



Margret Samuel Aru  
 Chairperson, Legislation and Justice Committee  
 National Legislative Assembly  
 Juba, Republic of South Sudan

CC: Members of the National Legislative Assembly

1 February 2016

**Re: Penal Code (Amendment) Bill 2016**

Dear Margret Samuel Aru,

We, the undersigned South Sudanese and international organisations, write to express our support for the National Legislative Assembly (NLA)'s initiative to ensure that South Sudanese legislation makes crimes under international law criminal under national law.

It is well documented that all parties to the conflict in South Sudan have deliberately targeted and killed civilians, committed crimes of sexual violence, destroyed schools and hospitals, stolen civilian property, attacked humanitarian personnel and recruited child soldiers. Such acts amount to war crimes and, in some cases, may also constitute crimes against humanity.

We believe that impunity for crimes under international law and human rights violations and abuses further emboldens perpetrators and contributes to a vicious cycle of violence. Ensuring that national legislation appropriately penalises such crimes is one important step towards accountability. We appreciate the urgency with which the NLA is addressing existing legal gaps.

It is, however, critical that such legislation be subject to broad public and transparent debate. To this end, we respectfully submit the attached views and recommendations on the Penal Code (Amendment) Bill. We also call on your Committee to organise a public hearing on this Bill and to seek additional guidance from experts in international criminal law.

Please note that these suggestions are intended only to offer feedback on the Bill in question and do not constitute a comprehensive assessment of the Penal Code's compliance with international human rights norms and standards.

Sincerely

Amnesty International  
 Community Empowerment for Progress Organization  
 Human Rights Development Organization  
 Soweto Community Based Organization

Assistance Missions for Africa  
 End Impunity Organisation  
 Jonglei Development Agency.  
 South Sudan Law Society

# OBSERVATIONS AND RECOMMENDATIONS ON THE PENAL CODE (AMENDMENT) BILL, 2016

## INTRODUCTION

The definitions of crimes under international law, such as genocide, crimes against humanity and war crimes which are included in the Penal Code (Amendment) Bill (hereinafter “the Bill”), should conform to internationally agreed definitions.<sup>1</sup>

We therefore recommend that the National Legislative Assembly (NLA) consider adopting the definition of genocide contained in the Convention on the Prevention and Punishment of the Crime of Genocide (hereafter “the Genocide Convention”)<sup>2</sup> and in the Rome Statute of the International Criminal Court (ICC) (hereafter “the Rome Statute”),<sup>3</sup> which reflect customary international law. For the definition of crimes against humanity, the NLA should draw inspiration from the definition of crimes against humanity contained in the Rome Statute.<sup>4</sup> For the definition of war crimes, we recommend that the NLA refer to customary international humanitarian law, as documented by the International Committee of the Red Cross (ICRC) in its study on the matter.<sup>5</sup>

Harmonisation of the Bill with international law is particularly important given the prospective establishment of the Hybrid Court for South Sudan (HCSS) by the Transitional Government of National Unity and the African Union (AU), as was agreed by the parties to the conflict in the Agreement on the Resolution of the Crisis in South Sudan (ARCSS). The Statute of this Court will draw on internationally agreed definitions, and may also incorporate crimes under South Sudanese law. It will be ideal for definitions of crimes in the HCSS Statute and the national justice system to be in full harmony.

We call for death to be abrogated as a punishment for the crimes listed in the Bill, as well as for all existing crimes in the Penal Code. The death penalty violates the right to life and is the ultimate cruel,

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<sup>1</sup> Definitions should be as broad as the definitions contained in the Rome Statute, but whenever international treaties (such as Protocol I) or customary law contain stronger definitions than those in the Rome Statute, these definitions should be incorporated into national law.

<sup>2</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 1948, available at: [treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf](https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf).

<sup>3</sup> Rome Statute of the International Criminal Court (ICC), available at: [www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf).

<sup>4</sup> However, the definition of persecution in the Rome Statute does not fully reflect customary international law, since persecution is a separate crime against humanity, independent of the other crimes and, therefore, may occur even in the absence of other crimes - as requested by the Rome Statute. In other words, the organizations rejects the notion that persecution may only be committed in connection with another crime under international law. In addition, the definition of enforced disappearance contained in the Rome Statute also falls short to international customary law. South Sudan should not include the restrictive language in Article 7 of the Rome Statute that defines an enforced disappearance as one requiring the perpetrator have had the double intent to remove a person from the protection of the law and to do so for a prolonged period of time.

<sup>5</sup> J. M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, International Committee of the Red Cross (ICRC), 2005.

inhuman and degrading punishment. In addition, the pervasive challenges to the justice system in South Sudan mean that the state cannot guarantee the right to a fair trial, making imposition of the death penalty a particularly egregious violation of the right to life.

We also propose additional provisions, including on torture, enforced disappearance, command responsibility, the irrelevance of official capacity, the non-applicability of amnesties, pre-conviction pardons and immunities and on important exception to the principle of non-retroactivity.

According to the Bill, genocide, war crimes and crimes against humanity will be inserted into the Penal Code as subsections of the existing section 206 on murder. We are concerned that this may lead to confusion, as these crimes are much broader in scope and may involve acts that do not in fact include murder. We recommend that the NLA consider either incorporating the proposed provisions into a new chapter in the Penal Code on international crimes or creating a new and separate international crimes bill.

## 66A. ESPIONAGE

The definition of the crime of espionage is vague and overly broad. It may undermine the principle of legality and raise the possibility of its use to repress the political opposition, target human rights defenders (HRDs) and harass and intimidate “suspect” religious and/or ethnic groups. It may also be used to clamp down on the legitimate exercise of the freedoms of expression, association, assembly and other human rights.

## 247A. DEFILEMENT OF PERSONS UNDER EIGHTEEN YEARS OF AGE

This section seeks to criminalise sexual conduct with children below the age of 18. However, we are concerned that there are no exceptions in the new section to apply to consensual sexual acts between children. Children should not be criminalised for consensual sexual conduct. In addition, many juvenile justice authorities advocate for an exception to statutory rape laws and similar legislation with regards to consensual sexual activity between persons who are close in age, such as sex between an 18-year-old and a 17-year-old. We recommend that you consider such an exception. We also recommend that you remove the death penalty as a punishment for the crime of defilement.

## 206A. GENOCIDE

### CHANGE “OR” TO “AND”

The definition of genocide under international law, as codified in the Genocide Convention and the Rome Statute, requires both the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, as well as an act in furtherance of that intent.

**Current text:** “Whoever intends to destroy, in whole or in part, a national, ethnical, racial or religious group or skills [sic] members of the group...”

**Recommendation:** “Whoever intends to destroy, in whole or in part, a national, ethnical, racial or religious group **and kills** members of the group (etc.)...”

In addition, as provided for in the Genocide Convention and also under the Rome Statute, conspiracy to commit genocide, direct and public incitement to commit genocide and any attempt to commit genocide should also be punishable under South Sudanese law.

#### CONSIDER EXPANDING THE LIST OF ACTS THAT CAN CONSTITUTE GENOCIDE

The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (hereafter, “Malabo Protocol”)<sup>6</sup> expressly includes ‘acts of rape or any other form of sexual violence’ in addition to the five prohibited acts listed in Article II of the Genocide Convention and Article 5 of the Rome Statute that can constitute genocide. This reflects and builds upon jurisprudence in recent decades, including the ICTR’s judgement in *Akayesu*. In that decision, the court found that rape and sexual violence “constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such.”<sup>7</sup> Of course, there are other non-enumerated acts that may fall with the prohibited acts listed in the Convention, however, Amnesty International considers that it is particularly important for states to follow the Malabo Protocol’s precedent to specifically recognize that rape and sexual violence, which are often ignored, constitute genocide committed with the necessary intent.

**Recommended change:** Add ‘acts of rape or any other form of sexual violence’ to the list of acts that can be committed as an act of genocide.

#### REMOVE DEATH PENALTY

**Recommendation:** Remove the death penalty as a punishment for genocide.

### 206B. CRIMES AGAINST HUMANITY

#### USE THE ROME STATUTE DEFINITION

The definition of crimes against humanity, as codified in Article 7 of the Rome Statute, does not require an individual to “direct” a widespread or systematic attack against any civilian population. It rather requires that a person commit an act, even a single act, that is part of a widespread or systematic attack directed against any civilian population.

The Rome Statute further defines an “attack directed against any civilian population” to mean “a course of conduct involving the multiple commission of acts...against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack.”

**Current text:** “Whoever directs widespread or systematic attack against any civilian population, with intent of killing...”

**Recommendation:** “Whoever commits an act of...as part of a widespread or systematic attack directed against any civilian population...”

#### REMOVE DEATH PENALTY

**Recommendation:** Remove the death penalty as a punishment for crimes against humanity.

### 206C. WAR CRIMES

South Sudan’s Geneva Conventions Act of 2012 defines war crimes as grave and other breaches of the Geneva Conventions and include applicable penalties for such breaches. We encourage legislators to

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<sup>6</sup> While the Malabo Protocol is not yet in force, it’s content reflects the views of the African Union with respect to definitions of genocide, war crimes and crimes against humanity.

<sup>7</sup> International Criminal Court for Rwanda, Prosecutor v. Akayesu, Judgment, Case No. ICTR-96-4-A, Trial Chamber I, 2 September 1998, para. 731.

adequately analyse the relationship between the proposed amendment to the Penal Code and the pre-existing provisions in the Geneva Conventions Act.

While we welcome the effort to provide a detailed enumeration of acts constituting war crimes, the list of war crimes contained in the amendment is incomplete. We are concerned that the definition in the Bill fails to reflect international law and will prevent successful investigation and prosecution of war crimes in the country.

**Recommendation:** We recommend that the NLA incorporate the definition of war crimes as outlined by the ICRC in its study on customary international humanitarian law.<sup>8</sup>

### ADDITIONAL PROVISION: TORTURE

South Sudan completed accession to the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (hereafter, "Convention against Torture")<sup>9</sup> on 30 April 2015. The Convention against Torture defines torture 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."<sup>10</sup> As a state party to the Convention against Torture, South Sudan is required to criminalise torture and provide for appropriate punishments.

Though South Sudan's Transitional Constitution provides that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment," the Penal Code does not define or criminalise torture. The NLA should include a provision on torture, which also a crime under international law, in the Bill.

**Recommendation:** The NLA should incorporate the definition of torture as contained in the Convention against Torture and provide for appropriate punishments by penalties which take into account their grave nature, but excluding the death penalty.

### ADDITIONAL PROVISION: ENFORCED DISAPPEARANCE

Although South Sudan has not yet signed or ratified the International Convention for the Protection of All Persons from Enforced Disappearance, it should make enforced disappearance criminal under national law. Enforced disappearance is defined in the Convention 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."<sup>11</sup>

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<sup>8</sup> J. M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Rule 156: Definition of War Crimes, available at: [www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule156](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule156).

<sup>9</sup> Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (Convention Against Torture), available at: [www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx](http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx).

<sup>10</sup> Convention against Torture, Article 1.

<sup>11</sup> International Convention for the Protection of All Persons from Enforced Disappearance, Article 2.

**Recommendation:** The NLA should incorporate the definition of enforced disappearances as contained in the Enforced Disappearance Convention and provide for appropriate punishments by penalties which take into account their grave nature, but excluding the death penalty.

#### ADDITIONAL PROVISION: RESPONSIBILITY OF COMMANDERS AND OTHER SUPERIORS

South Sudan's Penal Code provides for various forms of joint liability, including aiding and abetting and conspiracy. The Penal Code does not, however, include a provision on responsibility of commanders and other superiors, a form of liability under which commanders and other superiors may be held criminally responsible in certain cases for crimes committed by forces under their effective command and control.

**Recommendation:** The NLA should draw inspiration from the definition of command responsibility contained in the ICRC's study on customary international humanitarian law. The ICRC's Rule 152 states that "Commanders and other superiors are criminally responsible for war crimes committed pursuant to their orders."<sup>12</sup> The ICRC's Rule 153 states that "Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible."<sup>13</sup> Command responsibility should be available as a form of liability for genocide, crimes against humanity, war crimes, torture, enforced disappearance and extrajudicial executions.

#### ADDITIONAL PROVISION: RETROACTIVITY OF INTERNATIONAL CRIMES

*Nullum crimen sine lege* ("no crime without law") is the principle in criminal law that a person cannot or should not face criminal punishment except for an act that was criminalised by law before he/she performed the act. It is incorporated into Article 19(5) of South Sudan's Transitional Constitution, which says "No person shall be charged with any act or omission which did not constitute an offence at the time of its commission."

However, under customary international law, the *nullum crime sine lege* principle may not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations. This principle has been codified at Article 15(2) of the International Covenant on Civil and Political Rights (ICCPR). A leading scholar has concluded that Article 15(2) "contains an exception to the prohibition of retroactive national laws if an act or commission was, at the time when it was committed, criminal under customary international law."<sup>14</sup> In other words, genocide, crimes against humanity, war crimes, torture, enforced disappearance and extrajudicial executions may be punished by states by means of retroactive domestic criminal laws.

Likewise, the Special Tribunal for Lebanon has also concluded that: "Article 15 of the ICCPR allows at the very least that fresh national legislation...defining a crime that was already contemplated in international law may be applied to offences committed before its enactment without breaching the

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<sup>12</sup> J. M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Rule 152, available at: [www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule152](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule152).

<sup>13</sup> J. M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Rule 153, available at: [www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule153](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule153).

<sup>14</sup> M. Nowak, *U.N. Covenant on Civil and Political Rights (CCPR) Commentary, 2nd revised edition*, Engel, 2005, page 367.

*nullum crimen* principle."<sup>15</sup>

**Recommendation:** The South Sudan Penal Code should contain a provision enshrining the principle contained in Article 15(2) of the ICCPR with regard to genocide, war crimes, crimes against humanity, torture, enforced disappearance and extrajudicial execution. In addition, South Sudan should promptly accede to the ICCPR without making any reservation or declaration amounting to a reservation.

#### **ADDITIONAL PROVISION: IRRELEVANCE OF OFFICIAL CAPACITY**

Immunities or official capacity of a government official should not exempt anyone from criminal responsibility for genocide, war crimes, crimes against humanity, torture, enforced disappearance and extrajudicial execution. The NLA should consider adapting and incorporating the provision on irrelevance of official capacity contained in the Rome Statute into national legislation.

**Recommendation:** South Sudan law should contain a provision on the irrelevance of official capacity whereby the official capacity of a person as a head of state or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt him or her from criminal responsibility, nor shall it, in and of itself, constitute a ground for reduction of sentence. In addition, immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar national courts from exercising their jurisdiction over such a person.

#### **ADDITIONAL PROVISION: NON-APPLICABILITY OF AMNESTIES OR OTHER SIMILAR MEASURES OF IMPUNITY**

Amnesties for crimes under international law are prohibited, as they deny the right of victims to justice, truth and reparation. We oppose amnesties, pardons and similar measures of impunity that prevent the emergence of truth, a final judicial determination of guilt or innocence and full reparation to victims and their families.

Providing amnesty or pardon from investigation or prosecution for genocide, war crimes, crimes against humanity, torture, enforced disappearance, extrajudicial executions and other serious human rights violations and abuses breaches the obligations of South Sudan under international law. International treaties, including the 1949 Geneva Conventions, which South Sudan ratified in 2012, and customary international humanitarian law, require states to bring all those suspected of criminal responsibility for crimes under international law to justice in fair trials, before ordinary civilian courts.

**Recommendation:** A provision prohibiting amnesties or pardons for those suspected of criminal responsibility for crimes under international law or human rights violations and abuses should be incorporated into national South Sudan law.

#### **ADDITIONAL PROVISION: NON APPLICABILITY OF STATUTES OF LIMITATION**

South Sudan's Code of Criminal Procedure provides periods of limitations for ordinary crimes ranging from two to ten years.<sup>16</sup> However, the application of statutory limitations to genocide, war crimes and

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<sup>15</sup> Special Tribunal for Lebanon, Appeals Chamber, Interlocutory decision on the applicable law: terrorism, conspiracy, homicide, perpetration, cumulative charging case, STL-11-01/I, 16 February 2011, paragraphs 132-133.

<sup>16</sup> Code of Criminal Procedure Act, 2008, Section 47.

crimes against humanity is not in accordance with international law. The ICRC Study on customary international humanitarian law, for example, has found that “Statutes of limitation may not apply to war crimes.”<sup>17</sup> The same conclusion may be reached regarding genocide and crimes against humanity, as provided, among others in the Rome Statute of the ICC.<sup>18</sup>

**Recommendation:** Genocide, crimes against humanity, war crimes, torture, enforced disappearance and extrajudicial execution should not be subject to any statute of limitations under South Sudan law.

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<sup>17</sup> J. M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Rule 160.

<sup>18</sup> Rome Statute, Article 29; UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968; 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, Article 6.