casework/AmicusCuriaeBrief-SCSL1.pdf.

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

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

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

Immunities are also incompatible with the Bill of Rights, in particular article 27 (3) and the fundamental rights of freedom from extrajudicial killings and torture (articles 28 and 33) in conjunction with the right to litigation (article 35).

Statutes of limitations:

We propose that there should be no statutes of limitation for any of the international crimes included in the proposed amendment.

According to article 38 (a) of the Criminal Procedure Code, the international crimes added to chapter 18 would be subject to a prescription period of ten years as the offences are punishable with death or imprisonment of ten years or more.

Statutory limitations are the outcome of a balancing act between the right of the victim to an effective remedy and the duty and interest of the state to prosecute and punish crimes on the one hand and the need to maintain legal certainty on the other. This balancing act can be applied to the majority of crimes where the public interest in prosecution and punishment does not outweigh the need for legal certainty after the passage of a considerable length of time. However, some crimes, such as murder, are commonly exempt from prescription because of their extremely serious nature that is not diminished over time. The same rationale applies to international crimes, which by definition constitute the most serious crimes.

Several international treaties and statutes of international criminal tribunals provide for the non-applicability of statutes of limitation for international crimes.[24]

In 1993, Theo van Boven, the then Special Rapporteur on the Right to Reparation to Victims of Gross Violations of Human Rights, stated that:

> "… it should be taken into account that the effects of gross violations of human rights are linked to the most serious crimes to which, according to authoritative legal opinion, statutory limitations shall not apply."[25]

The United Nations Independent Expert who updated the Set of principles for the protection and promotion of human rights through action to combat impunity recognised that:

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

25 *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms,* Final report submitted by Mr. Theo van Boven, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1993/8, para.135.

> "the general trend in international jurisprudence has been towards increasing recognition of the relevance of this doctrine [that there should be no statutes of limitations] not only for such international crimes as crimes against humanity and war crimes, but also for gross violations of human rights such as torture."[26]

Many countries, such as Ecuador and Paraguay, have introduced legislation that abolish any statutes of limitation for international crimes.[27] There is also national jurisprudence where courts have upheld the constitutionality of laws that remove statutes of limitation for past violations, for example in the Czech Republic and Hungary.[28]

The right to reparation for victims of international crimes

We propose that a specific right to reparation for victims of international crimes be recognised in the Criminal Code. Provision for such a right could be made in Chapter 18.

Sudanese law does not recognise an explicit right to reparation for victims of international crimes or other serious violations for that matter. As discussed below, the proposed amendment to section 45 of the Criminal Code also fails to establish such a right in line with international standards.

The right to reparation for international crimes and serious violations of human rights that may amount to international crimes, such as torture, is recognised in the statutes of international criminal tribunals, international human rights treaties binding on Sudan and the landmark resolution of the UN General Assembly *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*.[29]

Victims, i.e. those who have suffered harm through acts or omissions that constitute a violation, are entitled to effective access to judicial and non-judicial procedures and to adequate and effective forms of reparation.[30] The right to should include compensation and other measures that are often equally important in the circumstances, such as restitution, rehabilitation, satisfaction and other guarantees of non-repetition.[31]

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26 *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity*, Report by Diane Orentlicher, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, para.47.
27 See Article 23 (2) of the Constitution of Ecuador of 1998 and Article 5 of the Constitution of Paraguay of 1992.
28 Decision of the Czech Constitutional Court Pl. US 19/9321 of December 1993 and decision of the Hungarian Constitutional Court, 53/1993 of 13 October 1993.
29 In particular articles 75 and 79 of the Rome Statute, Article 2 (3) of the International Covenant on Civil and Political Rights (ICCPR) and UN Doc. A/RES/60/147, 16 December 2005.
30 Ibid.
31 Ibid.

Establishing territorial jurisdiction over international crimes

We propose that the Sudanese criminal code be amended so as to extend territorial jurisdiction over any person suspected of having committed any of the three crimes (genocide, crimes against humanity, war crimes) irrespective of the nationality of the offender or the victim and the place where the crime has been committed.

The Sudanese Criminal Code does not allow the prosecution of non-Sudanese nationals who have committed international crimes outside Sudan.[32] This lack of jurisdiction may entail that the Sudanese authorities may not be able to prosecute someone who has committed international crimes, for example in cross-border conflicts, such as in Chad or Uganda, even where the suspected offender is in Sudan.

Under traditional criminal law, jurisdiction was with few exceptions confined to acts committed on the territory of the state. To date, several treaties stipulate that states must establish their jurisdiction over certain offences, such as torture or grave breaches committed in international armed conflicts, irrespective of by and against whom and where they have been committed, and must prosecute the suspect(s) unless they extradite him or her.[33] Even where there is no unambiguous treaty obligation of states to do so, such as with regards to genocide and crimes against humanity, it is generally recognised that states are permitted to exercise their jurisdiction over such offences in order to combat impunity worldwide and not to provide a safe haven for criminals.[34] Indeed, there is a growing practice of states exercising their jurisdiction over persons present on their territory suspected of having committed any of these international crimes.[35]

Ensuring consistency with other Sudanese acts

We propose that the definition of international crimes in the Armed Forces Act be changed so as to be in conformity with the changes resulting from the proposed amendment.

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32 Part I, Chapter 2 of the Sudanese Criminal Code.
33 Articles 5-9 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment; Articles 49, 50, 129 and 146 of the 1., 2., 3., and 4. Geneva Convention of 1949.
34 See for example Resolution by the International Law Institute, *Universal criminal jurisdiction with regard to the crimes of genocide, crimes against humanity and war crimes*, 2005.
35 See for example REDRESS and FIDH, *Fostering a European Approach to Accountability for Genocide, Crimes Against Humanity, War Crimes and Torture*, March 2007, pp.50 et seq., http://www.redress.org/publications/Fostering%20an%20EU%20Approach.pdf.

The Armed Forces Code contains the international crimes of genocide, crimes against humanity and war crimes although the relevant offences are not called by these names.[36] The definition of international crimes in the Armed Forces Code is not consistent with the definition of international crimes in the proposed amendment to the Criminal Code, resulting in an inconsistency for which there is no apparent justification.

III. Female genital circumcision (section 145)

We propose that female genital circumcision be defined more precisely. We also propose that criminal responsibility for the crime be explicitly extended to the parents and guardians as they bear a special responsibility and are often instrumental, both in encouraging and in preventing female genital circumcision. Furthermore, we propose that any professional found guilty of such an offence shall have his licence revoked as a matter of course.

The decision to criminalise female genital mutilation is an important step in combating serious violence against the girl child. As stated by the Special Rapporteur on Torture: "Many special procedures have found that female genital mutilation may constitute torture and that States have the responsibility to take all the necessary measures to eradicate it."[37]

The definition of female genital circumcision in section 145 (1) seemingly captures all methods of mutilation. However, it might be better to spell out the forms of mutilation in more detail, such as by way of example, as has been done in other criminal codes so as to capture all forms of female genital mutilation. For example, section 69 A (1) of the Ghana Criminal Code, amended in 1994, stipulates that:

> "Whoever excises, infibulates or otherwise mutilates the whole or any part of the labia minora, labia majora and the clitoris of another person commits an offence and shall be guilty of a second degree felony and liable on conviction to imprisonment of not less than three years. (2) For the purposes of this section 'excise' means to remove the prepuce, the clitoris and all or part of the labia minora; 'infibulate' includes excision and the additional removal of the labia majora."

Section 1 (1) of the UK Female Genital Mutilation Act stipulates that

> "A person is guilty of an offence if he excises, infibulates or otherwise mutilates the whole or any part of a girl's labia majora, labia minora or clitoris."

36 See sections 153 et seq. of the Armed Forces Act, 2007.
37 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc. A/HRC/7/3, 15 January 2008, para.54.

Criminal responsibility for female genital circumcision should not be confined to practitioners and professionals. Whilst parents and guardians who incite, aid or abet the commission of the offence are already subject to liability according to the general rules of the Criminal Code, we propose that their special responsibility should be expressly mentioned in section 145 for the added deterrent effect.

The punishments of imprisonment prescribed in section 145 (2) of the proposed amendment adequately reflect the seriousness of the offence of female genital circumcision. The offence also constitutes a serious misuse of professional powers. For this reason, the word 'may' in section 145 (3) (which reads: "the court may withdraw the professional licence on first conviction and, in case of repetition, must withdraw the licence and close the premises) which gives the court wide discretion should be changed to 'shall' so that a court would under normal circumstances have to revoke a license unless they are exceptional grounds not to do so.

IV. Compensation (section 45)

We propose to make provision for an adequate framework that recognises the right of victims of serious crimes to reparation and the corresponding responsibilities of the perpetrators and the state.

It is welcome that the state assumes responsibility for paying compensation in cases of murder, semi intentional and negligent homicide and wounds committed by any members of the police or armed forces. However, the proposed reforms are incomplete and fall short of establishing a legal framework in line with international standards and the Bill of Rights.

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the UN General Assembly in 1985, stipulates that the state should provide financial compensation to victims of crime where compensation is not fully available from the offender or other sources.[38] It also provides that victims of an abuse of power be provided with remedies and the right to restitution and/or compensation.[39]

Under international human rights law, in particular article 2 (3) of the International Covenant on Civil and Political Rights (ICCPR), victims of violations have a right to an effective remedy and states have a corresponding duty to provide reparation.

38 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985.
39 Ibid.

According to the Human Rights Committee, states parties must make reparation, which comprises compensation and other appropriate forms:

> "Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations."[40]

The proposed amendment to section 45 is incomplete. It only expressly covers violations by the police and the armed forces but not the security forces. This creates a gap in the system of state responsibility for such violations as there are no provisions in the current security forces law that would provide for the payment of compensation for such crimes.

Moreover, section 45 only covers a limited number of violations. It does not include a range of serious violations that may not leave any wounds, such as certain methods of torture or deprivation of liberty and fair trial rights. The compensation of dia is also limited as section 42 of the Criminal Code fixes a maximum amount,[41] which may not adequately reflect the seriousness of the offence, especially in cases where officials have gravely abused their powers.

In addition, the proposed amendment should specify the nature of liability as this is not clear from the text of the proposed section 45. This should be joint liability of the perpetrator and the state according to the general rules applying in Sudanese law. If the state is to be made solely liable, it should have the power to reclaim any compensation paid to the victim(s) from an officer who has committed a criminal offence. While it is welcome that the proposed amendment gives victim the opportunity to have recourse directly against the state, the individual perpetrator should eventually be held responsible financially as the latter will often act as an effective deterrent.

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40 Human Rights Committee, General Comment 31, supra, para.16.
41 Section 42 (1): "Dia (blood-money) is one hundred camels, or its equivalent value in money as the Chief Justice may determine from time to time, after consultation with the competent bodies."

V. Criminalising other serious violations and gender based violence

We propose that the Criminal Code be amended further so as to adequately criminalise serious violations, such as extrajudicial, summary or arbitrary executions, torture, enforced disappearances and gender-based violence that may not constitute genocide, crimes against humanity or war crimes

There are a number of serious human rights violations amounting to crimes that are not or not adequately incorporated or defined in the current Criminal Code. The international crimes to be incorporated in chapter 18 do not cover all these crimes. The three international crimes set a high threshold, such as deliberate intent to destroy a group in the case of genocide, the existence of a widespread or systematic attack against civilians in the case of crimes against humanity and the existence of an armed conflict in the case of war crimes, which will often not be met, such as in cases of torture committed by members of the police.

International human rights law imposes specific duties on states to repress and punish serious violations of human rights. This includes in particular extrajudicial, summary or arbitrary executions, torture and enforced disappearances.

- Extrajudicial, summary or arbitrary executions

We propose that section 131 (2) (a) of the Criminal Code be abolished or amended to ensure that there can be no mitigating circumstances in cases of extrajudicial, summary or arbitrary executions.

Extrajudicial, summary or arbitrary executions denote any killing by or with the involvement of state officials in violation of the right to life guaranteed in international human rights treaties, such as article 6 of the ICCPR, in regional human rights treaties, such as article 4 of the ACHPR and in national laws, such as article 28 of the Sudanese Bill of Rights.

Any person, including an official, who kills another person unlawfully is liable for murder under section 130 of the Criminal Code. However, pursuant to section 131 (2) (a) of the Criminal Code, an official may be charged with the lesser offence of semi-intentional homicide instead of murder:

> "where a public servant, or a person charged with a public service, exceeds, in good faith the limits of the power authorised thereto, believing that his act which has caused the death, is necessary for the performance of his duty."

This provision is problematic as it potentially covers cases of extrajudicial, summary or arbitrary executions and may, depending on the interpretation of the element of 'good faith' by the judge(s) in the case concerned, result in a punishment that is inadequate under the circumstances.

- Torture

We propose that the crime of torture be defined in line with the definition in article 1 of the UN Convention against Torture and be made subject to adequate punishments of several years of imprisonment.

Torture is defined in international law as

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

The current Sudanese Criminal Code explicitly criminalises torture in section 115 (2).[42] However, section 115 (2) falls short of international standards on several grounds:

- It does not define the elements of the act of torture;

- It only applies to the use of 'torture' to extract or to prevent someone from giving information but does not cover the other purposes recognised under international law, such as intimidation or coercion (see definition above);

- It imposes a maximum punishment of three months that is clearly inadequate in light of the seriousness of the offence of torture.

Similar considerations apply to the crime of hurt in section 142 of the Criminal Code that may apply where the official inflicts physical injuries and stipulates a maximum punishment of two years.[43]

42 Section 115 (2): "Every person who, having public authority entices, or threatens, or tortures any witness, or accused, or opponent to give, or refrain from giving any information in any action, shall be punished with imprisonment, for a term not exceeding three months, or with fine, or both."
43 Section 142 (1): "There shall be deemed to commit the offence of hurt whoever causes any pain, or diseases to another person, and shall be punished with imprisonment for a term not exceeding six month, or with fine, or with both;" (2): "Where hurt has occurred by dangerous means, such as poison, or intoxicating drugs, or where hurt is caused with the intention of drawing a confession from another, or compelling that other to do an act contrary to the law, the offender shall be punished with imprisonment for a term not exceeding two years, and may also be punished with fine."

- Enforced Disappearances

We propose that a crime of enforced disappearances be recognised in the Criminal Code and be made subject to adequate punishments.

Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance defines enforced disappearance, similarly to the elements of the crime against humanity of enforced disappearance, as

> " the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."

The current Criminal Code contains several offences that may be applied in cases of enforced disappearances, such as kidnapping (section 162), unlawful confinement (section 164) and unlawful detention (section 165). Section 165 (2) contains elements of the crime of enforced disappearance but it does not apply specifically to state officials, its definition is in parts too narrow (as it requires a particular purpose for the unlawful detention) and the prescribed maximum punishment of three years imprisonment does not adequately reflect the seriousness of the offence.

- Gender Based Violence

States have a duty to take effective measures against gender based violence as recognised in a series of declarations by UN bodies, such as the landmark *Declaration on the Elimination of Violence against Women* and in the practice of international human rights bodies.[44] This applies in particular to the crime of rape. Rape which is perpetrated by officials of the state or in which it can be said that the state has facilitated, acquiesced or enabled others to commit rape, is absolutely prohibited under international human rights law as a form of torture.[45] Even where no official is involved in the rape, states have a positive obligation to protect persons subject to their jurisdiction from violations of their physical, psychological and sexual integrity, and, to this end, to prevent and repress rape through adequate criminal legislation and other measures.[46] Rape has been

44 Declaration on the Elimination of Violence against Women, General Assembly resolution 48/104 of 20 December 1993.
45 *Aydin v. Turkey*, (57/1996/676/866, 25 September 1997), para. 83; *Maslova and Nalbandov v. Russia*, (Application no. 839/02, 24 January 2008), para. 107; *V.L. v. Switzerland* CAT/C/37/D/262/2005, 22 January 2007, para.8.10.
46 *M.C. v. Bulgaria* (Appl. No. 39272/98, 4 December 2003), para.153; Committee on the Elimination of Discrimination against Women, General Recommendation No. 19 (llth session, 1992).

recognised as an international crime, as a form of torture and as a serious offence in its own right in international treaties and/or national criminal laws.

- Rape[47]

We propose that the act of rape should, in addition to sexual intercourse of a woman or man, include penile penetration of the mouth and penetration of sexual organs with an object. There should be no reference to adultery in the definition of rape. Moreover, the definition of consent should be clarified to mean "voluntary and uncoerced agreement" and persons under the age of 16 should be legally incapable of consenting. Finally, rape should be made subject to adequate punishments up to life imprisonment.

The current definition of rape in section 149 of the Criminal Code does not include penetration other than sexual intercourse by way of penile penetration into the vagina or anus. The reference to the criminal offence of adultery in defining sexual intercourse has created ambiguity about the applicable rules of evidence, seemingly requiring four male eye-witnesses to the act of penetration or a confession for a conviction, a threshold that is virtually impossible to meet in practice. Said reference to adultery also exposes women to the risk of prosecution for the crime of adultery because any complaint about rape may be treated as an admission of having had (unlawful) sexual intercourse. Accordingly, there have been hardly any successful prosecutions for rape in Sudan and the current rape legislation has failed to provide adequate protection for women.

- Other forms of sexual violence

We propose to remove the offence of gross indecency (section 151) and to recognise a criminal offence of sexual assault that covers non-consensual physical acts of a sexual nature, such as touching and kissing, which fall short of the definition of rape. We also propose to insert a criminal offence of sexual harassment that covers other acts of a sexual nature, such as offensive remarks, which fall short of the definition of rape and sexual assault. Trafficking in human beings for use in the sex trade should also be made a separate offence. Each of these offences should be made subject to adequate punishments.

The offence of gross indecency in article 151 of the Criminal Act that effectively serves as a catch-all offence for all unlawful sexual acts not amounting to adultery, sodomy or rape, is clearly inadequate because it does not sufficiently distinguish between various forms of sexual harassment. It also stipulates punishments of a maximum of eighty lashes or imprisonment of up to two years

47 This section draws on a paper published by REDRESS and KCHRED on Reforming Sudan's Legislation on Rape and Sexual Violence, which is available at www.redress.org.

that are clearly inadequate in cases of serious sexual assault or harassment that do not amount to rape.