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Human Rights in Sudan in the Wake of the New Constitution

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BRIEF

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The Rome Treaty for an International Criminal Court: A Framework of International Justice for Future Generations

by Jerry Fowler*

Late in the evening of July 17, 1998, a treaty to create a permanent International Criminal Court (ICC) came up for a final vote before a UN Diplomatic Conference in Rome, that had begun on June 15, 1998. By a vote of 120-7, with 21 abstentions, the participants approved the treaty, which will create a tribunal for the most serious crimes of international concern: genocide, crimes against humanity, and war crimes. Amidst cheers and hugs, there was a widespread feeling that something historic just occurred. For U.S. human rights activists, however, the joy at this important step towards ending impunity was leavened by disappointment that the United States joined countries such as China and Iraq in opposing the treaty.

The treaty will not come into force until 60 countries ratify it, a process that will take a number of years. Even after the Court is established, jurisdictional constraints described below will limit its effectiveness in its early years. Nonetheless, over time the Court offers real promise for ending the cycle of impunity for the worst human rights atrocities and increasing deterrence of these horrible crimes. Coming at the end of a century that witnessed the Holocaust, and with the images of ethnic cleansing in Bosnia and genocide in

Rwanda still fresh, the importance to humanity of this promise is immense.

Structure of the Court

The Court will be a permanent tribunal with headquarters in The Hague (Article 3(1)). It will deal only with crimes committed after the Rome Treaty comes into force (Article 24). Because the Court will be established pursuant to a multilateral treaty, it will not be an organ of the United Nations, although the two organizations will have formal relations (Article 2). Moreover, the Security Council will have a significant role in the Court's operation by virtue of its authority to initiate or defer investigations (Article 13(b); Article 16).

Initially, the Court will consist of 18 judges, elected to nonrenewable nine year terms by a two-thirds majority vote of the Assembly of States Parties, which will be composed of nations that have ratified the treaty (Article 36(6), (9)). At least nine of the judges must have established competence in criminal law and procedure, while at least five must have established competence in relevant areas of international law, such as international humanitarian law and the law of human rights (Article 36(5)). In selecting judges, the States Parties must take into account the need for representation of the principal legal systems of the world, equitable geographic representation, and a fair representation of male and female judges (Article 36(8)). The judges will be distributed among three divisions: pre-trial, trial, and appeals (Article 39).

Human Rights in Sudan in the Wake of the New Constitution

by Ghazi Suleiman and
Curtis Francis Doeblle*

Prelude to Contemporary Times

Various international organizations have accused the Sudanese government of repeatedly breaching basic human rights. Claims against Sudan include violations of the rights to life, health care, free movement, and the enjoyment of one's property, as well as prohibitions against torture and slavery. These allegations have appeared consistently since 1990, one year after the current government came to power.

The current Sudanese government complains that the international human rights community misunderstands and targets it as a result of its preference for Islamic laws. Indeed, many allegations of human rights abuses first arose when former president Jafer Numeri attempted

continued on next page

See page 7 for latest
War Crimes Tribunal
Update

INSIDE:

News from the Inter-American System	Page 3
The Rights of the Defendant in the ICTY	Page 6
Judiciary Firmly Under Control in Fujimori's Peru	Page 9
Adalah, the Legal Center for Arab Minority Rights	Page 12
Hate Crimes Prevention Act	Page 13
Legislative Watch	Page 18

continued on page 4

Sudan, continued from previous page

to impose *Shari'a* (Islamic) laws on the country in 1983, after 11 years of relative peace. This action violated a 1972 peace agreement with southern opposition factions and re-started a civil war. After Numei was overthrown in 1985, five

Since it came to power, the current government, led by General al-Bashir, has taken steps to "Islamize" public life and claims that the promulgation of Islamic laws and practices is its highest goal.

years of democratic governance under Sadiq El-Mahdi followed. This democratic government agreed to suspend the promulgation and application of *Shari'a* laws and was on the path to serious negotiations aimed at ending the war when a coup lead by General Omar al-Bashir overthrew the government and took power in 1989.

Since it came to power, the current government, led by General al-Bashir, has taken steps to "Islamize" public life and claims that the promulgation of Islamic laws and practices is its highest goal. Consistent with these objectives, the government introduced a penal

code that includes *hadud* penalties, which are sanctions applied to Muslims who commit crimes defined in the Koran. The penal code also includes prohibitions against public disorder that allow the government to squelch dissenters swiftly, harshly, and with relative impunity. The government argues that these provisions are necessary for its Islamization process and for maintaining public order.

To understand the government's pro-Islamist position, it is important to highlight several facts. First, 50 to 70% of Sudanese people are Muslim. Second, the government is a coalition of modernist and extreme Islamists. Third, public support for the government depends heavily on its professed commitment to Islamic values. At the same time, the government's professed commitment to Islam is threatened by an increasing number of opposition figures who claim that the government adheres to Islamic values more in rhetoric than in practice. Furthermore, some public figures who rely on Islamic values for their power base, like former prime minister Sadiq El-Mahdi, now lead armed opposition movements against the government from outside the country. As a result of these factors, it appears that it is impossible for the government to retreat from the Islamization campaign that it used to buttress its authority.

The New Constitution

On July 1, 1998, a new constitution entered into force for Sudan. This constitution was marred by controversy from its inception because it was negotiated during the civil war and without the participation of any opposition representatives. Nevertheless, it appeared to offer a ray of hope in the midst of deteriorating living standards and increasingly uncontrolled security operations.

The drafting process began with the formation of a National Constitutional Committee in 1997. Originally, the task of this committee was to submit a draft constitution on behalf of the government to the National Assembly, which

The discrepancies between the initial and final draft of the constitution became known in due course and sparked heated debates both in the National Assembly and among public observers.

would then vote on a final version of the constitution before sending it to the electorate for a referendum. The committee, however, never had a quorum and only submitted a "suggested draft" to President al-Bashir.

Nevertheless, this draft contained a solid collection of human rights provisions and granted increased authority to the president, which the drafters thought would create a more optimum balance of powers. Surprisingly, this draft was even acceptable to some opposition figures, who praised it as a positive step forward. As expected, however, the president's office weakened the provisions on individual human rights. Less expected was the fact that the president's office also watered down its own newly proposed additional powers. This led observers to suggest that it was not the president, but others around him who made the changes. Many people assumed that Hassan al-Turabi, the speaker of the National Assembly, played a major role. Al-Turabi is an influential figure who helped install the current government after the 1989 coup. As a result of these changes, the draft constitution that the president's office passed to the National Assembly contained fewer human rights protections than the earlier draft.

These developments further aroused the suspicions of many people who

continued on page 10

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Sudan, continued from page 2

already did not trust the government. In addition, it annoyed the former chief justice and the former deputy chief justice, who chaired the National Constitutional Committee and were largely responsible for the pro-human rights initial draft. At approximately 10 a.m. on March 28, 1998, the day that the president submitted his draft to the National Assembly, the two former justices made speeches describing the strengths and weaknesses of the new constitution. These addresses were televised and replayed during the afternoon and evening news. The speeches concerned provisions contained in the initial draft, with its strong human rights protections. In contrast, when the speaker of the National Assembly unveiled and circulated the official draft later in the day, many of the provisions discussed in the morning's speeches disappeared from the text. As a result of the changes to the draft text, the two leading figures in the National Constitutional Committee appeared to support a document that was much less favorable to human rights than the one that they actually discussed in their speeches earlier in the day.

The discrepancies between the initial and final draft of the constitution became known in due course and sparked heated debates both in the National Assembly and among public observers. Although hardly a day went by without critical commentary in the national newspapers, the government censored only a few stories and detained relatively few people for their views.

This situation of relative tolerance changed, for unknown reasons, after the National Assembly accepted the constitution on March 28, 1998, and the national referendum began on April 1, 1998. During this period, nearly 100 lawyers, trade union activists, and other protestors were detained by security forces for voicing their opposition. At least one individual was charged with the crime of causing "danger" to the constitutional state. Referendum procedures were also subject to questionable practices. As an example, voting attendants allegedly went from house to house offering bribes and using threats in an attempt to convince people to vote. Such practices called into question the integrity of the voting results.

Perhaps the most important problem with the referendum was the possibility of low voter turnout. Throughout the referendum period, it seemed very unlikely that more than 50% of the pop-

ulation would actually vote. This was partially due to the fact that the referendum was held without the participation of large parts of southern Sudan that are not under government control. In addition, several groups advised people to either vote against the constitution or not to vote at all. For example, the *Umma* party of the former prime minister Sadiq El-Mahdi instructed its followers not to vote at all.

The political tussles that went on in the public sector, however, seemed to

Perhaps the most important problem with the referendum was the possibility of low voter turnout.

have little effect on either the government or the government-sponsored electoral commission, which confirmed that the constitution was adopted in mid-June. The commission declared that 91.9% of the registered voters (11.9 million) had voted, with 96.7% (10.9 million) voting for the constitution and 3.3% (326,732) voting against it (Reuters, reporting a July 24, 1998, statement by the Sudanese Election Commission). In one region, government officials even claimed that 100% of the voters supported the constitution. Many observers inside and outside Sudan view these high figures with skepticism, but the government continues to stand by the reported results.

The Provisions of the New Constitution

The human rights provisions in the new constitution are primarily found in Part II, Chapter I, Articles 20 through 34. These rights can be summarized as follows:

- Article 20, the right to life;
- Article 21, the right of everyone to be treated equally before the courts;
- Article 22, the right to acquire Sudanese nationality;
- Article 23, the right to freedom of movement;
- Article 24, the right to freedom of religion;
- Article 25, the right to freedom of thought and expression;
- Article 26, the right to freedom of association;
- Article 27, the right to cultural participation;
- Article 28, the right to property;
- Article 29, the right to privacy;
- Article 30, the prohibition of arbitrary detention;

Article 31, the right to bring a legal action;

Article 32, the right to be presumed innocent until proven guilty and the right to a legal defense;

Article 33, limitations on the application of the death penalty; and

Article 34, the right to petition the Constitutional Court for protection of enumerated rights.

The new constitution's human rights provisions raise several issues. First, there are several differences between Sudan's international human rights obligations and the human rights measures of the new constitution. One such difference is that, in most human rights treaties, the conditions under which governments may derogate human rights are very narrowly enumerated. For example, in the International Covenant of Civil and Political Rights, the International Covenant of Economic, Social and Cultural Rights, the Convention on the Rights of the Child, and the International Convention on the Elimination of All Forms of Racial Discrimination, human rights may only

For instance, there is no right to education or health, and there are no specific protections for refugees or internally displaced people, despite the fact that Sudan has one of the largest internally displaced populations in the world.

be limited when it is absolutely necessary, and several specific human rights are not derogable under any circumstances. "Necessity" is strictly defined in terms of public morals, public health, and national security, among other reasons. Sudan's new constitution, on the other hand, contains vague provisions stipulating that enumerated rights may be limited by law, and it grants the president broad powers to suspend many of the rights provided to individuals. The president's powers are enumerated in Article 132, which allows the president to suspend any right except the freedoms from slavery, torture, and discrimination; the right to bring a legal action; the right to be presumed innocent; and the right to a legal defense. The reasons for which the president may exercise Article 132 powers appear in Article 131 and are equally vague, applying to any "occurrence or

continued on next page

Sudan, continued from previous page

approach of any emergent danger," whether natural or man-made.

A second issue related to the new constitution is that it leaves out some very important rights. For instance, there is no right to education or health, and there are no specific protections for refugees or internally displaced people, despite the fact that Sudan has one of the largest internally displaced populations in the world. In addition, the rights of women, children, and the elderly only appear in the directive principles of Chapter I, which create no legal obligations.

Third, some of the wording in the constitution is quite vague. One word in particular has received substantial attention. This is the Arabic word *thwali* in Article 26, which concerns freedom of

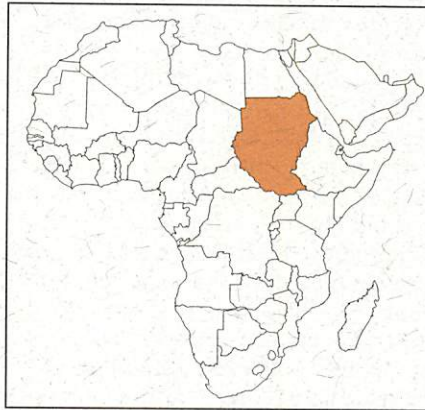
The new constitution, however, still leaves certain areas of human rights unprotected.

association. In the National Assembly's extensive debates over the precise meaning of this word, some speakers, including opponents of the current government, pointed out that in Islamic writings *thwali* means that only political associations with specially trained Islamic leaders are allowed. This interpretation of the word indicates restrictions on the freedom of association. These people said that Article 26 should use clearer language, rather than such an ambiguous word. Other speakers, however, including Hassan al-Turabi, claimed that the use of the word *thwali* permits full political association.

Another right that the constitution vaguely defines is the right to a fair trial in Article 32. This provision simply states that a person has a right to a fair trial and does not give any other guidance regarding the precise scope of this right. In contrast, Article 14 of the International Covenant of Civil and Political Rights, which also guarantees the right to a fair trial, is the most elaborate article in the treaty, with seven paragraphs defining the meaning of a "fair trial."

A final issue regarding the new constitution's human rights provisions is the question of enforceability. In this respect, the new constitution offers greater protection. For example, there are no opt-out clauses from the enumerated constitutional rights. This means that Sudanese courts must protect all of the rights in the Sudanese

constitution, such as the right to protection of earnings in Article 28. The new constitution, however, still leaves certain areas of human rights unprotected. Especially problematic are human rights that are protected by international instruments to which Sudan is a party but are not included in the constitution. Currently, interpreta-



tion of these provisions is ambiguous. Under the previous constitutional regime, courts could apply treaty provisions where there was no prevailing domestic legislation, but were not able to question a law duly passed by the National Assembly even when it clearly conflicted with an international treaty. In contrast, there is little in the new constitution about the relationship of international law to national law. This void is especially problematic for treaty recognition, an important aspect of international human rights law. One source of guidance, however, may be found in Article 90, which prohibits the president from making a provisional ordinance that is contrary to human rights provisions protected by the constitution or an international treaty. Hopefully, the new Constitutional Court, created under Article 105, will help to fill this absence by exercising its jurisdiction to adjudge "claims by the aggrieved for the protection of freedoms, sanctities or rights guaranteed by the constitution," which is contained in sub-paragraph (2)(b) of Article 105.

Examples of Implementation of the New Constitution

Since the new constitution entered into force, there have been ample opportunities to test its provisions. Within 48 hours of its enactment on July 1, 1998, hundreds of opposition figures were arrested after a series of bombs went off in Khartoum. Many of the arrests violated the guarantees for the rights of detainees in Article 30. More than a month later, three of the

detainees—Nugdalla Abdel Rahman, Abd Elmahmoud Abu Ibrahim, and Gabriel Matong Ding—were still being held without trial and without access to a lawyer or to family members. This is a violation of the guarantees provided to detainees in Article 32 of the constitution. Some government officials denied these detentions existed, while other government officials confirmed the detentions but denied access to the detainees, citing national security as the reason for the secrecy. Finally, the High Court's Constitutional Division, which is the body provisionally dealing with constitutional cases until the Constitutional Court is established, rejected their appeal on August 4, 1998, without allowing the defendants access to legal counsel. In these detainees' cases, even appeals by the government's own Ministry of Justice to allow the defendants access to legal defense fell on deaf ears.

Although there are no detailed provisions regarding treatment in detention, Article 30 states that detainees should be treated with respect for their dignity and Article 20 secures the rights to life and freedom from torture. Despite these provisions, however, security officials allegedly continue to use torture as a means of extracting information from defendants. For example, from the beginning of July, several detainees reported being tortured by repeated beatings. One victim was even released in mid-July to obtain medical treatment when security officials appeared to fear that he might die in custody. He was

Women are still regularly harassed by "public order police" who judge their conduct or attire is un-Islamic.

then re-arrested early the next day after a doctor determined that he was not seriously injured. Additionally, on August 2, 1998, a law student at Khartoum University, Mohamed Abdel Salim, died from a brain hemorrhage he suffered after being taken into custody by security officials who had used force to disperse a student demonstration.

Similarly, freedom of expression has deteriorated further since the new constitution entered into force. The government closed several newspapers for various reasons, and security officials prevented the publication of some stories. The National Council for Press and Publications suspended circulation of

continued on page 23

Faculty News, continued from previous page

advice and submitted memoranda on proposed constitutional amendments for the Republic of Armenia. This followed his consultation with the Armenian Constitutional Court and Armenian legislators on constitutional and legislative issues from May 22–27, 1998. Additionally, in July, Professor Schwartz was appointed Representative of the Office for Democratic Institutions and Human Rights at the Organization for Security and Cooperation in Europe, as well as to the Council of Europe's Commission on Democracy. He participated in a lecture series on judicial review held July 6–10, 1998, at the Central European University in Budapest, Hungary. Professor Schwartz organized the Second Biennial Symposium "Constitutional 'Refolution' in the Ex-Communist World: The Rule of Law," held at WCL on September 28, 1998.

Rick Wilson, Professor of Law, Co-Director of the Center, and Director of WCL's International Human Rights Law Clinic, appeared as counsel in three cases at the Inter-American Court of Human Rights in San Jose, Costa Rica in June 1998. The first case, *Iván Suárez v. Ecuador*, involved a former airline security guard held for nearly four years in preventive detention while awaiting trial. The case was one of the first under new Court rules that allow the victim's counsel to appear and argue separately during the reparations phase. In the second case, *Consuelo Benavidez v. Ecuador*, involving the disappearance of a teacher, Professor Wilson acted as special assistant to the Commission. The case resulted in the largest settlement in the Court's history. Finally, on behalf of the Amnesty International Secretariat, he argued orally as *amicus curiae* in *Advisory Opinion 16*, which was requested by the Republic

of Mexico. Mexico sought to clarify the human rights obligations for notification under the Vienna Convention on Consular Relations for foreign nationals awaiting the death penalty in the United States. The U.S. government appeared for the first time in the Court's history in response to the proceedings. Also in June, Professor Wilson lectured on the international human rights aspects of criminal procedure, due process, and the right to a fair trial as a visiting professor of law in the newly created Masters of Law program at the Pontificia Universidad Católica in Peru. In addition, during the summer, he became an Advisory Board member for the *Derechos*/Human Rights website, one of the largest and most active sites concerning human rights in the Americas. ☉

Sudan, continued from page 11

one Khartoum daily newspaper, the privately owned *Alwifaq*, for five days after a journalist complained that it defamed him. Additionally, there have been cases of individuals being tried for endangering the constitutional state after stating that the new constitution is not Islamic. Another person was charged with apostasy after stating that a secular state was compatible with the Islamic faith.

Finally, problems of equality and equal treatment are not improving. Women are still regularly harassed by "public order police" who judge their conduct or attire un-Islamic. In addition, three Catholic priests were arrested on suspicion of being involved in the July bombings, despite the absence of evidence.

One final effect of the constitution has been to serve as an alibi for some diplomats, who defend their unwillingness to hastily condemn human rights violations or even inquire about suspected violations under the pretext that things will change under the new constitution.

Conclusion

Although the new constitution may offer a ray of hope for moving Sudan toward democracy and greater respect for human rights, the government's continued intolerant practices may obscure this hope. The key to dispelling the skepticism of human rights advocates that has plagued the early days of

the new constitution lies in the government's hand. The current administration came to power through a military backed coup and retained power through several elections widely perceived as unfair. Despite these circumstances, the government must adequately ensure respect for human rights in Sudan. The new constitution, with supplemental legislation, will hopefully serve as a first step. For example, the legislature could end the debate over the meaning of *thwali* by expressly allowing full and free political association in accordance with Sudan's international human rights obligations. Such an interpretation would allow all individuals and associations to meet with each other for any peaceful purpose, including political parties, trade unions, and human rights organizational gatherings.

Other important players on the path to greater respect for human rights are Sudanese judges and lawyers. Judges currently seated need to develop the courage and knowledge to ensure that human rights are respected in cases before them. The still-to-be-named judges of the new Constitutional Court must have the courage to critically examine government practices and legislation that are contrary to the constitution. For example, courts should narrowly interpret the president's ability to derogate constitutionally guaranteed rights. This could be achieved by

requiring the government to show that proposed limitations are necessary to preserve the health, morals, public safety, or national security of the country and that their duration and substance are limited to what is absolutely necessary. Lawyers also must be informed and energetic enough to fight for the human rights of their clients when they are threatened.

Sudan is a country much in need of human rights defenders. Until recently, the government interpreted human rights as a challenge to the authority of state institutions and suppressed those who advocate respect for human rights. In response to this practice, some of Sudan's most prominent human rights activists have fled the country. Hopefully, the new constitution will help to unite the Sudanese people in the common purpose of pursuing human rights. If it does not, the current condition of human rights violations will certainly divide the country between those seeking respect for human rights and those without respect for these basic foundations of human dignity. ☉

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