



Seeking Reparation for Torture Survivors



## BRIEFING NOTE ON SECTION 45 (1) OF THE DRAFT POLICE FORCES BILL Published as part of the Criminal Law Reform Project in Sudan<sup>1</sup>

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The reform of the law governing the police provides an important opportunity to enshrine the rule of law in line with the principles reflected in Article 148 (1) of the Interim National Constitution, which reads:

“[The Police] shall discharge its duties with impartiality and integrity in compliance with the law and the nationally and internationally accepted standards.”

Respect for the rule of law is also one of the fundamental principles that police officers should follow in carrying out their job and duties pursuant to section 5 (a) of the Draft Police Forces Bill (hereinafter the Bill).

### 1. Immunity legislation runs counter to accountability and the rule of law

Section 45 (1) of the Bill<sup>2</sup> grants immunity to members of the police forces for acts done in the course of its work. It fails to strike an adequate balance between enabling the police to function effectively and ensuring that the Police is accountable to the public and the individual who may have been wronged by police action.

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<sup>1</sup> The Criminal Law Reform Project is a joint initiative of REDRESS and KCHRED aimed at advancing the process of bringing Sudanese law in conformity with the National Interim Constitution and international standards as stated in article 27 of the Bill of Rights.

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<sup>2</sup> Section 45 (1) of the Bill: “Save in cases of *flagrante delicto*, criminal procedures can not be initiated against any policeman for an act that constitutes a crime that took place while he was performing his duty or because of his official act except upon a permission issued by the Minister of Interior or his delegate.”

The Police is vested with wide ranging powers, particularly the power to use force, in order to enforce the law and protect the public from crime. To achieve this objective, it is necessary that members of the Police can exercise their function without undue fear of prosecutions. On the other hand, there is an inherent risk that police officers exceed the limits of their powers or even abuse them, a risk that needs to be countered by clear procedures designed to uphold the law.

It has been argued that immunities are necessary to protect police officers from malicious prosecution. This argument ignores that there is already sufficient protection against such prosecutions in Sudanese law. There are several provisions in the Criminal Act of 1991 that rule out prosecutions for certain acts carried out by public servants (which include police officers) or provide for lesser punishments for certain offences. According to section 11 of the Criminal Act of 1991: "No act shall be deemed an offence if done by a person who is bound, or authorized to do it by law, or by a legal order issued from a competent authority, or who believes in good faith that he is bound, or authorized so to do." Furthermore, pursuant to section 12 (3) of the Act: "No right of private defence arises against a public servant, acting within the limits of the powers of his post, unless there is apprehension of causing death, or grievous hurt." In cases of killings, police officers may be subject to lesser punishments where section 131 (2) of the Act applies.<sup>3</sup> Furthermore, there is a specific offence of false accusation in section 114 of the Act, which protects anyone, including police officers, from being the subject of unfounded prosecutions and acts as deterrent against malicious complaints or prosecutions.<sup>4</sup>

Police powers are (or ought to be) clearly defined by law so that police officers know what they are allowed to do and individuals are aware of their rights against excessive police action. In most situations, it will be clear which conduct is lawful and which is not. For example, torture or rape in custody is clearly unlawful. There is no apparent reason why police officers should be granted any immunity against prosecutions for such crimes. There may be difficult circumstances where a police officer has to decide quickly whether or not to use force, for example, in case of hostage taking by armed kidnappers. If the police officer uses force in such a situation and injures or even kills a person, experience of most countries shows that the individual police officer, the public and the victim (including relatives) are best served with a full and independent investigation that establishes the facts and either clears the police officer concerned (and his superiors) of any wrongdoing or results in charges being brought if deemed necessary.<sup>5</sup> Most countries do not provide the Police with special protection by way of immunity laws. On

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<sup>3</sup> "Notwithstanding the provision of section 130(1), culpable homicide shall be deemed to be semi-intentional in any of the following cases:- where a public servant, or a person charged with a public service, exceeds, in good-faith the limits of the power authorized thereto, believing that his act which has caused the death, is necessary for the performance of his duty."

<sup>4</sup> "Whoever, with intent to cause injury to any person, institutes, or causes to be instituted any criminal proceedings, against that person, or falsely accuses any person with having committed an offence, knowing that there is no reasonable, or lawful ground for such proceedings, or accusation, shall be punished, with imprisonment, for a term, not exceeding three years, or with fine, or with both."

<sup>5</sup> In the United Kingdom, for example, the Police have to refer any case of police conduct resulting in death or serious injury to the Independent Police Complaints Commission ([www.ipcc.gov.uk](http://www.ipcc.gov.uk)), an independent oversight body, for a full investigation. See Schedule 3, paras. 4 (1) and 13 (1) of the Police Reform Act 2002.

the contrary, efforts have been made in a number of countries to strengthen investigations into police misconduct because of the inherent difficulty of prosecuting police officers.<sup>6</sup>

Section 45 of the Bill vests the head of the Police with the power to decide whether or not police officers should be prosecuted. Although some prosecutions have been authorised in the past, the immunity provision has frequently resulted in delays or a lack of any prosecutions, a practice that fosters a climate of impunity. Individuals alleging police misconduct may lodge a complaint but there is no guarantee of a full investigation contrary to international standards. Individuals who file complaints do not have a right to appeal a decision not to lift immunity, or a way to counter the complete inaction for that matter, because the decision falls within the discretion of the head of the Police and is not subject to judicial review. This deprives victims of police violations of their right to litigation.

The lack of proper procedures to hold police officers to account for their actions is detrimental to the rule of law and runs counter to Article 148 (1) of the Interim National Constitution and section 5 (a) of the Bill. The exercise of power should be subject to the law and there must be an element of public and legal accountability relating to police conduct. This includes criminal and disciplinary sanctions for violations of the law. This understanding is reflected in international standards according to which any allegations of violations must be investigated effectively and perpetrators be brought to justice. At the national level, many countries have established procedures and independent bodies for the oversight of police conduct and investigations to ensure accountability.

If the rule of law is taken seriously, immunity provisions may not even be in the best interest of the police force themselves. A police force serving the public is bound to benefit from greater transparency and accountability by enhancing trust and legitimacy. This includes steps to vigorously combat wrongdoing in its own ranks so that the force that is meant to protect the law does not become the very institution that breaks the law, or at least tolerates such law-breaking. The existence of immunity provision sends the wrong signal to police officers that they may not have to answer for their conduct and can carry on regardless, even where they have committed violations, such as ill-treating detainees. It is for this very reason, and in order to ensure the rights of victims, that some countries, such as Turkey, have recently abolished immunity legislation.<sup>7</sup>

## **2. Section 45 (1) is incompatible with the Interim National Constitution and international standards binding on Sudan**

Section 45 (1) of the Bill is incompatible with article 27 (3) of the National Interim Constitution and the international standards recognised therein as an integral part of the Bill of Rights, as well as with article 28 (right to life), article 31 (equality before the law), article 33 (prohibition of torture) and article 35 (right to litigation) of the Bill of Rights.

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<sup>6</sup> See, for example, REDRESS, *Taking complaints of torture seriously, Rights of victims and responsibility of authorities*, November 2004, available at <http://www.redress.org/reports.html>.

<sup>7</sup> Concluding Observations of the United Nations Committee against Torture: Turkey, UN Doc. CAT/C/CR/30/5, 27 May 2003, para. 4 c (positive aspects): "...the elimination of the requirement to obtain administrative permission to prosecute a civil servant or public official..."

Under international law, states have an obligation to: (i) investigate allegations of serious violations such as torture promptly, effectively and impartially; (ii) bring the perpetrators to justice; (iii) and provide the victims of such violations with a remedy and reparation.

According to the UN Human Rights Committee responsible for monitoring the implementation of the International Covenant on Civil and Political Rights to which Sudan is a state party:

“Where the investigations ... reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7)...<sup>8</sup>; and

“...where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties (see General Comment 20 (44)) and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility...”<sup>9</sup>

The United Nations Human Rights Committee has repeatedly found that immunity legislation is incompatible with the right to an effective remedy and the concomitant duty to investigate and prosecute serious violations,<sup>10</sup> including in the case of Sudan:

“It [the Human Rights Committee] is particularly concerned at the immunity provided for in Sudanese law and untransparent procedure for waiving immunity in the event of criminal proceedings against state agents.”<sup>11</sup>

Hence, the Committee urged Sudan to:

“Undertake to abolish all immunity in the new legislation governing the police, armed forces and national security forces.”<sup>12</sup>

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<sup>8</sup> UN Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para.18.

<sup>9</sup> Ibid.

<sup>10</sup> Concluding observations of the UN Human Rights Committee: India, UN Doc. CCPR/C/79/Add.81, 4 August 1997, para.21: “The Committee notes with concern that criminal prosecutions or civil proceedings against members of the security and armed forces, acting under special powers, may not be commenced without the sanction of the central Government. This contributes to a climate of impunity and deprives people of remedies to which they may be entitled in accordance with article 2, paragraph 3, of the Covenant.”

<sup>11</sup> Concluding observations of the UN Human Rights Committee: Sudan, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para.9.

<sup>12</sup> Ibid., para.9 (e).

According to the African Commission on Human and Peoples' Rights responsible for monitoring the implementation of the African Charter on Human and Peoples' Rights to which Sudan is a state party:

“In order to combat impunity States should: Ensure that there is no immunity from prosecution for national suspected of torture...”<sup>13</sup>

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<sup>13</sup> Robben Island Guidelines, *The Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment in African*, adopted by the African Commission on Human and People's Rights, 2002, para. 16.