Introduction

In October 2010, a group of nine individuals, alleged to be affiliated with the Justice and Equality Movement (JEM) rebels in Darfur were sentenced to death by a judge in Nyala, South Darfur. They were found guilty of at least four charges (armed robbery, criminal damage, fomenting war against the state and offences against the state) in relation to a carjacking which had occurred in Khour Baskawit the previous May. The group included four minors: Ibrahim Shrief Yousef (17 years old, Birged Tribe), Altyeb Mohamed Yagoup, (16 years old, Zagawa Tribe), Abdalla Abdalla Doud, (16 years old, Gimr Tribe), and Abdarazig Daoud Abdelseed (15 years, Birged Tribe). The four minors sentenced to death had given their actual ages to the registry, but the court tried them as adults pursuant to medical examinations while they were in custody that determined they were over 18. There are no standardised procedures for determining age, and assessment is based on physical appearance. A fifth minor, Idriss Adam Abaker, was confirmed as a child on a second examination and his sentence commuted, but the court did not allow Ibrahim Shrief Yousef and Abdarazig Daoud Abdelseed to undergo the same examination. The group was tried by a Special Court established in
1997 to prosecute cases of hijacking and robbery; notably, the Court has significantly less judicial monitoring and oversight than other courts in Nyala.

The case is still being appealed and the juveniles have not been executed at the time of writing, but it highlights several disturbing trends related to the application of the death penalty in Sudan. First, it shows the government of Sudan’s lack of respect for international law. The prohibition against child executions is so widely accepted that only two countries have failed to ratify the international instruments upholding the norm and only five are reported to have actually carried it out in the last five years.1 Though the Sudanese Government has argued that in practice no child is ever actually executed and minors are sentenced to death to in order to collect diya, it can still be argued that the act of sentencing a child to death in light of the mental anguish imposed is in and of itself a rights violation, even if the sentence is never implemented.

Second, the case highlights the weaknesses and inconsistencies of national law. The Sudanese Interim National Constitution (INC) applies the international prohibition on the death penalty for children into national law by incorporating all international legal instruments to which Sudan is a party (Sudan ratified the Convention on Rights of the Child without reservation). However, the constitution subsequently undermines this protection by exempting hudud and qisas penalties from the overall prohibition of the death penalty in Sudan.2 Under the 1991 Criminal Code, certain hudud offences, including armed robbery, are capital crimes. Though the 2004 Child Law of Sudan attempted to rectify this gap in compliance with international law by restricting juvenile executions in principle, it defines a child as a person under 18, unless “they have reached maturity under other applicable law”. This opens the door to application of Article 9 of the Sudanese Penal Code of 1991 which allows for persons to be considered adults if they have attained puberty. There are similar conflicts at the level of ordinary laws between the 2010 Child Act and the 1991 Criminal Code.

Third, the status of the defendants as members of ethnic groups disfavoured by the Sudanese government and the implication of their affiliation with a rebel movement underline the potential ethnic and political undertones of the application of the death penalty. This relation is further underlined by the high profile sentencing of a large number of supposed JEM supporters in relation to the attacks on Omdurman in May 2008 and the subsequent role that this issue played in political negotiations.

This paper seeks to explore the legal and practical context within which the death penalty is applied in Sudan. It offers an overview of the role of the penalty in Sudanese law and the rights and guarantees to which individuals accused of offences punishable by the death penalty are entitled. It also offers an overview of recent cases, and places its current usage in the context of the historical development of the application of the death penalty in Sudan. The paper ends with an analysis of the way forward in advocating for the abolition of the death penalty, or at the very least the limitation of the scope of its application.

The History of the Death Penalty in Sudan

The death penalty has been applied in Sudan throughout its history. Despite the fact that Sudan’s legal systems have drawn from diverse legal schools, the death penalty has always figured in national legislation as a penalty for murder.

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2. Interim National Constitution, art. 36 (2).
Between 1925 and 1974, the death penalty was applied in a legal system based on Indian criminal law, which was itself influenced by Anglo-Saxon law. In 1974, the Nimeiry regime introduced large scale amendments to the penal code, adding elements of civil law. However, the reforms were short-lived due to the civil law amendments not being integrated into the penal code, causing practical limitations for courts. The Indian-based penal law was reinstated until 1983, when the Nimeiry regime revised a number of national laws, including the penal code, in an effort to promote the Muslim Brotherhood’s particular interpretation of Sharia. The penal code was repealed only two years later in 1985, and the 1974 criminal code was restored.

The 1974 law was replaced for the second time in 1991 with the 1991 Criminal Code, which remains in force in Sudan today. The new law was referred to as the Criminal Code rather than the Penal Code because it was intended to include measures of care and rehabilitation in addition to punishments. The law was also, however, adopted in the context of a broader effort to promote Islamisation in Sudan in the wake of the 1989 coup that brought President Omar Al-Bashir to power. Indeed, the new criminal law was one of a number of laws passed in the early 1990s marking a shift from the reliance on presidential decrees in the early days of the regime. At a time when international opinion against the death penalty was gaining ground, especially with the passage of the Convention on the Rights of the Child, the government of Sudan was on the contrary entrenching the death penalty through a series of legal amendments. Since then, it has shown little willingness to step back from its defence of the punishment, as the regular report of the government of Sudan to the African Commission on Human and Peoples’ Rights confirms.

Since the 1991 reforms, the scope of the application of the death penalty is Sudan has been expanding, in particular in relation to crimes of a political nature. This type of political targeting, of course, did not begin with the current regime. Indeed one of the most high profile cases of the usage of the death penalty to target political opposition was the case of Mahmoud Mohammed Taha, a prominent Sudanese thinker and Islamic scholar who was tried by the Nimeiry government for apostasy, convicted, and executed on 18 January 1985. The fact that the death penalty has been so abused in Sudanese history has strengthened calls for its abolition.

### The Recent Use of the Death Penalty in Sudan

The use of the death penalty has continued since the signing of the Comprehensive Peace Agreement (CPA) and the inclusion of greater rights respecting positions in the Interim Constitution. Although not at all an exhaustive sampling, the cases described below are intended to give a sense of the circumstances in which individuals in Sudan are sentenced to death. In its last reporting to the African Commission on Human and Peoples’ Rights, the government of Sudan reported that the death penalty had been invoked against 52 individuals in the previous year.3

In 2007, two Darfuri women, Sadia Idriss Fadul, 22, and Amouna Abdallah Daldoum, 23, were sentenced to death by stoning after being convicted of adultery, according to Amnesty International. These women were member of the Fur and Tama ethnic groups and did not have access to lawyers or assistance to defend themselves in the proceedings. The two women were charged under Article 146 (a) of Sudan’s 1991 Criminal Law.4 Their sentence was later commuted.

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In February 2008, five men were executed in Nile State after having been convicted of the killing of a 30 year old farmer in the Berber criminal court. The accused had appealed the sentences up to the constitutional court, but their appeals had been rejected. Efforts to convince relatives of the victim to accept payment of blood money in lieu of imposition of the death penalty had also been rejected.5

One of the most high profile recent cases involving the death penalty in Sudan has been the trial of suspected members of the JEM for their engagement in the 10th May attack on Omdurman, Khartoum’s sister city. The attacks, on 10 May 2008, shook Sudan’s capital. Although Sudan has been at war for most of its independent history, these attacks represented the first serious attack which penetrated so far into the heartland. The government response was swift and broad: large numbers of suspects (the majority of who were Darfuri, though there were reported arrests of individuals from South Sudan and Kordofan) were apprehended, often with little evidence. Indeed, one Sudanese civil society effort referred to the government response as an “assault on human rights and fundamental freedoms...that included extra-judicial killings and summary execution, enforced disappearance, arbitrary arrest, torture, inhumane and degrading treatment, ethnic profiling, and racial profiling.”6 Human Rights Watch noted that at least 300 individuals were arrested.7

In order to process individuals arrested during the government campaign, the government set up special terrorism courts. This mechanism was created on the basis of the 2001 Terrorism Act and the rules of procedure were laid out on the basis of Decree No. 82 (2008) issued by the Chief Justice. The courts were widely criticised for their lack of due process standards.

In particular, the rules of procedure violated the interim constitution and the 1991 Criminal Procedure Law. A number of human rights organisations and activists attempted to challenge the due process violations, filing an appeal with the Constitutional Court. The Constitutional Court refused the appeal on 19 August 2008. The reasoning of the head of the court supported by some of the members included the following:

This court is not political, however it is not isolated from what is happening in country. On examination of the procedures being questioned the court cannot but cope with some departure from normal criteria. In that regard, it has not committed a novelty...It is natural in a situation of invasion and war and national catastrophe to freeze temporarily some basic rights. Funds may be confiscated and individuals detained beyond the requirements of normal law. Accordingly I refuse to rule against the constitutionality of article 25 of the rules which dictates that rules are to be applied despite what follows from the laws of criminal procedure and Evidence. There is no doubt that this stands in contrast to the principle of hierarchy, undisputed in constitutional jurisdiction and justice, whereby constitutional clauses top the rank in authority and sovereignty followed by legislative laws issued by the legislative authority and then the secondary laws, and all articles or secondary clauses that contradict a basic law are termed defunct. The mentioned implies that I rule against the constitutionality and validity of article 25 of the rules where it not for the exceptional conditions that imposed the issue of these rules as I have detailed in this paragraph.8

By May 2010, 106 people had been sentenced to death by the tribunal. Some of the detainees were released in February and March 2010, following the signing of a peace accord between the

government of Sudan and the JEM. JEM claimed that some were subsequently re-arrested after the collapse of the ceasefire. ⁹

In April 2009, the Sudanese authorities executed nine individuals, all belonging to the Fur ethnic group. The group was convicted in 2007 of the murder of journalist and editor Mohamed Taha Mohamed Ahmed, who was found beheaded in 2006. During the appeals process, members of the group alleged that they had confessed under torture and judges refused to allow medical examinations to substantiate these claims. ¹⁰

In May 2009, Abdulrahman Zakaria Mohammed was executed in El Fasher, North Darfur. He had been found guilty of murder and robbery, but was only 17 at the time of his trial in 2007. Mr. Mohammed had appealed his sentence to the Supreme Court in Khartoum, but the latter declined to overrule the conviction, despite the defendant’s minor status. ¹¹

On 14 January 2010, six Sudanese men accused of killing 13 policemen at the Suba Aradi IDP camp in 2005 were executed at Kober Prison, Khartoum North. The deaths occurred as residents of the camps rioted in protest of police attempts to evict residents. The residents were predominantly IDPs from South Sudan, the Nuba Mountains, South Kordofan and Darfur. Initially 100 people had been charged in the case, and released after a year in detention. All men had exhausted all appeals allowable by law. ¹²

On 14 July, the Nyala Special Court of South Darfur sentenced 10 individuals to death under articles 186 (armed robbery) and 162 (kidnapping) of the Sudanese Criminal Code of 1991. The group was arrested on 3 January from the Tulus area of South Darfur. ¹³

From March 2009 - present, ACJPS has documented 12 cases involving almost 30 individuals in which the death penalty was imposed. In two cases, the Centre has confirmed that the sentences were carried out.

Legal Analysis of the Death Penalty in Sudan

Sudan's International Obligations

The basis for legal opposition to the death penalty in human rights terms is generally founded on two rights protections – the protection of the right to life and the protection against cruel, inhuman or degrading treatment or punishment. Both of these rights are recognised in the Universal Declaration of Human Rights and the African Charter on Human and Peoples’ Rights, although the issue of capital punishment is not explicitly discussed in these instruments.

The right to life is in some sense the most basic right and can be argued to be the foundation of the entire human rights system. Nonetheless, an argument could be made in the logic of retributive justice which would suppose that the violation of the right to life can be an appropriate penalty for those who have, themselves, violated the right to life of others (for example through murder and

other serious crimes). Others have argued that the right to life is inviolable and cannot be derogated from even where the person in question has committed very serious offences.

The issue of capital punishment is addressed in the International Covenant on Civil and Political Rights (ICCPR) to which Sudan is a state party. The ICCPR addresses the death penalty explicitly in Article 6 which deals with the right to life. Although not expressly prohibiting the imposition of the death penalty, the ICCPR limits its application by:

- Requiring that the penalty must be imposed only “pursuant to a final judgement rendered by a competent court.”
- Providing for the right to pardon or seek commutation of the sentence.
- Prohibiting the application of the death penalty to persons who were minors at the time of the offence or to pregnant women.  

In 1989, the UN General Assembly adopted the Second Optional Protocol aiming at the abolition of the death penalty. To date, this convention has 72 state parties. Sudan is not a state party to this convention, and so is not bound by its provisions, but the protocol does represent strong evidence of growing international consensus in favour of the abolition of the death penalty.

The second strand of legal reasoning in favour of the abolition of the death penalty is the contention that such a penalty constitutes cruel, inhuman or degrading treatment or punishment. This rationale can be seen in the Convention on the Rights of the Child (CRC), also agreed to in 1989. While not dealing with the death penalty generally, the CRC prohibits the imposition of the death penalty for crimes committed by minors in Article 37 which deals with the right not to be subjected to torture or cruel, inhuman and degrading treatment or punishment.

The prohibition appearing in the CRC is particularly important because of the high level of consensus internationally on this issue. All but two countries have ratified the CRC. One of these two non-signatories, the United States, nonetheless banned child executions in 2005. In issuing its decision banning the practice, the United States Supreme Court used legal reasoning similar to the CRC framework, relying on the US Constitutional prohibition on “cruel and unusual” punishment. In addition to the high level of legal consensus, there is a high level of consensus in practice. Only five states are reported to have executed child offenders since 2005. In this context, many have argued that the prohibition has become part of customary international law, binding on all states.

Sudan’s failure to comply with international law has already been noted. For example, the UN Human Rights Commission in the recommendations of its 90th session in the period 9-27 July 2007, upon reviewing the third report of the Government of Sudan, called for an end to the infliction of the death penalty in the case of offenses that cannot be described as “the most serious crimes” as provided for in Article 6 of the ICCPR. It also demanded that the prohibition on juvenile executions be respected.

**Sudanese Law and the Death Penalty**

Constitutions that have governed Sudan since independence have restricted the shape of the nascent state and stipulated basic rights including equality before the law, freedom of expression

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14 International Covenant on Civil and Political Rights, art. 6.

15 *Roper v. Simmons*, United States Supreme Court.

and conscience. The right to life, however, has not figured prominently. It was not stipulated in the self-rule agreement of 1953, the interim constitution of 1956, nor the 1964 constitution or its various amendments. However, provisions which provide the presidency with the right to issue amnesties for perpetrators of crimes, including those subject to the death penalty, were included.

The permanent constitution of the Democratic Republic of Sudan was issued in 1973. It clearly stipulated the right to life and protection from cruel treatment; however, it still allowed for the death penalty. For instance, Article 65 prohibited torture and Article 72 prohibited inhumane and brutal treatment and punishment. Consistent with Sudan’s obligations under the ICCPR, the 1973 Constitution restricted application of the death penalty, providing that the execution required the endorsement of the president of the republic (§ 74) and the ruling of a competent court. The constitution also gave those sentenced to death the right to appeal for clemency from the competent authority (§ 74). The death penalty was not to be applied to those younger than 18 years, pregnant women or breastfeeding mothers (§ 75).

The 1985 interim constitution was issued following the April Uprising. Article 29 of this constitution forbade torture and cruel and brutal and degrading punishments, and gave the head of state the right of amnesty in all sentences including those sentenced to death (§ 82). The 1985 Constitution removed the constitutional protection against child execution, but the criminal law of 1974 remained in force, forbidding child executions.

Following the 1989 coup which brought President Omar al Bashir to power, the country was governed by constitutional decree until the adoption of the 1998 Constitution. The 1998 Constitution differed from all previous Sudanese constitutions in the degree to which it incorporated principles of shari’a, or Islamic law. Although the constitution included some positive rights provisions, by recognizing shari’a principles it validated the expansion of the number of crimes to which the death penalty could be applied and limited protections for minors.

In terms of rights protections, the 1998 Constitution clearly stipulated the right to life in Article 20. The same article also prohibited enslavement and torture. It also signalled international standards by stating that the death penalty could not be applied to those younger than 18, and restricted execution of mothers to two years of cessation of breastfeeding and to those older than 70 years of age (§ 33(2)). However, these provisions were rendered toothless by the permitting the application of the penalty in the case of retribution and hudud crimes.

The constitution affirmed the death penalty (§ 33), associating the execution of the death penalty with retribution and the most serious of crimes. In dealing with the death penalty, the 1998 Constitution makes reference to categories of crimes as defined in shari’a. The Sudanese Criminal Act of 1991 reflects three major shari’a concepts relevant to the discussion of the death penalty. The first is the distinction between hudud and ta’zir crimes. Hudud crimes are those for which there is a penalty specified in the Koran. Some Islamic scholars argue that this means that there is no room for discretion on the part of contemporary authorities. Ta’zir crimes are defined as those that are neither hudud or qisas (“retribution”) crimes. Although not specifically defined in the 1991 Criminal Act, qisas reflects the shari’a notion of applying the same harm afflicted by the perpetrator as punishment. This allows for the application of the death penalty in murder cases at the discretion of the family of the victim, who also have the option of commuting the sentence and receiving diya, blood money, instead. Finally, the 1998 Constitution reflects shari’a notions of adulthood in exempting the protection against the death penalty for children in the case of hudud and retributive crimes. This notion, reflected in the 1991 Criminal Act, attributes legal responsibility at puberty, in contrast with international standards which apply responsibility at 18.
Overall, the application of these standards allowed for an increase in the application of the death penalty. First, it undermined the positive provision in the 1973 Constitution which had forbidden child executions. Second, it allowed for a number of new crimes to attract the death penalty, including apostasy and adultery. Not only was this expansion of the number of crimes to which the death penalty would apply in itself regressive, it also facilitated the expansion of the use of the death penalty against political opponents by criminalising opinion and personal behaviour.

Following signing of the CPA between the government of Sudan and the Sudan Peoples’ Liberation Movement, the 2005 Interim National Constitution was adopted. The interim constitution includes, for the first time in Sudanese history, a distinct bill of rights (§ 27). The bill of rights includes provisions which make all human rights agreements which the government of Sudan has ratified part and parcel of the constitution, including the right to life,\(^\text{17}\) and prohibition of torture (§ 33). With regard specifically to the death penalty, the constitution parallels the text of the 1998 constitution regarding the application of the death penalty.\(^\text{18}\)

Article 36 of the Interim National Constitution provides that "No death penalty shall be imposed, save as retribution, hudud or punishment for extremely serious offences in accordance with the law."\(^\text{19}\) Although framed as a restrictive provision and taking note of the international law requirement that death penalty decisions be subject to due process, the provision essentially allows that the death penalty can be applied in cases of retribution (qisas) and hudud\(^\text{20}\) offences. The definitions of both classes of crimes are broad in national law, meaning that in practice the death penalty can be applied for a wide variety of offences.

In the same article (§ 36) exemptions from the death penalty are addressed:

\(\text{(2)}\) The death penalty shall not be imposed on a person under the age of eighteen or a person who has attained the age of seventy except in cases of retribution or hudud.

\(\text{(3)}\) No death penalty shall be executed upon pregnant or lactating women, save after two years of lactation.

Although the prohibition on the execution of pregnant women seems consistent with international commitments, the prohibition on the application of the death penalty for juvenile offences is rendered ineffective by the exemption of retribution and hudud offences, which are, in any case, the only offences to which the death penalty may apply.

In this context, it is clear that the interim constitution is internally inconsistent. On the one hand, Article 27 (3) (incorporating international commitments) and Article 28 (protecting the right to life) would seem to argue against application of the death penalty generally. In any case, in view of the government of Sudan’s obligations under the CRC (which it has ratified without reservation), Article 27 (3) must be seen to prohibit the application of the death penalty to juvenile offences. This is contradicted by Article 36 which explicitly allows both the death penalty generally and its application to juvenile offences.

\(^\text{17}\) “Every human being has the inherent right to life, dignity and integrity of his/her person, which shall be protected by law; no one shall be arbitrarily deprived of his/her life;” 2005 Interim Constitution, art. 28.
\(^\text{18}\) Article 38(a) provides that the death penalty shall not “be inflicted save as retribution or punishment for extremely serious offences in accordance with the law.”
\(^\text{19}\) Interim National Constitution, art. 36.
\(^\text{20}\) According to the 1991 Criminal Code, hudud offences include drinking alcohol, apostasy (ridda), adultery (zina), defamation of unchastity (quazf), armed robbery (hiraba) and capital theft. Criminal Act 1991, art. 3.
The government of Sudan has attempted to bypass the contradiction of these texts with international obligations; for example, in Sudan’s regular report to the African Commission on Human and Peoples’ Rights in May 2006 it claimed that the death penalty applied only to the most serious of offenses like drug trafficking. The report made no mention of application of the death penalty to political crimes:

Following the example of many countries, the Sudanese lawmakers thought it wise not to abolish capital punishment; nevertheless, they have confined it to the most dangerous crimes and those which jeopardize the security of society and the rights of its members such as premeditated murder, drug trafficking or extreme treason.21

Age of Criminal Responsibility Regarding the Infliction of the Death Penalty in Sudan

As noted above, there is a tension in Sudanese Constitution with regard to the application of the death penalty for children. Similarly there is a tension at the level of ordinary laws.

The 1991 Criminal Act sets the age of criminal responsibility at adolescence (sometimes also translated “puberty”). This definition of maturity is rooted in Islamic law, following sayings of the prophet that the actions of a boy until he reaches puberty should not be recorded. However, puberty is an ambiguous standard. As puberty is a process it is unclear at what stage precisely maturity is attained. Indeed Muslim scholars differ in their interpretations of this point. However, by adopting the standard of puberty, the 1991 Criminal Code allows for children to be tried and sentenced as adults.

The 2010 Child Act clearly and unambiguously defines a child as a person under the age of 18 and defines a juvenile offender as a person between the ages of 12 and 18 who has committed an offense. Indeed, some have understood it to repeal the death penalty for minors. Speaking on the occasion of the adoption of the bill Nils Kastberg, UNICEF Representative in Sudan, said the law “abolishes the death penalty for anyone under 18-years-old and spells out alternative measures for dealing with child offenders.”22

In practice it appears that the Child Act is less widely applied than the Criminal Act, although this may change over time. For example, until recently children suspected of serious crimes have been initially processed by the regular criminal justice system, despite the existence of parallel juvenile structures. Lawyers can ask the judge to transfer the case, in accordance with the law, but their ruling as to where the child is tried will determine under which laws they can be sentenced.

In addition, another practical difficulty in the Sudanese context is the lack, in many cases, of adequate documentation proving age. In the absence of documentation, age is in practice judged by physical appearance. In cases where there is uncertainty, medical examinations may be ordered, but these are not based on standard protocols and in general no scientific tests are performed.

Judicial practice in Sudan has confirmed application of death penalties against minors. In a challenge brought against the practice in 2008, the Constitutional Court upheld the death penalty based on two arguments. One, the prohibition of death penalty for children did not apply to hudud offenses. Two, the Court ruled that the definition of adult should be drawn from the Criminal Act, despite the

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existence of an earlier version of the Child Act defining 18 as the age of maturity. We refer herein to the report of the Special Rapporteur for Human Rights in Sudan, Sima Samar:

The Special Rapporteur was also disappointed that the INC fails to comprehensively protect children under 18 years of age from the death penalty, in violation of the Convention on the Rights of the Child. The death penalty can also be imposed on persons who committed a capital offence as a child if the sentence is imposed when the convicted person is 18 years old or older. In this regard, the Special Rapporteur learned that in late August 2005, two individuals were executed at Kober prison in Khartoum who were reportedly under 18 years at the time the offence was committed. This is to be contrasted with the Southern Sudan Interim Constitution, which prohibits the death penalty for children under 18. Children in the Sudan should not receive different levels of protection from the law depending on where they live. Such inconsistencies also violate the right to equality before the law.

**Procedural Guarantees Relevant to Death Penalty Cases**

The following guarantees apply to persons accused of a capital crime under the Criminal Procedures Law of 1991:

1. The accused may only be found guilty of offenses prohibited by legislation at the time of their commission (§ 4)
2. The accused is innocent until proven guilty (§ 4)
3. Attacks on the person of the accused or his money are prohibited. The accused shall not be forced to incriminate himself or take an oath except in very limited circumstances. (§ 4)
4. The accused has the right to appeal (§ 21).
5. The accused is guaranteed sanctity from harm, and the right to medical care and to contact a lawyer and their family (§ 83, paragraphs 1-6).
6. The accused has the right to be defended by a lawyer, and the state represented by the Ministry of Justice assumes the cost of one if the accused is insolvent (§ (135)(1)(3)).
7. Release on bail: Article 106 (1) states that “the detained for crimes punishable with the death penalty or an amputation had shall not be released. Scripts of investigation or trial to be presented to the head justice concerned when detention lasts 6 months or longer, and he is entitled to decide what is appropriate”. This makes it clear that the right to release on bail is not provided in the case of a crime punishable with the death penalty save in the case of retribution and with approval of family of the deceased according to paragraph 2 of the same article.

Although these guarantees are more or less consistent with international legal standards, these rights are limited in practice. The Special Rapporteur for Human Rights in Sudan, Sima Samar, also noted the lack of sufficient guarantees of fair trial for the accused facing the death penalty, saying “[u]nfortunately, the failure of the Government to ensure fair trial guarantees raises serious doubts about its compliance.”

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With regard to procedural guarantees, there are a number of serious concerns. First among them is torture, which although illegal under Sudanese law is regularly documented by ACJPS and other organizations. The Criminal Procedures Act allows courts to consider evidence even if it was obtained following torture, which both encourages the practice and further undermines the rights of the accused.

An additional concern has to do with the right to counsel. Although the criminal code provides that impoverished defendants should be given access to free legal aid, this assistance is, in practice, not provided. Legal aid throughout Sudan, due to insufficient funds, and the lack of competent staff in the Ministry of Justice to represent the accused, entails that private lawyers providing pro bono work assume the majority of legal aid cases, though this will likely soon be regulated by a governmental legal aid Commission. In addition, there is a conflict of interest as the same ministry which is conducting the prosecution also assumes the role of defence. This conflict of interest may harm rights of the accused. Finally, the assistance is only available at the trial stage leaving individuals dangerously exposed at the investigations stage.

Finally, special courts – both in Darfur and the terrorism courts in Khartoum – are allowed to impose the death penalty but with far fewer procedural guarantees than the regular courts. The specialised courts are discussed in further detail below.

**Eligible Crimes for Capital Sentencing**

The major law in the Sudanese criminal legislation corpus is the 1991 Criminal Code. This constitutes the general law aside from other particular laws with criminal competence. The rules of procedure applied in criminal courts are those of the 1991 Criminal Procedures Law and the decrees published by the chief justice. Regarding proof, the Evidence Law of 1994 is applied. We address below the crimes punishable with the death penalty, and then the methods of proof utilised by law noting judicial precedence to compare between law and application.

The 1991 Criminal Act includes 15 clauses relating to the death penalty.

**Crimes against the state**

The law provides for the death penalty for crimes against the state, including undermining of the constitutional order; instigation of war against the state; and espionage.

**Religious crimes**

Article 126(2) of the Act criminalises apostasy, prohibiting Muslims from changing their religion. The appropriateness of this crime is a great debate among Islamic scholars. Some hold the view that Islam provides for the freedom of religion, and this article should be abolished, while others believe it should be applied. Each party supports his position with Shari’a texts. In practice, a small number of Muslim countries apply this clause. In any case, this article constitutes a clear violation of the Interim Constitution’s guarantee of freedom of conscience and religious creed (§ 38).

**“Crimes against body and soul”**

26 The African Centre has compiled an average of 8 cases of torture per month over roughly a year and a half.
Chapter 14 of the Criminal Act deals with “crimes against body and soul”, including two that can attract the death penalty:

- **Murder**: Article 130 provides that the punishment of a murderer is to be retribution unless the family of the deceased decides not to pursue it. In that case, the punishment is replaced with imprisonment with or without the payment of blood-money.
- **Instigation of a minor or the insane to commit suicide**: Article 134 provides that if suicide is instigated, then the instigator is punished with the punishment due for murder (§ 134).

“Crimes of honour, public morality and reputation”

In Chapter 15, dealing with “crimes of honour, public morality and reputation,” the death penalty features in some of the articles:

- **Adultery**: Article 146(1)(a) provides “whoever commits adultery is punished with death by stoning if married.” Sudanese courts have issued rulings of stoning against married persons accused with adultery. However, judicial practice has not affirmed the infliction of these stoning punishments since the issuance of the law.\(^{28}\)
- **Sodomy**: Article 148(2)(c) provides for the death penalty if a perpetrator is convicted with sodomy for the third time.
- **Rape**: Article 149(3) provides that rape, if it also constitutes adultery or sodomy, is punishable with death.
- **Incest**: Article 150 provides that incest is punishable by death if it also includes constituent crimes of adultery, sodomy or rape.
- **Prostitution**: Article 155(3) provides that the “administration of a prostitution institution” can be punishable by death on the third conviction.

“Crimes against money”

In chapter 17 “crimes against money” certain offences are punishable with the death penalty, including:

- **Armed robbery**: Article 168 provides that whoever commits the crimes of armed robbery shall be punished with death or crucifixion if his action entails murder or rape. Whoever commits the crime of armed robbery in the Southern states shall be punished with death if his actions entail murder.
- **Corruption**: Article 177 provides that corruption if committed by a public servant or an employee is punishable by death.

**Crimes against humanity, genocide, and war crimes**

In the 2009 amendment of the 1991 Criminal Law, chapter 18 (“crimes against humanity, genocide, and war crimes”) provides for the death penalty. According to Article 186, whoever commits, partakes in or encourages or supports any wide-scale or systemic attack against civilians in the same context of any of the acts in paragraphs noted shall be punished with death.

\(^{28}\) Managel Criminal Court in Gezira State sentenced Shadia Idris Fadul and Amouna Abdalla Dalom to death by stoning in March and April 2008. The court of appeal later mitigated the sentence (Amnesty International report on Sudan, 2008).
The application of the death penalty for these crimes contradicts the general international trend not to inflict the death penalty on these charges despite their serious nature. This was made obvious in the special courts for the former Yugoslavia and for Rwanda, and in the Rome Statute that established the International Criminal Court. That said, the Rome Statute does not prohibit the application of the death penalty for these crimes, but rather allows states to determine penalties as they see fit.

**The Death Penalty in other Laws**

A number of other laws provide for imposition of the death penalty. For example,

- **Firearms and Ammunitions Act 1986** – The Firearms and Ammunitions Act provides for the death penalty for trade in firearms or running of private store without a license (Article 44(3) table 9) and for owning, use or carrying firearms without a license.
- **Drugs and Narcotics Act 1994** – The Drug and Narcotics Act provides for the death penalty for trade in drugs and narcotics (Article 15), provision of drugs and narcotics (Article 16), commitment of the offences in articles 15-16 in association with an international gang, or as part of an international crime (Article 17).
- **The National Security Act 2010** – The National Security Act of 2010 provides for the death penalty for crimes related to the collaboration with enemy (Article 55), conspiracy and rebellion (Article 56), and endangering the internal or external security of the country (Article 57).
- **The Anti-Terrorism Act 2001** – The Anti-Terrorism Act 2001 provides that incitement to commit an act in furtherance of the purposes of a terrorist state (Article 5) or to commit an act of terrorism (Article 6) will be punishable by the death penalty.
- **Military Forces Act 2007**: The Military Forces Act provides for the death penalty for a range of offences including:
  - non-compliance with orders and instructions (Article 142)
  - abandonment of military posts (Article 143(1))
  - forcing subordinates to surrender (Article 145)
  - surrender or unconditional truce (Article 146)
  - assistance of the enemy (Article 147)
  - joining the enemy (Article 148 (1))
  - rebellion against the constitutional order (Article 162(1))
  - dealing with another country with the intention to harm the interests of the state (Article 163)
  - disclosure of military information and secrets (Article 164)
  - violations related to firearms and ammunition (Article 182)
  - offences related to military equipment, gear and uniforms (for example selling uniforms)(Article 183(1))

**Emergency and Public Safety Act: Procedures before the Special Courts for Darfur**

The Emergency and Public Safety Act does not explicitly provide for the infliction of the death penalty, however, it states the formation of special prosecutions and courts which may apply it as provided for in the 1991 Criminal Act.
Special courts in Darfur were formed before the issue of this law in 1991 by the chief justice. Procedures before these courts were characterised by restrictions on the texts of the Criminal Code and Evidence Law. The President of the Republic issued a decree amending the punishment for possession of firearms to the death penalty in the case of charges examined in these extraordinary courts. These courts have issued a number of death penalties according to extraordinary procedures that did not guarantee the accused a fair trial. For example, the accused are not allowed legal representation, only informal legal advice. In addition, only one stage of appeal is permitted, in contrast to the three levels of appeal provided for in the 1991 Criminal Procedures Act.

In March 2001, special criminal courts for Darfur were established by virtue of decrees issued by the governors of the three Darfur states on the basis of the state of emergency. These were distinct from the previous special courts and were created specifically to address capital punishment cases. These “special criminal courts” investigate crimes against the state and criminal offences such as “armed robbery and possession of firearms.” Lawyers were not allowed to represent their clients, but can give “friendly” advice. This is in clear violation of national and international fair trial guarantees.

In 2005, another set of Special Courts for Darfur were adopted in response to international attention related to international crimes in Darfur. These courts have also adopted curtailed appeals procedures.

The special courts in Darfur have issued inhumane and cruel and degrading punishments, in addition to imposing the death penalty on a number of individuals with restriction of the right to appeal. Appeals can be filed against court rulings of imprisonment for periods longer than five years, but must be filed within seven days and to a court of appeal in Darfur, the rulings of which are considered binding save in the case of amputations and the death penalty. These serious cases appeals are to be filed to the higher courts and the constitutional court. These two courts have, in some instances, overturned rulings due to unsatisfactory evidence. Reports point out that the courts in Darfur have issued rulings against hundreds of individuals, mostly for charges of armed robbery or possession of firearms without licence. Many have been sentenced to death for crimes that do constitute very serious crimes as reported by the Government of Sudan to the UN Human Rights Council.

Minors are also exposed to the danger of the death penalty in the context of these courts. For instance, al Sadig Bakheet al Bagir, 17, Farouq Yagoub, 16, and six others were detained in Kalma camp in South Darfur and charged with the murder of Abd el Rahman Ahmed Madibbo, a volunteer in a workshop established by an international NGO, on 12th August 2004. All deny the charges against them, and one, Farouq Yagoub, alleged that a policeman beat him. They are being tried by the special court in Nyala, and if convicted may face the death penalty.

29 Following an unfair trial where the accused was not allowed any legal representation al Tayeb Ali Ahmed was sentenced to death on 28th January 2004. He was convicted by a special court in El Fasher of opposition of the government through violence and membership of a terrorist organisation.

30 Article 14 of the International Covenant on Civil and Political Rights provides for fair trial standards including “to defend himself in person or through legal assistance of his own choosing.” At the national level, Article 135 (1,2, and 3) provide other guarantees.

31 At least five persons were sentenced to death in June and August 2004 in North Darfur. Abdalla Mohamed al Tahir was sentenced to death; he filed an appeal. It was reported that Mohamed Adam Khamis, a 35 year old Zaghawa was sentenced to death on 27 August 2004 on charges of armed robbery and possession of firearms without a license.

Means of Execution

The death penalty in Sudan is implemented in accordance with the text of Article (27)(1) of the 1991 Criminal Law: “execution is either by hanging or stoning or in the same manner as the commitment of murder by the perpetrator, and may be as a hudud punishment or in retribution or approximation, and may be with crucifixion”.

In practice, however, the punishment is executed via hanging by tying a rope around the neck of the indicted to prevent breathing and by dropping the accused from a considerable height into a well. The Criminal Procedures Law 1991 entrusted the Prison Police with the duty of implementing death sentences in Article 27(a), whereby the Prison Organisation and Inmates Handling Act regulates implementation as follows:

- implementation of the death sentence and the death and crucifixion sentence shall be implemented by national/state prisons and localities (Article 29)
- restrictions on the implementation of the death sentence (Article 30)
  - Implementation of the sentence shall not be delayed for longer than 24 hours after notification of the indicted
  - The sentence shall not be inflicted on pregnant women, or breastfeeding mothers save after two years of breastfeeding
  - The punishment shall be implemented in the presence of the prison warden and a physician to write the death certificate (article 31).

Amnesty from Application of the Death Penalty

The 1991 Criminal Procedures Law provided the president of the republic the right to issue amnesties from the application of penalties, including the death penalty, however on the conditions that the crime is neither a hudud nor retribution crime with approval of the family of the deceased (Article 208). Other laws that contain the death penalty also provide the President of the Republic the right to issue amnesties from the application of the death sentence.

Conclusion: What is to be done?

Sudanese courts have issued hundreds of death sentences in the period 2008-2009, many of which were implemented. On 14th January 2010 the death sentence was implemented on 6 accused charged in the case of Soba Aradi with the murder of a number of policemen following skirmishes with residents after police evicted the IDPs from their homes under Communication no. 575 – 2005. Approximately 100 IDPs were arrested after security went door – to – door, and they were held for a year until charges were dropped.

Sudan has seen a tremendous increase in eligibility of crimes for capital sentencing, which is troubling given the interim period’s potential for legal reform. Further, there has been an increase in the implementation of death sentences further than conviction that requires the organisation of a
large campaign to halt the use of the death penalty and commute the sentences of those currently on death row. Aside from the death penalty violating the right to life, international standards and criteria for fair trials are not being met in capital cases. Indeed, the scope of capital crimes and establishment of courts without due process has widened significantly. Pressure from the international community on the Government of Sudan is necessary to abolish Sudan’s usage of the death penalty, which is arbitrary, has political and ethnic undertones, allows for execution on the basis of personal opinion, and legalises the execution of minors.