



The Judiciary in Sudan:

**Its Role in the Protection of Human Rights
During the Comprehensive Peace Agreement
Interim Period (2005-2011)**

1. EXECUTIVE SUMMARY

This study examines the state of the judiciary in the Sudan and its role in the protection and promotion of human rights during the Comprehensive Peace Agreement (CPA)-mandated Interim period of July 2005 to July 2011. The paper aims to shed light on the structure of the judiciary and analyzes substantive laws and constitutional guarantees governing the operational independence of the judiciary. In addition to examining the normative framework, this study analyzes the concept of judicial independence and the operations of the judiciary as an institution. This study concludes that in some instances, the effectiveness of the Sudanese judiciary is compromised by the resistance or refusal of the executive branches of government to implement its decisions.

Furthermore, close scrutiny of Sudan's criminal justice system reveals that 'jurisdictional competence' is hindered by existing laws that encroach upon the judiciary's independence. The Minister of Justice, for example, may *at any time* after completion of inquiry and before passing of a preliminary judgment, take a grounded decision and stay the court proceedings or terminate the suit and his decision is final and cannot be contested.¹ Hence, the Minister of Justice is a representative of the state prosecution and has the power to stop or dismiss legal proceedings. This raises a serious question related to separation of powers and whether the Sudan judiciary is truly immune from interferences from the executive branches of government.

This study argues that the judiciary as an institution, and judges as individuals, must have exclusive powers to decide cases before them. It recommends that reforms of key laws are required in order to ensure that there are structural and functional safeguards against political or other interference in the administration of justice in Sudan. In order to ensure the independence of the judiciary, officials responsible for the administration of

¹ Article 58 of the Criminal Procedures Act 1991.

justice must be completely autonomous from those responsible for prosecutions. The judiciary should have jurisdiction over all issues of a judicial nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

This study also considers the role of the National Judicial Service Commission (which replaced the High Judicial Council), a body introduced after the CPA as part of the reform of the judiciary. Unfortunately, the National Judicial Service Commission Act, which established the Commission, does not address the fundamental issues of operational independence of the judiciary nor its role in the promotion and protection of human rights. Although the CPA and the Interim National Constitution of 2005 (INC) outline ambitious principles that should form the basis of an independent judicial system, few concrete steps were taken during the interim period to ensure judicial independence.

In addition to examining the judiciary as an independent institution, the study looks at the status of judges in terms of their appointment, removal, security of tenure, financial security, promotion, accountability, freedom of expression and association. This report emphasizes that judges lack exclusive authority when applying the law and that some judgements made in their courts cannot be enforced due to existing bad laws. Sudanese laws, particularly those laws regulating law enforcement institutions such as the police, the security and the army provide immunities for their personnel and protect their properties and assets from judicial decisions. Case law indicates that courts have no powers to enforce decisions against such assets. Furthermore, judges do not have the power to oversee the work of the National Intelligence and Security Service (NISS), which has wide powers of search, confiscation of assets, arrest, and detention of persons for up to four and a half months without judicial review. Other executive bodies such as the armed forces and police have immunities from prosecution under their respective laws, which were not properly reformed during the CPA Interim period. The members of these institutions can only be tried by police or army courts. This issue will be further examined in this study.

This study aims to shed light on judicial oversight with regard to the administration of justice at the pre-trial and trial stage, and in particular focuses on the lack of judicial oversight when law enforcement officials abuse the human rights of the accused. This report concludes that due process rights relevant to fair trial guarantees that are enshrined in the INC and the International Covenant on Civil and Political Rights (ICCPR), to which Sudan is a party, are not respected in Sudan, including the right not to be subjected to torture/ill-treatment, the right to adequate time and facilities to prepare a defense, the right not to be compelled to confess one's guilt, the right to *habeas corpus* and the right to enforceable compensation.

This study also assesses to what extent Sudanese judges utilize human rights law when issuing decisions. In this respect, the researchers tried to track courts' implementation of international human rights law and the Bill of Rights of the INC 2005. Although Article 27 (3) of the INC provides 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', national courts rarely consider the application of international human rights instruments ratified by the Sudan. Case law and practice indicate that judges rarely rely on the Bill of Rights or consider it as part of judicial reasoning or decisions.² The study thus recommends that clear judicial policies and directives are urgently needed in order to guide judges when applying or interpreting the law and also when there is a conflict between international human rights law and national laws. Law-makers should clarify the status of human rights law when applied or interpreted by courts and the legal status of national laws vis-a-vis international human rights treaties to which Sudan is a party.

² See i.e. Constitutional Court cases *Al Hag Yousif Al Haj v (1) Izalledin Ahmed Mohamed (2) Government of the Sudan*, Constitutional Court, 2006/46 (dismissing case on the ground that the Bill of Rights of the INC 2005 is not part of the Constitution; *Kamal Mohamed Saboun v Government of the Sudan*, Constitutional Court, 60/2008; *Faroug Mohamed Ibrahim v (1)Government of the Sudan (2) National Assembly*, Constitutional Court 18/2007; *Dr Babiker Mohamed Al Hassan v (1) University of Khartoum Council (2) Government of the Sudan*, Constitutional Court, 2006/57; *Masarat for Media Production Ltd v National Security and Intelligence*, Constitutional Court, 2008/73.

Finally, the study explores public confidence in the judiciary and to what extent the judiciary is accessible to the Sudanese people. Finally the study concludes by making a number of recommendations of steps that should be taken to enhance the performance of the Sudan judiciary in terms of its independence, ability and willingness to protect human rights.

2. INSTITUTIONAL INDEPENDENCE

Sudan's judiciary has a critical role to play in the protection of human rights. It has a long-standing judicial heritage and the national judicial system has developed alongside the changing political landscape.³ The judiciary is composed of separate hierarchies for civil matters, criminal matters and personal laws governed by *Sharia*. Various courts exercise criminal jurisdiction in Sudan including the regular courts, special mixed security courts, military courts and customary courts. At the apex of this system sits the Supreme Court, which serves as the final court of appeal. There is a hierarchy of criminal courts within each state. The Chief Justice has the power to create special courts, and confer on them particular thematic jurisdiction. Article 127 of the INC also allows for legislation to establish further national courts as may be required.⁴ For the administration of criminal justice, considerable powers are conferred on the Chief Justice, who can issue circulars or guidance to judges on criminal justice matters.⁵

2.1 The Notion of Judicial Institutional Independence

The notion of independence of the judiciary means that the judiciary must be independent from the other branches of government, namely, the executive and legislative branches. According to Principle 1 of the Basic Principles on the Independence of the Judiciary, "the independence of the judiciary shall be

³ For a historical background on the development of the Sudan's judiciary see Mohamed, Mohamed Ibrahim, *The History of the Sudan Judiciary: between Two Eras 1899-2005*, 2nd edition 2007 (Arabic) Currency Printing House. For the development of common law as applied by Sudanese courts see, Mustafa, Z., *The Common Law in the Sudan: An Account of the Justice, Equity and Good Conscience Provision*, Clarendon Press, 1971).

⁴ It states 'Other national courts shall be established by law as deemed necessary'.

⁵ section 212, Criminal Procedure Act 1991.

guaranteed by the state and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.” In order to secure true independence of the judiciary from the other two branches of government, it is necessary for this independence to be guaranteed, preferably by the Constitution. The judiciary must also be independent as to internal matters of judicial administration, including the assignment of cases to judges within the court to which they belong. Furthermore, the judiciary must have independence in financial matters and sufficient funds to perform their functions efficiently.⁶ The judiciary must be independent as to decision-making as both the Government and other institutions have the duty to respect and observe the decisions handed down by the judiciary. The judiciary must have jurisdictional competence, which means that there must be judicial autonomy in the determination of questions of competence.

2.2 Sudan's Constitutional and Legal Guarantees of Judicial Independence

This section provides an overview of the legal and institutional framework governing the work of the judiciary in Sudan since the signing of the CPA and the subsequent adoption of the INC. In this section, the study also examines the national laws guaranteeing the independence of the judiciary and judges and the National Judicial Service Commission Act, which replaced the High Judicial Council with the National Judicial Service Commission during the interim period.

The INC emphasizes the independence of the Sudan's 'National Judiciary' and the constitutional principle of separation of powers as critical components of democratic governance in Sudan. Article 123 (2) of the Constitution states: 'the National Judiciary shall be independent of the Legislature and the Executive, with the necessary financial and administrative independence'. At question, however, is whether the judiciary in practical terms is able to maintain the required independence vis-à-vis the executive branch of government of Sudan. This question will be answered elsewhere in this study when it assesses whether the judiciary decision-making is respected and enforced by courts and to what extent the judiciary enjoys

⁶ Principle 7 states that "It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions."

judicial competence to adjudicate issues, which fall exclusively within its judicial work.⁷

2.3 The National Judicial Service Commission

After the signing of the CPA and as part of the process of institutional reform of the judiciary, the INC called for the establishment of the National Judicial Service Commission to replace the High Judicial Council. The objective of creating the new body was to accommodate the new constitutional provisions aimed at reforming the judiciary. Accordingly, Article 129 provides that the President of the Republic, after consultation within the Presidency, shall establish the National Judicial Service Commission to undertake the overall management of the national judiciary. The Commission was mandated to regulate the relations between judiciaries at the national and state level and also at the regional level, before the secession of Southern Sudan. The Commission is chaired by the Chief Justice as the head of the National Judiciary of the Republic of the Sudan. One important change to note is that under the previous system the High Judicial Council was a body within the judiciary. However the National Judicial Service Commission was introduced as a separate external entity and tasked with a supervisory role over the work of the judiciary. The important question here is whether this new body has managed to play its role and managed to achieve some judicial reform.

Unfortunately the National Judicial Service Commission has not lived up to its mandated task of providing effective oversight of the judiciary.⁸ It has not played an active role in enhancing the independence of the judicial system for a variety of reasons. First, the Commission, as a supervisory body, is expected to focus on fundamental areas of institutional reform including protecting the judiciary from interference from the executive branches of government. Unfortunately, this mandate was not envisaged as part of the Commission's constituting Act adopted in 2005. The functions of the Commission are not defined in such a way so as to oversee the

⁷ Article 123 (1) (2) states: 'the National Judiciary shall have judicial competence to adjudicate on disputes and render judgments in accordance with the law'.

⁸ Medani, A. 'A legacy of Institutionalized Repression: Criminal Law and Justice in Sudan', in Oette ed. *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan*, 2011 (Ashgate) p. 86.

independence of the system.⁹ Its mandate is limited to the adoption of the budget of the judiciary, making 'recommendations' to the executive on the appointment of judges to the Constitutional Court, the Chief Justice and his deputies, judges of the High Court and other judges. In other words, the Commission mainly makes recommendations and does not take decisions.¹⁰ The Commission does not act as a real supervisory body over the judiciary work as the Chief justice of the Supreme Court is also the head of the Commission and is in a position to set the agenda of the Commission. The Commission does not adopt internal regulations or policies with regard to frequently raised concerns about judicial competence over judicial work, the interference of the Ministry of Justice in the work of the judiciary in staying or dismissing legal proceedings, the role of the judiciary with regard to special courts and immunities granted to law enforcement officials. Finally, the Commission was initially almost entirely constituted from political party members, reflecting the power-sharing formula between the two ruling parties, the National Congress Party (NCP) and the Sudan People's Liberation Movement (SPLM), rather than an independent commission responsible for the establishment and functioning of an independent judicial system.¹¹ Once Southern Sudan seceded from Sudan, the composition of the Commission came to be dominated by NCP members and its appointees.

2.4 Independence of Judicial Decision-Making

According to a manual on human rights for judges published by the Office of the High Commissioner for Human Rights other branches of government have the duty "to respect and observe the independence of the judiciary."¹² This means that the legislature, as well as other executive bodies such as the police and prison authorities must respect and abide by the judgments and decisions of the judiciary, even when they do not agree with them.¹³ Respect for judicial authority is indispensable in the maintenance of the rule of law and respect for human rights. All

⁹ Id, at 86-87.

¹⁰ Id.

¹¹ Id.

¹² See Human Rights in the Administration of Justice: *A Manual on Human Rights for Judges, Prosecutors and Lawyers*, 121, Office of the High Commissioner for Human Rights, Geneva, 2003.

¹³ Id

branches of government have a duty to prevent the erosion of the independent decision-making authority of the judiciary.¹⁴

It is pertinent to note that components of the executive branch of Sudan's government have ignored decisions issued by national courts on numerous occasions. This phenomenon is illustrated by the case of *the National Union of Retired Employees of Government Banks v Council of Ministers*. In this case the Minister of Finance and the Governor of the Central Bank implemented Presidential Decision No. 2000/1110 ordering that the government no longer pay bonuses for festive seasons, holidays, tickets and medical insurances. Courts including the High Court and the Constitutional Court reviewed the decision and issued orders that the Central Bank pay out all the aforementioned benefits despite the presidential decision. The High Court also referred all financial matters and compensations to a mandated committee to issue payments in accordance with the Civil Procedures Act 1983 and instructed that this Committee work under the supervision of the Court.¹⁵ Unfortunately, this decision was not implemented by the executive branch of government and the benefits were not paid out, despite the Court's decision. This example represents an insult to the judicial independence.

On some occasions, judicial decisions in Sudan are rendered ineffective as a result of existing bad laws. In particular, Sudanese laws regulating law enforcement institutions such as the police and the army provide that properties or assets belonging to these institutions are immune from judicial decisions as no court order can be enforced against such assets. Article 35 of the Armed Forces Act 2007 and Article 41 (b) of the Police Act 1999 prohibit freezing the monies or assets of these institutions for the purpose of enforcing court orders. Recently, Article 39 (3) of the Police Act 2008 provides that 'it is prohibited to liquidate or freeze properties, movable properties and monies belonging to the Police Forces related to the performance of its legal functions and duties'. These provisions, according to one of the judges "are unconstitutional, unjust and represent serious encroachments on justice and 'empty' judicial decisions from their content as no right can be enforced.

¹⁴ Id.

¹⁵ High Court Decision- administrative Claim T/7/m. (constitutional Court case no. M.D.G.D 2002/85- 20/04/2003.

In such circumstances how can a citizen gets his rights while these institutions have companies and investments, in particular in the context of Directive No. (1) 2011 issued by the Chief Justice.”¹⁶

2.5 Jurisdictional Competence

According to Principle 3 of the Basic Principles on the Independence of the Judiciary, the independent decision-making power of the judiciary also comprises “jurisdiction over all issues of a judicial nature and ... exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.”¹⁷ This rule of judicial autonomy in the determination of questions of competence is well established at both the national and international levels and can also be found in article 36(6) of the Statute of the International Court of Justice, and, as relevant to the European Court of Human Rights, in article 32(2) of the European Convention on Human Rights.¹⁸

In Sudan jurisdictional competence is not only hindered by institutional laws, but also by other legislation that encroaches upon the judiciary’s independence and jurisdictional competence. For example, under Article 58 of the Criminal Procedures Act 1991, the Minister of Justice has the right to interfere in judicial proceedings and stay or dismiss any criminal proceedings. This Article stipulates: “the Minister of Justice may *at any time* after the completion of inquiry and before passing of a preliminary judgment, take a grounded decision to stay the suit, and *his decision shall be final* and shall not be contested; the court shall thereby stay the proceedings and terminate the suit’. This Article violates Principle 4 of the Basic Principles on the Independence of the Judiciary, according to which: “There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision.”¹⁹ It also violates the fair trial

¹⁶ See Hamid, Mohamed Khalifa, *The Independence of the Judicial Authority: Texts and Reality* (2011), ISBN 152/2011 (Arabic), p. 104.

¹⁷ See Human Rights in the Administration of Justice: *A Manual on Human Rights for Judges, Prosecutors and Lawyers*, 121. Office of the High Commissioner for Human Rights, Geneva, 2003.

¹⁷ Id.

¹⁸ Id.

¹⁹ This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law. It is not clear whether executive amnesties and

standards outlined in Article 14 of the ICCPR as well as the right to litigation provided for in Article 35 of the INC 2005.²⁰

The Minister of Justice's discretionary powers to 'stay' pre-trial proceedings are vulnerable to abuse. These powers have generated some debates among judges and within the legal profession. It has been argued that the Chief Justice's decisions are quasi-judicial according to Article 58 of the Criminal Procedures Act 1991 while others see that his decisions are administrative and subject to judicial review, and can be characterized as decisions taken by the executive branches of government.

On 13 June 2010, the Constitutional Court issued a decision in response to a petition by the former Minister of Justice Abdelbasit Sabdrat in 2009 about the nature of decisions issued by the Minister regarding the proceedings of criminal suits in the pre trial stage (including the authority to stay the criminal procedures in accordance to article 58 of the Criminal Procedures Act 1991). The main question in this case is whether his powers can be regarded as having judicial or administrative nature. The petition also involved the interpretation of Article 133 of the INC regarding the powers of the Minister of Justice and the General Prosecution Office.²¹ The Minister claimed that various judicial precedents established that the decisions of the Minister in criminal issues are of a judicial nature and should be final. Further, the petition, claimed that since such decisions are issued based on a constitutional provision through Article 133 of the INC and the Criminal Procedures Act 1991, it is not possible to challenge them before any court. The Court ruled that the decisions of the Minister in relation to the pre-trial procedures are unchallengeable before any

pardons would be contrary to Principle 4, but Governments must exercise considerable care in resorting to such measures, so that any measures of clemency do not subvert the independent decision-making power of the Judiciary, thereby undermining the rule of law and true respect for human rights standards'. See Human Rights in the Administration of Justice: *A Manual on Human Rights for Judges, Prosecutors and Lawyers*, 121.

²⁰ Article 35 of the INC 2005 reads: 'the right to litigation shall be guaranteed for all persons; no person shall be denied the right to resort to justice'.

²¹ Article 133 of the Constitution stipulates that "Minister of Justice represent state in public prosecution, litigation and adjudication, and conduct pre-trial proceedings. He is the chief legal advisor of the national government and is the prosecuting authority at the national and northern states level

court or before the Constitutional Court unless the decision somehow violates a constitutional right.²²

The Constitutional Court's decision on this issue not only violates Sudan's international human rights obligations to observe the right to litigation but also the Article 78 of the INC, which provides for means of contest against acts of national Ministers either before the Constitutional Court on cases of violation of the constitution, Bill of Rights, CPA and decentralized system of governance, or before courts of law or competent authority on allegations based on other legal grounds. This provision does not exclude the acts of the Minister of Justice from this rule. Judicial precedence in Sudan differs in the classification of the decisions of the Minister of Justice in pre-trial proceedings. Early precedence established that such decisions are challengeable if it is implied that the Minister has exceeded his authorities, while recent precedence established that the decisions are final.²³

Although the court ruled that the Minister's decisions are unchallengeable, it did not address the second issue regarding the nature of the Minister's decisions, whether they are judicial or administrative, which is crucial to the correct application of Article 78 of the INC. Furthermore, the court's decision did not address the question of what other means of challenge can be taken by those adversely affected by the decisions of the Minister in the pre-trial proceedings. The Chief of the Court stressed that the constitution and legislators deliberately did not provide any means of further challenge with the intention to end the criminal proceedings at this stage.²⁴

The above case also raises critical issues related to the principle of the separation of powers and whether the Sudan judiciary is truly immune from interference from the executive branches of government. Generally, the independence of the judiciary is rooted in a firm commitment to the separation of powers in a democratic society. In the context of this principle, different organs of the state should have exclusive and specific responsibilities. The judiciary as an institution, and judges as individuals, must have the exclusive power to decide cases before them. The independence of

²² Constitutional Court Decision, Powers of the Minister of Justice During Pre-trial proceedings, 13/06/2010.

²³ Id.

²⁴ Id.

the judiciary should be guaranteed by the state, enshrined in law and respected by all governmental institutions.²⁵ States should ensure that there are structural and functional safeguards against political or other interference in the administration of justice.²⁶ The independence of the judiciary shall be guaranteed by the state and enshrined in the Constitution or the law of the country. Therefore, it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

The independence of the judiciary requires it to have exclusive jurisdiction over all issues of a judicial nature. This means that court decisions may not be changed by a non-judicial authority to the detriment of one of the parties, except for issues relating to mitigation, the commutation of sentences and pardons.²⁷ The independence of the judiciary also requires that the officials responsible for the administration of justice are completely autonomous from those responsible for prosecutions. If one closely scrutinizes Sudan's criminal justice system, it becomes apparent that the Minister of Justice acts as the Minister of Justice and the Public Prosecutor simultaneously. Until the 1990s, the Ministry of Justice had limited powers and prosecution issues were within the exclusive jurisdiction of the judiciary. Although some legal scholars have argued that this old system was problematic. In it judges had a multiplicity of responsibilities, acting as judges and also supervising criminal prosecution and investigation procedures.²⁸ This system was reformed during the 1990s giving the Minister of Justice additional powers of prosecution. The current system is highly problematic as it is important that the Office of Prosecutor shall be strictly separated from judicial functions in order to ensure the proper separation of powers.²⁹ Principle 3 of the Basic Principles on the Independence of the Judiciary supports this division indicating that “the judiciary shall have jurisdiction over all issues of a judicial nature

²⁵ See *Amnesty International Fair Trials Manual*, Amnesty International Publications, 1989, p.89; and Principle 1 of the Basic Principles on the Independence of the Judiciary.

²⁶ *Amnesty International Fair Trials Manual*, Amnesty International Publications, 1989, p.89

²⁷ Principles 3 and 4 of the Basic Principles on the Independence of the Judiciary.

²⁸ See El Naim, Abudullahi, *The Many Hats of the Sudanese Magistrate, the Role Conflict in the Criminal Procedures Act*, *Journal of African Law*, 1978.

²⁹ See Guideline 10 of the Guidelines on the Role of Prosecutors; *Amnesty International Fair Trials Manual*, p. 90.

and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.”³⁰

2.6 Judicial Administration and Special Courts

The judiciary should have the power to administer its own operations. This administration includes the assignment of cases to judges within the court to which they belong. Decisions about which court should hear each case should be made by the judiciary and based on objective factors.³¹

The researchers conducting this study found it difficult to locate concrete evidence that allocation of cases is influenced by interference from the executive branches of government, in particular, cases involving human rights violations. However, the researchers concluded that many prominent cases that involved human rights violations were actually administered through special courts.³² Thus, the issues of concern are not only how cases are allocated and how judges for each case are selected, but include the operation of the system of special courts in terms of their establishment, procedures, jurisdiction and, independence.

The 'mushrooming' of these courts (police courts, security, army, terrorism courts, Public order courts etc...) interferes with judicial administration and competence. As a result, the judiciary is precluded from examining cases involving officials from the police, army and national security. The system of special courts also violates cardinal legal principles such as equality before the law and equality before the courts as all citizens are not treated equally in special courts, particularly vulnerable are members of marginalized groups and women. The best example of the problematic nature of the special courts system manifests in the implementation of the Combating Terrorism Act of 2000. Under this Act, cases of alleged terrorism are not subject to trial before ordinary courts, but are subject to the exclusive jurisdiction of special courts established by the Chief Justice. The rules of procedure of these courts are established by the Chief Justice in consultation with the Minister of

³⁰ *Amnesty International Fair Trials Manual*, p. 90.

³¹ Principle 14 of the Basic Principles on the Independence of the Judiciary.

³² See for example, *Kamal Mohamed Saboun v Government of the Sudan*, Constitutional Court, 60/2008.

Justice. The latter is a member of the executive whose participation in the establishment of trial courts is a flagrant violation of the principles of the independence of the judiciary and of the separation of powers. The Act further enables the Chief Justice to establish a 'Special Court of Appeal', in flagrant violation of the provisions of the Criminal Procedures Act 1991 under which there is a standing Court of Appeal.³³

2.7 Financial Independence

As supported by Principle 7 of the Basic Principles on the Independence of the judiciary, the judiciary must be granted sufficient funds to properly perform its functions. Without adequate funds, the Judiciary will not only be unable to perform its functions efficiently, but may also become vulnerable to outside pressures and corruption.³⁴ Moreover, there must logically be some kind of judicial involvement in the preparation of court budgets in order to ensure representative and realistic budgets. However, when it comes to administrative and financial issues, independence may not always be total, given that the three branches of government, although in principle independent of each other, are also by nature in some respects dependent on each other, for instance with respect to the appropriation of resources.³⁵ While this inherent tension is likely inevitable in a system based on the separation of powers, it is essential that in situations where, for instance, Parliament controls the budget of the judiciary, this power is not used to undermine the efficient functioning of the latter.

One of the strongest aspects of the management of Sudan's judiciary is that it has its own separate budget. Article 8 (3) of the Judicial Authority act 1406 states that 'the

³³ The case of *Kamal Mohamed Saboun v Government of the Sudan*, Constitutional Court, 60/2008 concerns the raid by the Darfur Rebel forces of JEM on the city of Omdurman. The Chief Justice and the Minister of Justice formulated rules and procedures of trials courts in a flagrant violation of the principles of the independence of the judiciary. These rules reduced the period of appeals to the appeal courts from two weeks to one week; reduction confirmation of sentence from two stages (court of appeal and the Supreme Court) to that of the Special Court of Appeal; trial in absentia; See Medani, A. 'A legacy of Institutionalized Repression: Criminal Law and Justice in Sudan', in Oette ed., above, note 8 at 79-81

³⁴ Human Rights in the Administration of Justice: *A Manual on Human Rights for Judges, Prosecutors and Lawyers*, 121. Office of the High Commissioner for Human Rights, Geneva, 2003.

³⁵ *Id.*

judicial authority shall have its independent financial budget which shall be decided by the Head of the State in accordance to a recommendation from the High Judicial Council'. The National Judicial Service Commission also provides under the National Judicial Commission Act of 2005 that the Commission shall have its own independent budget. Article 8 of the Act provides that "the Commission shall have an independent budget, to be approved by a decision of the President of the Republic, upon recommendation of the Commission." Also, the National Judicial Service Commission (Conduct of Business) Regulations of 2006 provide that the Commission shall issue its recommendations with the budget proposal presented to it by the Secretary General. Article 14 also provides that one of the powers of the Secretary General of the Commission is to prepare proposals of the annual budget of the Commission. Article 17 (1) further provides that "the Commission shall have an independent budget, to be prepared by the Secretary General, in accordance with the financial regulations, and submit the same to the commission, before the end of every financial year, to make recommendations with respect thereto, and submit it to the President of the Republic for approval."

3. APPOINTMENT AND SELECTION OF JUDGES

In order to safeguard the independence and competence of the judiciary, there are international standards relating to the selection of judges and their conditions of employment. Many of these standards are articulated in the Basic Principles on the Independence of the Judiciary, which require that Judges be selected on the basis of their legal training, experience and proper qualification.³⁶ Promotion of judges should be based on objective factors, particularly ability, integrity and experience.³⁷ States must provide adequate resources to enable the judiciary to perform its functions, and to ensure adequate salaries and pensions for judges. Finally judges' terms of office, conditions of service, retirement age, pensions, and adequate remuneration are all to be secured by law.³⁸

During the 1990s, the UN Human Rights Committee expressed concern that the judiciary in Sudan was neither independent in fact or appearance. It found that many

³⁶ Principle 10 of the Basic Principles on the Independence of the Judiciary.

³⁷ *id.* Principle 13.

³⁸ Principles 7 and 11 of the Basic Principles on the Independence of the Judiciary.

judges were selected on the basis of something other than their legal qualifications, that very few non-Muslims or women occupied judicial positions and that judges could be subjected to pressure by a supervisory authority dominated by the government.³⁹ From 1989 until the signing of the Comprehensive Peace Agreement, the practice of the selection of Sudanese judges discriminated against women, as there was an undeclared policy to refrain from appointing women judges. This practice violated Principle 10 of the Basic Principles on the Independence of the Judiciary, which states “in the selection of judges, there shall be no discrimination against a person on the grounds of race, color, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.”

Unfortunately, during the CPA Interim period, no concrete steps seem to have been taken to ensure judicial independence and to rectify the *status quo* although both the CPA and the INC provide for ambitious principles of preserving an independent judicial system. Furthermore, the very same cadres of judges that were present in 2005 continue to fill all the judicial posts.⁴⁰ None of the hundreds of judges that were arbitrarily dismissed following the military coup d'etat of 1989 have been reinstated.

In order to ensure the independence of the judiciary, judges should have security of tenure, to insulate them from concern that their post will be affected by political reaction to their decisions. Whether appointed or elected, judges should have guaranteed tenure until they reach the age of mandatory retirement, or if they have a term of office, until its expiry. Judges should only be suspended or removed from office if they are incapable of carrying out their duties, or for conduct incompatible with their office.⁴¹ In an ideal system, judges may be subjected to disciplinary procedures and sanctions for misconduct, including suspension and removal. However, all disciplinary, suspension or removal proceedings should be determined in accordance with established standards of judicial conduct.⁴² Decisions in

³⁹ Concluding Observations of the HRC: Sudan, *UN Doc.CCPR/C/79/Add.85*, 19 November 1997, para.21.

⁴⁰ Medani, A. 'A legacy of Institutionalized Repression: Criminal Law and Justice in Sudan', above note 8 at p. 86.

⁴¹ Principles 12 and 18 of the Basic Principles on the Independence of the Judiciary

⁴² *Id.* Principle 19:

disciplinary, suspension or removal proceedings should be subject to an independent review.⁴³ The state may also be liable to pay compensation for judicial misconduct. However, judges should enjoy personal immunity from civil suits for damages for improper acts or omissions in the exercise of their judicial functions. Complaints made against judges in their judicial capacity should be processed expeditiously and fairly in the course of fair hearings.⁴⁴

4. JUDICIARY OVERSIGHT OVER THE ADMINISTRATION OF JUSTICE

Due process rights such as the right to a fair trial, the right not to be subjected to torture/ill-treatment, the right to adequate time and facilities to prepare a defense, and the right not to be compelled to confess one's guilt are all enshrined in the INC, the ICCPR and other human rights treaties ratified by Sudan. However, due process rights are violated often in Sudan. Practice indicates that many accused persons have been compelled to confess guilt. When these persons appear before courts, they retract their confession and courts tend to ignore these retractions.⁴⁵ This type of violation is actually facilitated by the fact that the Evidence Act of 1993 does not outlaw evidence obtained through illegal or unlawful means. Article 10 (1) (Evidence obtained by unlawful means) provides that "Without prejudice to the provisions on

⁴³ Id. Principle 20.

⁴⁴ Id. Principles 16, 17, 19 and 20.

⁴⁵ The Working Group on Arbitrary Detention, mandated by the UN Human Rights Council to investigate allegations of arbitrary detention around the globe, issued a legal opinion in November 2008 in which it raised serious questions about the fairness of the trial of the accused persons who belong to the Fur tribe of the Darfur region of Sudan and for being accused of having committed the murder of newspaper editor Mohamed Taha Mohamed Ahmed. "No judicial system, and in particular, the judicial system of a country that ratified the International Covenant on Civil and Political Rights on 18 March 1986, can consider as valid a confession obtained under torture and revoked before a court, and a sentence based on such confession," the Working Group stated in its opinion. A statement was also issued later on 19 April 2009 on the execution of the defendants who were found guilty of having committed the murder. The defendants were held in detention for up to four months without contact with the outside world and still bore visible signs of torture when they appeared in court. The Statement was issued by the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Ms. Manuela Carmena Castrillo, the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Philip Alston, the Special Rapporteur on the independence of judges and lawyers, Mr. Leandro Despouy, the Special Rapporteur on the situation of human rights in the Sudan, Dr. Sima Samar, and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak. See statement 'Five United Nations human rights experts strongly condemn the execution of nine men following an unfair trial in Sudan'. <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9245&LangID=E> accessed on 6 January 2012.

the inadmissible evidence, evidence shall not be rejected merely because it has been obtained by unlawful means whenever the Court is satisfied with the genuineness of its substance.”⁴⁶ However, the Court may reject the evidence if it violates the principles of *Sharia* Law, law, justice or public order.⁴⁷ This example indicates that Sudanese laws prioritize adherence to Islamic laws and observance of public order over the application of international human rights standards, in terms of sources of law. International human rights law dictates that the use of evidence and confessions obtained by torture is unlawful and should be expressly prohibited by national law.

It is important to note in this context that the UN Human Rights Committee has stated that “it is important for the discouragement of violations under article 7 [of the International Covenant] *that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.*” Judges have a legal duty under international human rights law to order investigations into allegations of violations of due process rights or torture.⁴⁸ The UN Human Rights Committee also emphasized that “judges should have authority to consider any allegations made of violations of the rights of the accused during any stage of the prosecution.”⁴⁹ Similarly, prosecutors shall refuse evidence that has been obtained by recourse to unlawful methods.⁵⁰ Both judges and prosecutors in Sudan should pay attention to any sign of unlawful compulsion related

⁴⁶ Article 10 (2) however provides that 'a court may, whenever it deems it appropriate to achieve justice, not institute conviction by virtue of the evidence mentioned in sub-section (1) unless it is supported by further evidence'.

⁴⁷ Article 9 (1) (Rejection of evidence).

⁴⁸ See article 14(3)(g) of the ICCPR “in the determination of any criminal charge against him”, every person has the right “not to be compelled to testify against himself or to confess guilt”; article 8(2)(g) of the American Convention, everyone has “the right not to be compelled to be a witness against himself or to plead guilty”; article 8(3) “a confession of guilt by the accused shall be valid only if it is made without coercion of any kind”; article 55(1)(a) of the Statute of the International Criminal Court and articles 20(4)(g) and 21(4)(g) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia contain protection against self-incrimination.

⁴⁹ *HRC General Comment No. 13*, paragraph 15.

⁵⁰ Guideline 16 of the Guidelines on the Role of Prosecutors. See also *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* 283 Chapter 7 • *The Right to a Fair Trial: Part II – From Trial to Final Judgment*

to confessions should refrain from using confessions obtained in this manner against the accused.

Under the INC, courts have the responsibility of upholding constitutional rights of accused person when their human rights are violated. The 1998 Constitution established that the Constitutional Court would stand outside the national judicial hierarchy with no appellate jurisdiction. However the Court does have the responsibility of determining the constitutionality of laws, to hear cases of individual citizens' rights guaranteed by the Constitution, and to rule between different courts on matters of jurisdiction. Researchers conducting this study found that courts do shoulder their constitutional responsibility and investigate allegations of torture and other human rights abuses that do not amount to torture, such as inhuman and degrading treatment and prolonged detention without judicial oversight. These violations are routinely documented in Sudan, and many convictions rely, to some extent, on allegedly forced confessions, sometimes leading to death sentences.⁵¹ National courts and the Constitutional Court must uphold constitutional human rights, or otherwise they *de facto* violate the constitution. There are many documented cases in which the accused persons claimed that they were tortured and ill-treated during prolonged detention and that their confessions were extracted while they were being tortured.⁵² Sudan's criminal courts routinely fail to order investigations into defendants' claims before the courts that they were tortured in order to extract their confession, and often refuse to grant independent medical examinations as requested by the defendants' lawyers.⁵³

5. COURTS IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS LAW

Although Article 27 (3) of the INC provides 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 component of the Bill of Rights, case law and judicial practices indicate that judges in ordinary courts rarely rely on the Bill of

⁵¹ See statement 'Five United Nations human rights experts strongly condemn the execution of nine men following an unfair trial in Sudan', above note 46.

⁵² See Amnesty International Report, *Agents of Fear: The National Security Service in Sudan*, Amnesty International Publications, 2010

⁵³ *Id.*

Rights and international human rights instruments. The judiciary should take into consideration that courts are not only obliged to apply international human rights law but also that these laws should prevail over the application of conflicting Sudanese laws as dictated by the Vienna Convention on the Law of Treaties 1969 and Article 27 (3) of the INC.

The current practice of Sudanese courts, including the Constitutional Court, indicates that the courts have failed to protect constitutional human rights of the Sudanese people.⁵⁴ National courts must consider international law of human rights and its developed jurisprudence and, when interpreting any legislation, courts must promote the spirit, purpose, and objects of the Bill of Rights.

Where there is a conflict between international human rights law and national law, the latter law should prevail. This question requires serious discussion and adoption of judicial guidelines or directives in order to inform judicial practices. Law-makers have the responsibility to clarify the status of human rights law when applied by national courts, and above all, when constitutional human rights conflict with *sharia* law. Unfortunately, neither the Judiciary nor the Chief Justice issued any guidelines, directives or policies (e.g. as in the case of judicial circulars) providing direction on the application of constitutional human rights vis-à-vis national legislation since the signing of the CPA and the adoption of the Bill of Rights. The National Judicial Service Commission has also failed to provide guidance to the judiciary on its policies with regard to protection of human rights of citizens.

6. JUDICIAL CONFIDENCE AND ACCESSABILITY

“Independence of the judiciary is a cornerstone of the rule of law, a prerequisite for engendering trust in justice. This value, which is enshrined in the Interim National Constitution, must be scrupulously protected. If Sudan’s judges are not perceived as being outside of the direct or indirect influence of the Government, then Sudanese will continue to be sceptical of the justice system, and it will not work. The prevailing lack of confidence in justice among many is a consequence of the steps the

⁵⁴ I.e. See Constitutional Court decisions, above, note 1.

Government has taken, or failed to undertake, with respect to the justice system. Time and again, the Panel was told during its consultations that many of Sudan's trained and experienced judges had been forced to leave their country and now served elsewhere, especially in the Gulf States. Others were forced out of their jobs but remained in the country. For many in Sudan, these exiled judges, and their colleagues who stayed in Sudan, are a reminder of a compromised judicial system. However, the Panel believes that these former judges should now be regarded as a potential legal resource for the reinvigoration of the justice system in Sudan..... Such events have contributed to the loss of confidence in the justice system. Justice for the past cannot be credible if injustices continue to be a feature of the present situation."⁵⁵

The highly respected AU High Level Panel on Darfur chaired by President Thabo Mbeki highlighted the failures of the Sudanese judiciary and the impact these failings have on public confidence in the justice system in Sudan. As result of the AUPD report, international governmental organizations such as the United Nations and the African Union made some specific recommendations as to how to enhance judicial accessibility, victims' confidence in the system, and its ability to redress violations. The AUPD report concluded that the status of the legal system must be rectified urgently, and within the context of achieving a negotiated peace.⁵⁶ The Panel emphasised that the burden of justice for the crimes committed in Darfur falls on the national system, not the ICC, and that Sudan cannot continue to reject the intervention of the ICC while simultaneously shirking its own duty to address the crimes committed in Darfur.⁵⁷ The Panel gave priority to the strengthening of Sudan's national legal system in order to enable it to appropriately deal with the perpetrators of the violations, and to make reparations to the victims inside Sudan. However to date, the perpetrators of serious crimes in Darfur remain unpunished and the needs for healing and reconciliation remain largely unmet.⁵⁸ As a result of the

⁵⁵ The Quest for Peace, Justice and Reconciliation, Report of the African Union-High Level Panel on Darfur (AUPD), October 2009, paragraph 206.

⁵⁶ The Quest for Peace, Justice and Reconciliation, Report of the African Union-High Level Panel on Darfur (AUPD), October 2009

⁵⁷ *Id.*

⁵⁸ *Id.* paragraph 17.

failings of the State in dealing with the grave situation in Darfur, faith in the criminal justice system has been severely eroded. To restore confidence and prevent impunity, systematic and comprehensive change will be required.⁵⁹

Although the Government of Sudan took steps to amend its Criminal Act of 1991 and the Armed Forces Act of 2007 to incorporate international crimes, Sudanese legislation still provides for the immunity of the police and armed forces for crimes committed in the course of their duties. “These obstacles to justice must be removed *and the judiciary of Sudan needs to regain its credibility and esteem in the eyes of the people of Darfur and nationally.*”⁶⁰ In this respect, the Panel identified major obstacles to justice such as the failure to reform the judiciary and a lack of sufficient qualified personnel in the judiciary, and the absence of respect for the rule of law. In order to address these failings the Panel recommended that the following steps be taken: judicial reforms that will lead to an autonomous and impartial judiciary, investigations of human rights abuses, the prosecution of individuals suspected of crimes by competent and independent courts which would accord them fair trials, the adoption of new approaches and techniques to adapt and strengthen the old justice and reconciliation structures which have become weak or overtly political.⁶¹

7. RECOMMENDATIONS

Law Reform

1. The performance of the judiciary and its independence is limited by the existing legal framework, particularly those laws relating to the criminal justice system. The Government of Sudan must take a series of measures with the stated aim of improving the workings of the criminal justice system. It should introduce new judicial and prosecutorial measures, as well as substantive laws (including criminal and security laws) to ensure that administration of justice as well as rule of law requirements are all provided for in the justice system.

⁵⁹ Id. paragraph 18.

⁶⁰ Id. paragraph 19. (emphasis added).

⁶¹ Id. Paragraph 2001.

2. Any law reform process should consider the incorporation of all substantive and procedural standards and guarantees of the administration of justice provided for in Article 14 of the ICCPR on fair trial and Article 9 of the ICCPR related to liberty and security of persons. The incorporation of these standards and guarantees, both in law and judicial practice is essential in order to address the serious violations of human rights such as torture, incommunicado detention, and the failure to provide the accused with defence counsel that occur in the course of the administration of justice process in Sudan.
3. The laws creating the National Judicial Service Commission and the Constitutional Court must be amended to ensure that there are structural and functional safeguards against political or other interference in the judicial work and autonomy.
4. The Ministry of Justice should be separated from the office of the Attorney General and criminal prosecutions in order to remove the conflict in his powers as a representative of the state prosecution and his power to terminate legal proceedings. The judiciary should have jurisdiction over all issues of a judicial nature and exclusive authority to decide cases submitted for its decision within its competence as defined by law.
5. The Interim National Constitution is unfortunately constantly violated by national laws and has lost some of its relevance as a constitutional document. In order to address this, the Criminal Procedures Act of 1991, the National Security Act of 2010 and the Police Act of 2008 should be reformed in order to align with the INC and international human rights standards.

Institutional Reform

6. The judiciary as an institution must be reformed. The experience of the National Judicial Service Commission, which replaced the High Judicial Council, should be revisited as the National Judicial Service Commission has failed to institute the required institutional reform or play an effective oversight role to ensure the independence of the judiciary. The National Judicial Service Commission Act should be amended in order to bring about genuine reform of the judiciary in terms of its operational independence and promotion of the rule of law and human rights standards and principles. These principles shall be regarded as cardinal principles that guide the work of the judiciary.

Courts Implementation of Human Rights Law

7. Sudanese judges rarely rely on the Bill of Rights of the INC or international human rights instruments ratified by the Sudan. They only apply national law, particularly in cases in which a defendant raises human rights concerns, such as allegations of torture, inhuman and degrading treatment and/or incommunicado detention. The Chief Justice should issue clear policies and directives to guide judges when applying the law in this context. Clear judicial policies and directives should be adopted to guide judges when applying the law.

Technical Support to the judiciary

8. The Sudanese judiciary requires technical support in order to educate judges about international human rights law and its jurisprudence developed by international and regional human rights courts. Sudanese academic institutions can assist in this regard by providing formal training to judges through targeted programs focusing specifically on the role of judges on the protection of human rights and promotion of the rule of law. The assistance of international

organizations in these types of training, including the UN Office of the High Commissioner for Human Rights would be valuable.

9. Legislators should clarify the status of human rights law and its relevance to national courts and the legal status of national laws vis-a-vis international human rights treaties to which Sudan is a party. Legislation should give direction to judges when interpreting and applying human rights law in their courts.

The upcoming constitutional Review

10. The constitutional review process and its outcomes must ensure full respect for the independence of the Sudanese judiciary. This can be achieved through the implementation of legal and institutional reform outlined as part of the above recommendations. A new Constitution should create the required institutional mechanisms to prevent interference from the executive branches of government in the work of the judiciary in order to ensure operational independence and autonomy of the judiciary.