

TABLE OF CONTENTS

Foundations and sources of legislation	2
Bill of Rights	2
1) The right not to be tortured.....	3
2) The right to Fair Trial (Article 34)	3
3) Rights limited to “citizens”	4
4) The Death Penalty	4
5) Freedom of expression, association and assembly	5
“Unenforceable” Rights? - the Rights of Women and Children.....	6
Economic, social and cultural rights	7
Immunities	7
The National Human Rights Commission	8
Reparation for Victims of Human Rights Violations	8
The State of Emergency	8
Conclusion	9

SUDAN

Memorandum to the National Constitutional Review Commission

Amnesty International welcomes the drafting of a new interim constitution for Sudan, as an opportunity to provide a better constitutional framework for the protection of human rights than the previous Constitution of Sudan of 1998. Amnesty International is presenting this memorandum to the National Constitutional Review Committee (NCRC), in charge of finalising the Draft Interim Constitution, in the hope that its comments and recommendations to improve the human rights provisions of the text will be debated and incorporated.

The Draft Interim Constitution¹ is based on the 9 January 2005 Comprehensive Peace Agreement (CPA), comprising the seven protocols and agreements reached between the Government of Sudan (GoS) and the Sudan People's Liberation Army/Movement (SPLA/M) between July 2002 and December 2004. According to Article 225(1), the Comprehensive Peace Agreement is "*deemed to have been duly incorporated in its entirety in this Constitution*" and "*The provisions of the Comprehensive Peace Agreement which are not expressly incorporated herein shall be considered as part of this Constitution.*" In particular, the Power-Sharing Protocol, agreed in May and signed on 5 June 2004, forms the basis of the relationship between government institutions, and contains the Bill of Rights which is included in the constitution.

Over the past two years there have been a number of conferences and debates on the future Sudanese Constitution in light of the expected peace accords and the armed conflict which preceded them. Conferences organized by non-governmental organisations such as Justice Africa and the Cairo Institute for Human Rights Studies, including Sudanese and international lawyers and jurists, were held in Nairobi, Kenya and Entebbe, Uganda. However, it is not clear to what extent these conferences were able to provide input into the current Draft Interim Constitution. A draft interim constitution proposed and made public by the Max Planck Institute of Heidelberg, Germany, in February 2005 was apparently rejected by the GoS and the SPLM.

The current Draft Interim Constitution was drafted by a panel of 14, composed of seven members nominated by the GoS and seven by the SPLM. This draft is now being discussed by the National Constitutional Review Committee (NCRC)².

The Draft Interim Constitution which is at present being discussed by the National Constitutional Review Committee is dated 16 March 2005, but it was not, apparently, made public until May 2005. It contains 16 parts and 227 articles and will come into effect on 9 July 2005, when according to the CPA the interim period is scheduled to begin.³

This memorandum is not an exhaustive analysis of the Draft Interim Constitution. It presents some of Amnesty International's concerns and recommendations to improve human rights provisions in the Draft. The Interim Constitution itself will not be sufficient to prevent human

¹ The Draft Interim Constitution is available online in English at: http://www.sudantribune.com/article.php3?id_article=9417.

² The representation in the NCRC was laid down by the Power-Sharing Agreement: 52% to the National Congress Party (NCP); 28% to the SPLA; 14% to "other Northern political forces" and 6% to "other Southern political forces". However some political opposition forces objected to the percentage divisions laid down in the agreement and refused to join the NCRC. Amnesty International raised concerns at the failure to include civil society as a participant in discussions leading to the CPA; at present there is no feeling of ownership of the CPA neither by opposition groups nor by most of Sudanese civil society.

³ Article 227 contains seven schedules on the respective powers of the central and southern governments and the means to resolve conflicts in respect of these.

rights violations; however, strong constitutional guarantees for the respect, protection and promotion of human rights, would be a powerful tool to prevent further human rights abuses in Sudan and usher a new era for the protection of the human rights of all in Sudan.

Foundations and sources of legislation

Amnesty International welcomes the fact that Article 1 of the Draft Interim Constitution places “the advancement of human rights and freedoms” firmly as one of the foundations of the state.

“The Republic of the Sudan is a sovereign, democratic, decentralized, multi-cultural, multi-racial, multi-ethnic, multi-religious, and multi-lingual State; committed to the respect and promotion of human dignity and founded on justice, equality and the advancement of human rights and freedoms. It is an all embracing homeland wherein races and cultures coalesce and religions co-exist in harmony;”

However, this firm commitment is not always reflected in the other provisions, concerning sources of legislation. Article 5 of the Draft states that nationally enacted legislation outside southern Sudan “shall have as its sources Shari’a and the consensus of the people” (Article 5(1)), while in the Southern Sudan it shall have as its sources “popular consensus, the values and customs of the people of the Sudan, including their traditions and beliefs having regard to the Sudan’s diversity” Article 5(2)). This article fails to mention international human rights law among the sources of national legislation and may cause difficulties in interpretation and implementation when legislation based on religion or custom conflicts with human rights rules and standards. According to Article 27 of the Vienna Convention on the Law of Treaties, a state may not invoke the provisions of its internal law as justification for its failure to observe its international obligations.

Amnesty International recommends the NCRC to refer explicitly in Article 5 to Sudan’s international human rights obligations. Religious or customary law cannot be invoked as justification for Sudan’s failure to observe its international human rights obligations.

Bill of Rights

Articles 27 to 48 of the Draft constitute a Bill of Rights. According to article 27 of the Draft,

“This Bill of Rights is a covenant between the Sudanese people and between them and their governments at every level and also a commitment to respect and promote the human rights and fundamental freedoms enshrined in this Constitution; it is the cornerstone of social justice, equality and democracy in the Sudan; the State shall guarantee, protect, and fulfil this Bill; all rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of Sudan shall be an integral part of this Bill”;

Amnesty International particularly welcomes the part of this provision that ensures that human rights instruments ratified by Sudan shall be an integral part of the Bill of Rights.⁴ In particular, like any other part of the Bill of Rights, human rights instruments ratified by Sudan should be directly enforceable in a Sudanese court of law as constitutional provisions.

⁴ Sudan is a state party to the International Covenant on Civil and Political Rights (accession on 18 March 1986); the International Covenant on Economic, Social and Cultural Rights (accession on 18 March 1986); the International Convention on the Elimination of All Forms of Racial Discrimination (accession on 21 March 1977); the Convention on the Rights of the Child (ratification on 3 August 1990); the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (accession on 2 November 2004); and the African Charter on Human and People’s Rights (accession on 18 February 1986).

Article 27 of the Draft should be amended to clearly state that the international human rights instruments ratified by Sudan are directly enforceable in a Sudanese court of law as having the same force as the constitutional provisions of the Bill of Rights.

The Bill of Rights includes some explicit human rights guarantees: the right to life; the right to liberty and security of person; the right not to be held in slavery or servitude; the right to equality before the law; the right not to be subjected to torture or ill-treatment; the right to a fair trial; equal rights of men and women; the right to education; the right to privacy; the right to property; the right to freedom of conscience and religion; the right to freedom of assembly and association. Sudan authorities must ensure that these guarantees are effectively implemented, correctly interpreted and consistently enforced.

However, Amnesty International is concerned that the Draft does not mention, or gives a narrow definition of, other human rights, thus opening the door to possible future problems in the implementation, interpretation and enforcement of Sudan's international human rights obligations.

1) The right not to be tortured

Amnesty International welcomes the commitment under Article 33 that:

“No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment”.

Detainees continue to be routinely tortured and ill-treated in Sudan, by members of the police or the National Security forces. Every year, Sudanese people are subjected to floggings as judicial punishments; others are sentenced to amputations or death by stoning, which are cruel, inhuman and degrading punishments under international human rights law. Confessions obtained through torture are used in unfair trials.

Amnesty International recommends that in addition to the prohibition against torture and other forms of ill-treatment in the Draft, the Draft should specifically incorporate those safeguards intended to prevent torture and other forms of ill – treatment which are included in international standards. These include that any complaint of torture or ill-treatment should be promptly and impartially examined by independent civilian judicial authorities. The Draft should also specify that perpetrators of torture will be brought to justice.

2) The right to Fair Trial (Article 34)

Article 34 of the Draft sets out some fair trial guarantees, including the right to be promptly informed of the reasons of the arrest and of any charges, the right to a public trial by a competent, independent and impartial court of law, and the presumption of innocence, the prohibition of prosecution for offences which were not crimes when committed and the right to defend oneself, in person or through counsel.

However, it leaves out many important safeguards explicitly mentioned in articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR). In particular, article 34 of the Draft does not include the right to be brought promptly before a judge, the right to be tried in reasonable time or to be released from detention pending trial (ICCPR, article 9(3)); the right to challenge the lawfulness of the detention before a court (ICCPR, article 9(4)); the right to reparation for unlawful arrest or detention (ICCPR, article 9(5)); and the right to appeal against conviction to a higher tribunal (ICCPR, article 14(5)). Moreover, the article guarantees the right to legal assistance only during the trial, while the right to the assistance of a lawyer is established under international law at all stages of criminal proceedings, including interrogations.

Amnesty International recommends that the NCRC strengthens Article 34 of the Draft Interim Constitution to include all the fair trial safeguards established under international human rights law.

3) Rights limited to “citizens”

Certain rights appear to be restricted to “citizens” rather than being recognised to all persons.

This is the case, for instance, of the right to privacy, under article 37 of the Draft,⁵ of the right to freedom of expression and information (article 39)⁶ and of the right to freedom of movement (article 42)⁷. The right to education (article 44), and the right to equal access to public health care and basic medical services (article 46) are also restricted to citizens.

Amnesty International believes that such general restrictions constitute a discrimination against non-citizens, prohibited under international law.

Amnesty International recommends that all rights guaranteed under the Interim Constitution apply to all persons, without any discrimination.

4) The Death Penalty

Article 36 of the Draft states that:

“No death penalty shall be inflicted save as retribution or punishment for extremely serious offences in accordance with the law”.

Amnesty International believes that the death penalty should be abolished. It is the ultimate cruel, inhuman and degrading punishment. It violates the right to life. It is irrevocable and can be inflicted on the innocent; moreover, it has never been shown to deter crime more effectively than other punishments. The international trend is towards the abolition of the death penalty; twelve African countries are abolitionist for all crimes including Senegal, which abolished the death penalty in December 2004.

However, if article 36 is maintained in the Draft, pending the revision of the 1991 Penal Code, it is most important that judicial safeguards should be clearly written into the constitution. At the moment, in most of the death penalty cases which have come to the attention of Amnesty International, defendants have been sentenced to death in unfair trials, often without the benefit of a lawyer. These sentences have often been upheld by local courts of appeal but overturned by the Supreme Court of Appeal in Khartoum. It is, therefore, important that article 36 should include the safeguards in article 6 of the ICCPR, including the requirement that: *“This penalty can only be carried out pursuant to a final judgement rendered by a competent court.”*

At the moment the Sudanese Penal Code of 1991 allows the death penalty for a variety of offences, including crimes against the state such as undermining the constitutional system, waging war against the state or espionage, as well as for apostasy and, if married, for sexual intercourse outside marriage. The Human Rights Committee, in its General Comment 6, stated that *“the expression ‘most serious crimes’ must be read restrictively to mean that the death penalty should be a quite exceptional measure”* and paragraph 1 of the UN Safeguards guaranteeing protection of the rights of those facing the Death Penalty, endorsed by the UN General Assembly in 1984, states that crimes punishable by death *“should not go beyond intentional crimes, with lethal or other extremely grave consequences”*.

⁵ *“...the privacy of citizens shall not be violated save with a judicial warrant or in accordance with the law”.*

⁶ *“Every citizen shall have the right to the freedom of expression, reception of information, publication, and access to the press without prejudice to order, safety and public morals as determined by law; “*

⁷ *“Every citizen shall have the right to the freedom of movement and the liberty to choose his/her residence except for reasons of public health and safety as shall be regulated by law”.*

The 1991 Penal Code also allows the death penalty on those under the age of 18 and those over the age of 70 who have committed *hudud* offences.⁸

Amnesty International strongly recommends that Article 36 of the Draft should be amended to abolish the death penalty without exceptions. If Article 36 is maintained, judicial safeguards included in the constitution should include the limitation of the death penalty to crimes with lethal or other extremely grave consequences, strict requirement of fair trials according to international standards, including the right to appeal to a court of higher jurisdiction, and a prohibition on imposing the death penalty on people under the age of 18 at the time of the offence, those over 70, the mentally disabled, pregnant women and new or recent mothers.

5) Freedom of expression, association and assembly

Article 39 of the Draft guarantees the right to freedom of expression and information,⁹ as well as the freedom of the press and other media.

The right to Freedom of expression is not only a right in itself, but it is also a tool for the defence of other human rights. It encompasses freedom of speech, the right to receive, impart and seek information and freedom of the press and other media. Many persons expressing peacefully their beliefs have been detained arbitrarily in Sudan.

Article 40 of the Draft guarantees the right to freedom of association and assembly.

It also regulates the formation of political parties; Article 40 (3) (b) in particular states that:

“No association shall function as a political party at the national level unless it:

(b) has a programme that upholds the Comprehensive Peace Agreement, and conforms to this Constitution”.

Amnesty International is concerned that Article 40 (b) may be interpreted as excluding from registration and political life those groups who debate or criticise provisions of the CPA.

Article 40(b) should be revised to ensure that discussions on the CPA are allowed in Sudanese political life.

Articles 39 and 40, and many other articles in the Draft, stipulate that restrictions to the enjoyment of the right to freedom of expression and information and to the right of association and assembly will be *“determined by law”* or *“regulated by law in a democratic society”*, or *“as is necessary by law in a democratic society”*.

The human rights guarantees in the 1998 Constitution of Sudan were consistently diminished by the restrictions in the Penal Code of 1991, which was not brought in accordance with the constitutional guarantees, or laws passed subsequently to the 1998 Constitution, often consisting of presidential decrees. For instance, the right to freedom of expression has been consistently curtailed under legislation on “crimes against the state” or the Press laws.

⁸ Article 33 of the 1998 Sudan Constitution states that the death penalty should not be imposed for crimes committed by persons below 18, on pregnant or lactating women or those above the age of 70 “unless they have committed crimes of *qisas* or *hudud*”, This last requirement made the first safeguard almost worthless, since *hudud* crimes include murder and burglary over a certain amount, and apostasy, for which, therefore, children and over-70s might be and were executed. In addition, such safeguards in the 1998 Constitution have been consistently ignored.

⁹ Article 39 (1) states: “Every citizen shall have the right to freedom of expression, reception of information, publication, and access to the press without prejudice to order, safety and public morals as determined by law”.

Amnesty International is concerned that the current provision in the Draft allowing restrictions to the enjoyment of the right to freedom of expression and information and to the right of association and assembly “regulated by law in a democratic society” does not offer a sufficient guarantee that human rights will be respected, protected and promoted in their entirety in present or future Sudanese legislation.

Articles 39 and 40 of the Draft should require that restrictions to human rights guarantees, provided by national legislation, comply with international human rights law and standards.

“Unenforceable” Rights? - the Rights of Women and Children

Part II of the Constitution (Guiding Principles and Directives) contains a number of important human rights provisions, including articles on the rights of women and children. However, article 22 specifically states that the articles included in Part II are **not** directly enforceable:

“Unless this Constitution otherwise provides, or a duly enacted law guarantees the rights and liberties described in this Chapter, the provisions contained in this Chapter are not by themselves enforceable in a court of law; however, the principles expressed herein are basic to governance and the State is duty-bound to be guided by them, especially in making laws;”

Amnesty International is seriously concerned about the disregard for children’s and women’s rights in the Draft Constitution.

Articles 13 (Education, Science, Art, Culture and Cultural Heritage), 14 (Children, Youth and Sports), 15 (Family, Women and Marriage) and 19 (Public Health) of the Draft constitution should be directly enforceable in a Sudanese court of law.

Article 14, generally titled “Children, Youth and Sports”, states that:

“The State shall direct policies and provide facilities for youth welfare and ensure that they develop morally and physically; the State shall also protect children from moral and physical abuse and abandonment;” (article 14(1))

and that the state should promote sports for the youth “to develop their potential and enjoy their leisure”. The very narrow formulation of this article falls short of promoting a satisfactory implementation into national legislation of the provisions of the Convention on the Rights of the Child, of which Sudan is a party.

The Draft Interim Constitution should therefore be amended to reflect Sudan’s obligations under the Convention of the Right of the Child.

Article 15 on “Family, Women and Marriage” prohibits forced marriage and provides that the State shall “emancipate women from injustice, promote gender equality and encourage the role of women in family and public life”. However, under article 22 this provision is not by itself enforceable in a court of law and only expresses a basic principle to governance. Notwithstanding the recognition of the principle of non-discrimination between men and women in Article 32,¹⁰ the Draft Constitution fails to satisfactorily guarantee the respect, protection and promotion of the rights of women.

The Interim Constitution should require the State to take positive measures in all fields to ensure the full development and advancement of women, including measures to ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s rights.

¹⁰ Article 32, which is part of the Bill of Rights, states: “*The equal rights of men and women to the enjoyment of all civil and political rights and all social, cultural and economic rights, including the right of equal pay for equal work, shall be ensured*”.

Economic, social and cultural rights

Amnesty International welcomes the recognition of the right to education in Article 44 and the commitment to ensure free primary education for all without discrimination, as well as the recognition in Article 13(1)(b) of the right to establish and maintain educational institutions which accord with parent's religious and philosophical convictions, subject to compliance with standards provided by law. In accordance with international standards, the right to education should be recognised as a right of the whole population.

Amnesty International welcomes the commitment in Article 46 that "all citizens shall have equal access to public health care and basic medical services", however, this does not amount to recognition of the right of all to the highest attainable standard of physical and mental health.

The right to equality between women and men, and the recognition of the right to equal pay for equal work (which the organisation submits should be understood in the light of international standards as the right to equal pay for work of equal value) is welcome. However the draft Bill of Rights does not adequately guarantee other labour rights, recognised by Sudan under various conventions of the International Labour Organisation, as well as in Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹¹

Furthermore, the Draft does not guarantee, among others, the right to adequate food, housing, water and other elements of the right to a decent standard of living as recognised by Sudan under Article 11 of the ICESCR.

Amnesty International recommends that the "Guiding Principles in Respect of Equitable Sharing of Common Wealth" in the Draft include a commitment to the effect that, "the government of Sudan shall take steps, according to the maximum of available resources, including those available through international cooperation and assistance, with a view to achieving progressively the full realisation of [economic, social and cultural rights] [human rights]" which Sudan has committed to under Article 2(1) of the ICESCR.

Regarding housing, land and property restitution, the Interim Constitution should recognise the importance of establishing a transparent, accessible and independent commission to ensure rights to land, housing and property restitution as well as the rights to some security of tenure for all.

Chapter III "Development and Management of the Petroleum Sector", Article 190 (d) – (g) recognises the impact that oil extraction can have on the human rights of the population.

Amnesty International recommends that the draft constitution includes a commitment to undertake a human rights impact assessment of all planned oil extraction, in order to identify, mitigate and remedy all adverse impacts on the human rights of affected people.

Immunities

Article 60 and 92 of the Draft guarantee immunity from prosecution to the President of the Republic and Members of Parliament. Amnesty International is concerned at this immunity from prosecution. Whatever immunity the Head of State or members of Parliament may have under national law with respect to investigation for ordinary crimes, such immunity must not apply to crimes under international law such as war crimes, crimes against humanity and genocide.

¹¹ These articles include the right to work which s/he "freely chooses and accepts"; the right to training; the right to fair wages; safe and healthy working conditions; equal opportunity for promotion; and rest, leisure and reasonable limitation of working hours.

The Draft should be amended to expressly exclude any immunity of national or foreign officials for crimes under international law, such as war crimes, crimes against humanity and genocide.

The National Human Rights Commission

Amnesty International welcomes Article 142, which provides for the promulgation of a Human Rights Commission Act and for the establishment of a Human Rights Commission composed of “*fifteen independent, competent, non-partisan, impartial and representative members*”. According to Article 48 of the Draft, the mandate of the Human Rights Commission will include monitoring the application and enforcement of the Bill of Rights.¹²

While the mandate and procedures of the Human Rights Commission will be further specified in the Human Rights Commission Act, Amnesty International recommends that the Interim Constitution specifies that the **Members of the Human Rights Commission should be representative of the different regions of Sudan and include women.**¹³

Reparation for Victims of Human Rights Violations

The Interim Draft Constitution should guarantee the right to full reparation, including restitution, compensation, satisfaction, rehabilitation and guarantees of non repetition, to all victims of human rights violations.

The Interim Draft Constitution should also guarantee that effective mechanisms, whether judicial or non-judicial, are established to award full reparation to victims of human rights violations.

The State of Emergency

Article 211 of the Draft allows the President of the Republic to suspend part, of all, of the Bill of Rights during a state of emergency.

The Government of Sudan has consistently used a quasi-permanent State of Emergency to restrict the rights of the Sudanese people, in violation of its obligations under Article 4 of the ICCPR and the African Charter on Human and People’s Rights. The Government of Sudan announced that the current state of emergency in the country, extended in December 2004 for six months, would be lifted after the adoption of an Interim Constitution.

Emergency laws have allowed the Sudanese authorities to detain people indefinitely, without charge or trial, to break up peaceful demonstrations and to violate human rights under the pretext of counter-insurgency. Current detainees under the state of emergency include political opponents and prisoners of conscience who have been held, mostly incommunicado, for more than two years without charge or trial.

The African Charter of Human and People’s Rights does not allow derogation of any of its articles during a state of emergency. The Human Rights Committee gave detailed advice

¹² Article 48 of the Draft states that: “[...] *This Bill of human rights and fundamental freedoms shall be upheld, protected, applied and enforced by the Constitutional Court and other competent courts; the Human Rights Commission shall monitor its application and enforcement.*”

¹³ For principles relating to human rights see the Paris Principles relating to the status of national institutions, adopted by UN Commission on Human Rights Resolution 1992/54 (the Paris Principles) and adopted by the General Assembly in its resolution A/RES/48/134 of 20 December 1993. See also Amnesty International’s Proposed Standards for National Human Rights Commissions, January 1993 (AI Index IOR: 40/01/93).

on the proper content of state of emergency legislation in General Comment 29, which is enclosed for information in an Annex to this memorandum.

Article 211 should be amended to ensure its consistency with article 4 of the ICCPR, which states that governments may “take measures derogating from their obligations under the Present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”. Among the non -derogable articles, according to the ICCPR, are the right to life, the prohibition of torture, cruel inhuman or degrading treatment or punishment or slavery; the prohibition on retroactive legislation; and the right to freedom of thought, conscience and religion.

Conclusion

Members of the National Constitutional Review Committee have the important task, on behalf of the Sudanese people, to enshrine in a new Constitution the human rights of all in Sudan, which should provide better protection to the Sudanese and hope for a new era. Amnesty International trusts that they will take into account the comments and recommendations contained in this Memorandum and strengthen safeguards and guarantees for the respect, protection and promotion of the human rights of all in Sudan.

The next challenge for the Sudanese will be to undertake a comprehensive review of existing national laws and practice to ensure that they do not conflict with the human rights safeguards in the new Constitution. Only then will the Sudanese feel confident that peace equals human rights.

Amnesty International would also like to remind the government of Sudan of its promises to lift the current state of emergency and release political prisoners once the Interim Constitution is adopted. The NCRC and the international community should hold the Sudanese government accountable to such promises. This would be the best way to demonstrate commitment to the human rights contained in the Draft Constitution; it will also be the first test of implementation of the spirit of the Interim Constitution.