



Comments to Sudan's 4th and 5th Periodic Report to the African Commission on Human and Peoples' Rights:

The need for substantial legislative reforms to give effect to the rights, duties and freedoms enshrined in the Charter

April 2012

I. Introduction

The 2005 Comprehensive Peace Agreement (CPA) in Sudan presented a unique framework and process to undertake wide-reaching legislative and institutional reforms that address long-standing concerns of respect for human rights and the rule of law. The period of Sudan's third and fourth periodic report (2008-2012) largely overlaps with the second and final phase of CPA implementation, and the immediate repercussions of South Sudan's independence in July 2011. The consideration of Sudan's report provides in this context an opportune moment to scrutinise recent reforms in depth. This includes assessing the extent to which these reforms advance the implementation of the African Charter on Human and Peoples' Rights (African Charter) and identifying measures that the state party needs to take with a view to ensuring effective protection of the rights guaranteed in the Charter.

This Alternative Report focuses on legislative steps taken by the Republic of Sudan (Sudan) in the period of 2008-2012 that have a bearing on its obligations under the African Charter in relation to the following articles: article 2, 3 (equality and non-discrimination in respect of women's rights), article 4 (right to life), article 5 (prohibition of torture), article 6 (right to liberty and security) and article 7 (right to a fair trial). The Report, which forms part of the Criminal Law Reform Project in Sudan (www.pclrs.org), focuses on key developments in the field of criminal

justice. It refers to related developments, such as the freedom of the press, where appropriate but does not purport to present a comprehensive review of law reform in the reporting period.

II. Implementation of the Charter in Sudan's legislation

1. Article 1: Positive obligation to give effect to the rights, duties and freedoms enshrined in the Charter

Article 1 of the African Charter expressly stipulates that member states 'shall undertake to adopt legislative or other measures to give effect to [the rights, duties and freedoms enshrined in this Chapter]'. The duty to implement the rights granted in a treaty in 'good faith' is a fundamental, and critical, feature of regional and international human rights treaties.¹ The Commission has increasingly emphasised the importance of legislative measures, including repealing laws incompatible with the Charter.²

Article 27 (3) of Sudan's Interim National Constitution of 2005 (INC) provides that '[a]ll rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill [of Rights]'. The African Charter has therefore been incorporated into Sudan's national legal system. However, three factors undermine the effective implementation of the African Charter in Sudan. Firstly, the Bill of Rights - of which article 27 (3) forms an integral part - lists a number of rights, many of which are also contained in the African Charter, but adopts definitions that diverge from the Charter. For example, article 31 on equality before the law does not refer to 'national and social origin, fortune, birth or other status' as grounds of discrimination, therefore seemingly narrowing the scope of prohibited grounds. Rights such as the right to liberty (article 29) and the right to a fair trial (article 34) do not extend the full guarantees as provided in the Charter (articles 6 and 7 respectively). This includes the right not to be subject to arbitrary arrest or detention, the right to be brought promptly before a judge and the right to an independent tribunal, the absence of which has resulted in concerns about forced confessions and unfair trials.³ The definition of some rights, such as freedom from torture and other forms of ill-treatment and punishment, is at variance with international treaties. In contrast to article 7 of the ICCPR, article 33 of the Bill of Rights omits cruel, inhuman or degrading punishment, such as

¹ 254/04: *Zimbabwe Human Rights NGO Forum v Zimbabwe*. See also 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 (2004), para.3.

² 279/03-296/05: *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) / Sudan*, para.229 (g); 236/00: *Curtis Francis Doebbler v Sudan*, Findings; 254/04: *Zimbabwe Human Rights NGO Forum v Zimbabwe*, para.215.

³ See for example, Opinions adopted by the Working Group on Arbitrary Detentions, *Opinion 208 (Sudan)*, UN Doc. A/HRC/13/30/Add.1, 2 March 2010, 166-181.

flogging, which is still frequently used in judicial practice.⁴ Rights such as freedom of expression (article 39) are subject to limitations to be determined 'by law' that may be overly restrictive. An example is the law governing assemblies that has been used to forcibly break up public demonstrations before the recent elections.⁵ Emergency laws such as the Emergency and Safety Act of 1997 permit further limitations. The broad powers of authorities to restrict assemblies, associations and other rights have stifled civil society and the exercise of essential freedoms in Darfur.⁶

Secondly, Sudan has not enacted (or repealed) the requisite laws to bring Sudan's legislation in conformity with the Charter. There has been no comprehensive review of the compatibility of Sudan's laws with its international obligations, including under the Charter. Reforms undertaken have not addressed a number of critical areas, such as women's rights, leaving significant gaps in recognition and protection. While some reforms, such as the Child Act, 2010, constitute a significant achievement towards greater protection of rights, several recently enacted laws, most notably the National Security Law, 2010, are evidently incompatible with Sudan's obligations under the Charter (see below).

Thirdly, contrary to the requirements stipulated in the Commission's jurisprudence, there is a lack of effective remedies to give effect to rights. Article 35 of the Bill of Rights provides that '[t]he right to litigation shall be guaranteed for all persons; no person shall be denied the right to resort to justice'. However, the Constitutional Court has failed to act as a constitutional protector of rights and remedies provided for in statutory law have proved largely ineffectual, which is due to a combination of factors. This includes lack of access to justice, concerns over the independence of the judiciary, emergency laws and legislation providing for immunity, amnesties and brief statutes of limitation that limit accountability.⁷

Several factors of a political and institutional nature, such as the lack of an effective law reform commission, also contribute to these shortcomings. The separation of the South in July 2011 has prompted a constitutional review process in Sudan that provides a new opportunity to build on the present Bill of Rights. The task includes revising existing provisions with a view to bringing them in conformity with the Charter, and putting in place an effective institutional framework conducive to Charter compliant law reform and protection of rights.⁸

⁴ See on Sudan's position, *Information received from Sudan on the implementation of the concluding observations of the Human Rights Committee* (CCPR/C/SDN/CO/3), UN Doc. CCPR/C/SDN/CO/3/Add.1, 18 December 2009, Recommendation No.10, para.14.

⁵ *Report of the independent expert on the situation of human rights in the Sudan*, Mohammed Chande Othman, UN Doc. A/HRC/15/CRP.1, 14 September 2010, para.22.

⁶ *Ibid.*, paras. 21 and 69.

⁷ See in particular *Kamal Mohammed Saboon v Sudan Government*; and *Farouq Mohamed Ibrahim Al Nour v (1) Government of Sudan; (2) Legislative Body*; Final order by Justice Abdallah Aalmin Albashir President of the Constitutional Court, 6 November 2008.

⁸ See in particular REDRESS and Sudanese Human Rights Monitor, *Criminal Justice and Human Rights: An agenda for effective human rights protection in Sudan's new constitution*, March 2011, available at <http://www.pclrs.org/downloads/1203%20Sudan%20Criminal%20Justice%20and%20Human%20Rights.pdf>

Recommendations:

In light of these considerations, the Sudanese Human Rights Monitor and REDRESS recommend that Sudan:

- Uses the current constitutional review process as an opportunity to undertake a full review of the compatibility of the Sudanese Bill of Rights with its obligations under the African Charter on Human and Peoples' Rights with a view to ensuring full conformity of the provisions of the new constitution with the African Charter
- Commits itself to undertaking a comprehensive law reform process to bring its legislation into conformity with the African Charter, taking into consideration the jurisprudence of the African Commission and observations made by the African Commission and other AU bodies on Sudanese laws to date.
- Establishes a law reform commission, whose members include civil society representatives with a proven track of working in the field of human rights and law reform, to lead the law reform process.

2. Articles 2, 3: Equality and non-discrimination, with particular reference to women's rights

The African Charter prohibits discrimination, both of a direct and indirect nature (de facto) on the grounds of sex (article 2), and provides for equality before the law and equal protection of the law (article 3). These distinctive but interrelated rights impose a series of corresponding obligations on states parties. Sudan's Bill of Rights recognises equality before the law and equal rights of men and women.⁹ However, Sudan's statutory law is full of legislation that discriminates against women or fails to provide equal protection, which has been the subject of sustained protests and advocacy for reforms.¹⁰

Several provisions of the 1991 Personal Status Law of Muslims governing marriage (marital rights and duties), divorce and inheritance grant women inferior rights compared to men and constitute de jure discrimination.¹¹ In the applied law of evidence, for some offences, such as adultery, only men can provide admissible evidence which amounts to *de jure* discrimination.¹² Public order laws and provisions, such as article 152 of the Criminal Act 1991 that makes the wearing of 'indecent' or 'immoral' dress punishable by whipping, have a

⁹ Articles 31 and 32 respectively.

¹⁰ See Asma Abdel Halim, 'Gendered Justice: Women and the Application of Penal Laws in the Sudan', in Lutz Oette (ed.), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan*, Ashgate, Farnham, 2011, 227-241.

¹¹ See Zeinab Abbas Badawi, 'Needed Reforms in Family Muslim Laws and Customary Laws in Sudan', in Akolda Tier and Balghis Badri (eds), *Law Reform in Sudan*, Ahfad University of Women, 2008, 207-237.

¹² Article 149 Criminal Act 1991. See REDRESS/KCHRED, *Time for Change: Reforming Sudan's Legislation on Rape and Sexual Violence*, November 2008, 28, 29, www.pclrs.org/downloads/Miscellaneous/Position%20Paper%20Rape.pdf

disproportionate impact on women who are de facto the sole targets of this provision.¹³ This includes instances of intersectional discrimination where women from less privileged backgrounds and/or different ethnic origin are targeted by such laws.¹⁴ In practice, the enforcement of public order laws by the public order police has frequently been discriminatory and arbitrary.¹⁵

The laws on sexual violence fail to provide equal and adequate protection of women's right to physical and mental integrity, which constitutes both discrimination and a failure to implement positive obligations arising from article 1 in conjunction with article 4, 5 and article 16 (right to health). Article 149 of the Criminal Act defines rape with reference to adultery, which creates confusion over evidentiary requirements for a prosecution (adultery requires four male eye-witness of the act) and puts a woman at risk of facing prosecution for adultery if she cannot prove rape.¹⁶ The definition of rape is narrow in scope and does not reflect legislative reforms and best practices elsewhere.¹⁷ There is only one offence covering all other forms of sexual violence, which carries an inadequate maximum punishment of two years imprisonment. In addition, domestic rape, forms of sexual harassment and certain types of female genital cutting/mutilation are not criminal offences.¹⁸ The Government of Sudan has discussed the reform of rape laws but effective steps have yet to be taken in this regard.¹⁹

Recommendations:

In light of these considerations, the Sudanese Human Rights Monitor and REDRESS recommend that Sudan:

- Undertake a comprehensive review of Sudanese laws - in consultation with cross-section of women's rights groups - with a view to ending discrimination and providing protection by bringing legislation in line with the African Charter, particularly the 1991 Personal Status Law, the 1991 Criminal Act and public order laws.

¹³ See Strategic Initiative on Women in the Horn of Africa (SIHA), *Beyond Trousers: The Public Order Regime and the Human Rights of Women and Girls in Sudan*, A Discussion Paper, Submission to the 46th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, the Gambia, 12 November 2009.

¹⁴ *Ibid.*, 24-30.

¹⁵ *Ibid.*

¹⁶ *Concluding observations of the UN Human Rights Committee: Sudan*, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para.14 (b).

¹⁷ REDRESS/KCHRED, *Time for Change*, above note 11, 28, 29. See on developing practices in the broader region, Rashida Manjoo, Gift Kweka and Suzzie Onyeka Ofuani, 'Sexual Violence and the Law: Comparative Legislative Experiences in Selected Southern African Countries', in Oette, above note 10, 269-295.

¹⁸ REDRESS/KCHRED, *Time for Change*, above note 12, 55-58.

¹⁹ *UN Human Rights Committee: Sudan*, above note 16, paras. 13-15 and *Information received from Sudan on the implementation of the concluding observations of the Human Rights Committee* (CCPR/C/SDN/CO/3), UN Doc. CCPR/C/SDN/CO/3/Add.1, 18 December 2009, para.24.

3. Article 4: Right to Life

3.1. Death Penalty

There is a growing international movement towards the abolition of the death penalty on account of its inherently cruel nature. Where the death penalty is retained, its imposition is subject to a series of strict conditions, i.e. for the most serious crimes on a non-mandatory basis following a fair trial, the absence of which renders it incompatible with the right to life.²⁰ Sudan's law and practice governing the imposition and execution of the death penalty fails to meet these requirements on several counts.

The death penalty remains in force for numerous offences, including on a mandatory basis and for those that cannot be considered to be the most serious²¹ - some of which also violate other rights, such as the crime of apostasy (article 126 of the 1991 Criminal Act, which is incompatible with article 8 of the Charter, freedom of religion). Sudan's courts have imposed the death penalty in several instances where the defendants have been held incommunicado and alleged that they had been tortured into making confessions.²² An example illustrating this practice is Opinion No.38/2008 of the Working Group on Arbitrary Detention, which concerned the trial of ten defendants accused of the murder of Mohamed Taha.²³ This case, as well as convictions pursuant to trials under the anti-terrorism law,²⁴ raises serious concerns over their compatibility with the right to life.²⁵

Recommendations:

In light of these considerations, the Sudanese Human Rights Monitor and REDRESS recommend that Sudan:

- Consider the abolition of the death penalty. As long as the death penalty is in force, it should be confined to the most serious offences only and not be mandatory. Any legislation incompatible with the right to a fair trial in death penalty cases, such as provisions of anti-terrorism legislation, should be repealed.

²⁰ 137/94-139/94-154/96-161/97: *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) / Nigeria*, para. 103.

²¹ Human Rights Committee, *General Comment No. 6: The right to life (art. 6)*, 30 April 1982, paras.6,7.

²² See for example *Paul John Kaw and others vs (1) Ministry of Justice; (2) Next of kin of Elreashed Mudawee*, Case No. MD/QD/51/2008, Constitutional Court, Judgment of 13 October 2009, confirming the death sentence of six men accused of murder committed in the Soba Aradi riots of May 2005.

²³ Opinion No.38/2008, above note 3.

²⁴ See *Report of the Special Rapporteur on the situation of human rights in the Sudan*, Sima Samar, UN Doc. A/HRC/11/14, 14 June 2009, para.30.

²⁵ See Human Rights Committee, *General Comment 6*, above note 21, para.7.

3.2. Positive obligation to protect life: International crimes

The duty to protect the right to life requires states to adopt legislation effectively repressing the commission of crimes that arbitrarily deprive a person of his or her life. Sudan recently adopted legislation that for the first time incorporated international crimes into domestic law. The Armed Forces Act of 2007 and the amendment of the Criminal Act of 2009 recognise genocide, war crimes and crimes against humanity.²⁶ However, the definitions used are not fully in line with internationally recognised ones and there are some inconsistencies between the definitions used in the respective pieces of legislation.²⁷ In addition, the practical effect of amendments may be limited due to non-retroactivity, amnesties and immunities,²⁸ which may have the effect that those responsible for serious crimes in Darfur and elsewhere cannot be held accountable.

Recommendations:

In light of these considerations, the Sudanese Human Rights Monitor and REDRESS recommend that Sudan:

- Bring the definition of international crimes in the Armed Forces Act and the Criminal Act in line with international standards and remove barriers to effective prosecutions for the commission of any of these crimes.

4. Article 5: Prohibition of torture and other cruel, inhuman or degrading treatment or punishment

Article 5 of the Charter requires states to take legislative and other measures to prevent torture, hold perpetrators of torture accountable and provide reparation to its victims. The prevalence of torture in Sudan has been a long-standing concern. Indeed, reports suggest that the practice of torture continues to be commonplace and may even have increased in the course of recent crackdowns and conflicts.²⁹

4.1. Lack of a criminal offence making torture subject to adequate punishments

The Bill of Rights prohibits torture but there is no criminal offence of torture in line with international standards. Article 115 of the Criminal Act 1991 stipulates that '1. Whoever intentionally does any act which tends to influence the fairness of judicial proceedings relating thereto, shall be punished with imprisonment for a

²⁶ Mohamed Abdelsalam Babiker, 'The Prosecution of International Crimes under Sudan's Criminal and Military Laws: Developments, Gaps and Limitations', in Oette, above note 10, 161-181.

²⁷ REDRESS/KCHRED, *Comments on the proposed amendment of the Sudanese Criminal Act*, September 2008, www.pclrs.org/downloads/Miscellaneous/Penal_Code_Amendment_Position%20Paper%20_2_.pdf

²⁸ Ibid.

²⁹ See ACJPS, SDFG and REDRESS, *Comments to Sudan's 3rd and 4th Periodic Report to the African Commission on Human and Peoples' Rights: Article 5 of the African Charter: Prohibition of torture, cruel, degrading or inhuman punishment and treatment*, April 2012.

term not exceeding three years or with fine or with both. 2. Every person who, having public authority entice or threaten or torture any witness or accused or opponent shall be punished with imprisonment for a term not exceeding three months or with fine or with both.’ This provision only covers one of the purposes of torture, i.e. in the context of judicial proceedings, and also fails to define torture in line with article 1 of the UN Convention against Torture and Inhuman, Cruel and Degrading Treatment or Punishment which has been referred to by the African Commission in its practice.³⁰ Other offences, such as causing hurt or abuse of office, may be applicable in lieu of a specific offence of torture. However, they do not adequately capture the serious nature of torture. Moreover, relevant offences, including article 115 of the Criminal Act 1991 mentioned above, carry punishments of short-term imprisonment only that are clearly inadequate given the seriousness of torture.

4.2. Lack of custodial safeguards

- Criminal Procedure Act, 1991:

Article 83 CPA provides for several custodial safeguards concerning the treatment of detainees, including the right of access to a lawyer, right to inform a family member and provision of medical care. However, the wording of the provision casts doubt on the effectiveness of these safeguards. Article 83(3) CPA provides the right for an arrested person to ‘contact his [her] lawyer’ but does not specify modalities, particularly the right to do so from the earliest stages of proceedings. The right to inform a family member is subject to the approval of the Prosecution Attorney, or the court, which can result in delays and introduces a discretionary element for what should be a clearly defined right. The provision of medical care is not formulated as a right and lacks details as to how such care is to be provided, i.e. upon entering and leaving detention and throughout where necessary in line with internationally recognised standards.

The prosecuting attorney can extend the initial 24 hours period of arrest to 96 hours, i.e. the latest point by which a detainee has to be brought before a judge. Four days is an unduly long period compared to the 24-48 hours that are widely seen as best practice.³¹ The period enhances the risk of torture at a time when arrested and detained persons are known to be most vulnerable.

- National Security Act:

The new National Security Act adopted in 2010³² largely fails to address the concerns that had been expressed in respect of its predecessor, the 1999 National Security Forces Law:³³ ‘In Khartoum and other parts of Northern Sudan,

³⁰ Communication 334/06: *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, para.162.

³¹ *General Recommendations of the Special Rapporteur on Torture*, UN Doc. E/CN.4/2003/68, para. 26 (g).

³² Its text is available at www.pclrs.org/smartweb/english/bills-and-laws.

³³ See REDRESS/SORD, *Security for All-Reforming Sudan’s National Security Services*, October 2009,

the National Intelligence and Security Services (NISS) systematically use arbitrary arrest and detention against political dissidents. According to allegations received by [UN] human rights officers, NISS detention can typically be accompanied by additional serious human rights violations such as incommunicado detention, ill-treatment, torture or detention in unofficial places of detention. The human rights concerns related to the NISS are longstanding and institutionalized problems that could be addressed through institutional reform.³⁴

The new Act effectively gives National Security Services (NSS) members the same broad powers that are alleged to have frequently resulted in human rights violations. Article 50 of the NSA retains the power to arrest and detain a person on vague grounds for an initial period of up to thirty days (45 days upon renewal) and a possible total of four and a half months. Article 51 of the Act grants the right to communicate with family members or a lawyer. However, the exercise of these safeguards is conditional upon not prejudicing the investigation. The NSS may therefore still hold detainees without contact to the outside world where it sees fit, contrary to international standards that prohibit incommunicado detention.³⁵ Detainees do not have access to a judge or the right to file a habeas corpus petition within the period of 45 days or four and a half months respectively, depriving them of any judicial protection.

- Use of evidence alleged to have been extracted under torture

There have been a number of recent cases, including death penalty cases, where courts dismissed allegations raised by defendants that confessions had been extracted under torture.³⁶ Article 20 (2) of the Evidence Act of 1993 stipulates that confessions in criminal matters will be invalid if they are the result of coercion. However, article 10 of the same Act creates an exception as it allows the court to admit evidence – even where it was obtained in breach of recognised procedures – if it is confident that the evidence is independent and acceptable. The court may also require corroborating evidence to rely on such evidence as a basis for conviction. The lack of clarity in the Evidence Act runs counter to international standards according to which confessions or statement obtained as a result of torture or ill-treatment are void and inadmissible.³⁷ It introduces a grey area that undermines protection against the resort to torture to extract confessions and statements.

available at www.pclrs.org/downloads/Resources/Resources/Security%20for%20all%20Final.pdf

³⁴ Tenth periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan, *Arbitrary arrest and detention committed by national security, military and police*, Geneva, 28 November 2008, 3.

³⁵ Communication 275/2003: *Article 19 v Eritrea*, paras. 100-103.

³⁶ See above 3.1.

³⁷ Communication 334/06: *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt* (2011), paras.212-219.

4.3. Legal barriers to effective investigations and prosecutions

- Immunity

The granting of immunities for officials in Sudanese laws is a long-standing concern. Effectively, authorities are given the right to police themselves and the resulting lack of accountability facilitates human rights violations. The UNHRC, the African Commission, various UN bodies, the AU High-Level Panel on Darfur and others have called on Sudan to abolish immunities.³⁸ Sudan had the opportunity to do so in the Armed Forces Act of 2007, the Police Act of 2008, and the National Security Act of 2010, but has opted not to do so. The Sudanese Constitutional Court has justified immunities by emphasising their conditional nature and the possibility of judicial review.³⁹ However, in practice, immunities have frequently led to impunity, including for serious human rights violations, and legal remedies are neither clear nor effective.⁴⁰ By maintaining the current system, the state party fails in its positive obligation to prevent, investigate and prosecute serious violations and in providing effective remedies to victims thereof.⁴¹

- Statutes of Limitation

The passage of time has constituted an additional obstacle to the investigation and prosecution of torture cases, particularly where the authorities have to date failed to take any action.⁴² The criminal offence of torture is subject to a limitation period of two years (article 115 (2) of the Criminal Act of 1991) and/or, the offence of hurt for a maximum period of five years (article 142 (2) of the Criminal Act of 1991) pursuant to Article 38 (1) (b) of the 1991 Criminal Procedure Act. These periods are unduly short given the seriousness of the crime of torture, which should ideally not be subject to any limitation periods.

- Lack of victims and witness protection

Individuals who allege that they have been tortured, such as Osman Hummeida, Monim Elgak and Amir Suliman in 2009, received threats that prompted them to leave Sudan. Article 4(e) Criminal Procedure Act provides that witnesses should not be subject to any injury or ill-treatment. Beyond this general prohibition, Sudanese law does not provide for the effective protection of victims and witnesses in torture cases.

³⁸ See e.g. *UN Human Rights Committee: Sudan*, above note 16, para.9 (e) and *Darfur: The Quest for Peace, Justice and Reconciliation*, Report of the African Union High-Level Panel on Darfur (AUPD), PSC/AHG/2 (CCVII), 29 October 2009, xix, para.25 (c) and (d); 56-63, paras.215-238; and 91, 92, para.336.

³⁹ *Farouq Mohamed Ibrahim Al Nour v (1) Government of Sudan; (2) Legislative Body*; Final order by Justice Abdallah Aalmin Albashir President of the Constitutional Court, 6 November 2008.

⁴⁰ *UN Human Rights Committee: Sudan*, above note 16, para.9 and OHCHR, Report, above note 34.

⁴¹ See above II.1.

⁴² *Farouq Mohamed Ibrahim Al Nour v (1) Government of Sudan; (2) Legislative Body*.

4.4. Lack of effective remedies and reparation

- No explicit right to reparation for torture

In practice, there is an almost complete absence of cases that have resulted in compensation or other forms of reparation being awarded to victims of torture. Article 35 of the Bill of Right stipulates the right to litigation. However, neither the Bill of Rights nor statutory law provide for an explicit right to reparation for torture. While compensation as one form of reparation can be claimed in the course of criminal proceedings, Sudanese criminal law does not recognise the crime of torture as mentioned above. Moreover, immunities, short statutes of limitation and lack of adequate protection significantly limit the prospect of successfully bringing a compensation claim as part of criminal proceedings. A victim of torture may claim damages for tort under civil law.⁴³ However, individual officials enjoy immunity and, where this immunity is not lifted, a suit cannot be brought against the state because its liability is vicarious.⁴⁴

Recommendations:

In light of these considerations, the Sudanese Human Rights Monitor and REDRESS recommend that Sudan amends its legislation by:

- Making torture a criminal offence, defining torture in line with the definition contained in article 1 of the UN Convention against Torture that has been applied and referred to by the African Commission in its jurisprudence;
- Establishing custodial safeguards in the Criminal Procedure Act and National Security Act, particularly timely access to a lawyer, medical assistance and examinations, and judicial review (including habeas corpus);
- Providing unambiguously in the Evidence Act that any evidence obtained as a result of torture or ill-treatment is unlawful and void;
- Removing immunities for officials in relation to any acts carried out in the performance of their duties;
- Significantly extending if not removing altogether statutes of limitation for acts amounting to torture;
- Providing adequate protection for victims and witnesses of human rights violations, including torture;
- Stipulating an explicit right to reparation for torture in the constitution and statutory law.

⁴³ Article 153(1) Civil Transaction Act of 1984.

⁴⁴ Article 164(1) *ibid.*

4.5. Prohibition of cruel, inhuman and degrading punishment

The recognition and application of corporal punishment in Sudanese law has been a long-standing concern.⁴⁵ Sudan's laws provide for several forms of corporal punishment, including stoning, amputation, cross-amputation (the application of these three types of corporal punishment appear to be subject to a de facto moratorium) and whipping. A large number of offences in the Criminal Act and Public Order Laws provide for the punishment of whipping. The punishment is routinely meted out, particularly against women from a marginalised background, following summary trials. This practice, which the African Commission found to violate article 5 of the African Charter in its landmark case of *Doebbler v Sudan*, continues in defiance of the Commission's recommendation to repeal relevant legislation, both in the case of *Doebbler v Sudan* and in its observations on Sudan's 2nd state party report.⁴⁶

Recommendations:

In light of these considerations, the Sudanese Human Rights Monitor and REDRESS recommend that Sudan:

- Declare an immediate moratorium on the imposition of any form of corporal punishment;
- Repeal legislation providing for any form of corporal punishment.

5. Article 6 and 7: Right to liberty, security and fair trial

The lack of access to a lawyer and absence of effective judicial supervision frequently result in incommunicado detention. Such detention is not only considered a form of ill-treatment in its own right. It also undermines the right of defence and therefore the right to a fair trial.⁴⁷

5.1. Bill of Rights

Article 29 of the Bill of Rights does not explicitly recognise the right not to be subject to *arbitrary* arrest and detention.⁴⁸

Recommendations:

⁴⁵ *Doebbler v Sudan*, above note 2; *UN Human Rights Committee: Sudan*, above note 16, para.9. See also REDRESS and Sudanese Human Rights Monitor, *No more cracking of the whip: Time to end corporal punishment in Sudan*, March 2011, <http://www.pclrs.org/downloads/Corporal%20Punishment%20-%20English.pdf>

⁴⁶ *Doebbler v Sudan*, above note 2, and African Commission on Human and Peoples' Rights, *Concluding Observations and Recommendations on the Third Periodic Report of the Republic of Sudan (2003-2008)*, (2009), para.54.

⁴⁷ Human Rights Committee, General Comment 32, *Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para.23.

⁴⁸ Note that if read in conjunction with article 27(3) of the Bill of Rights which provides that binding international treaties are an integral part thereof, article 29 should be interpreted to prohibit arbitrary arrest and detention.

In light of these considerations, the Sudanese Human Rights Monitor and REDRESS recommend that Sudan:

- Explicitly recognise in the new Constitution the right not to be subjected to arbitrary arrest or detention.

5.2. Criminal Procedure Act

The Criminal Procedure Act, 1991, contains several shortcomings if viewed in light of article 6 and 7 of the Charter and the Principles and Guidelines on the Right to a Fair Trial in Africa. It does not provide for speedy access to a lawyer of one's choice, fails to provide that an arrested person should be brought before a judge promptly (normally within the first 48 hours) and does not provide for an unequivocal right of compensation for arbitrary arrest and detention.⁴⁹

Recommendations:

In light of these considerations, the Sudanese Human Rights Monitor and REDRESS recommend that Sudan:

- Amend the Criminal Procedure Act and provide access to a lawyer of one's choice from the outset of criminal proceedings, judicial supervision of the lawfulness of detention within the first 48 hours of arrest and in regular intervals thereafter, and the right to compensation for unlawful arrest or detention.

5.3. National Security Act:

The National Security Act, 2010, does not clearly stipulate the need for 'reasonable suspicion' as a ground of arrest and/or detention, does not provide an unconditional right to see a lawyer, and fails to grant access to a judge 'promptly' or even within a reasonable time (a person can be held for up to four and a half months without any judicial supervision).⁵⁰ These extraordinarily wide powers make it virtually impossible that any detention under the NSA is considered unlawful, which renders a right to compensation for a breach of article 6 illusory.

Recommendations:

In light of these considerations, the Sudanese Human Rights Monitor and REDRESS recommend that Sudan:

⁴⁹ See Nabil Adib, 'At the State's Mercy: Arrest, Detention and Trial under Sudanese Law', in Oette, above note 10, 121-138, 122-133.

⁵⁰ See articles 50, 51 National Security Act, 2010.

- Remove the powers of arrest and detention from the national security services as envisaged in articles 150 and 151 of the Interim National Constitution; and – should the powers of arrest and detention be retained -
- Provide an unconditional right to see a lawyer of one’s choice from the outset and to challenge the lawfulness of detention before a judge within the first 48 hours of arrest and in regular intervals thereafter.

5.4. System of Special Courts under the Combating of Terrorism Act

The Combating of Terrorism Act establishes a system of ‘Special Courts’ set up by the Chief Justice, which have the power to impose and confirm the death penalty. The operation of these ‘Special Courts’ have been of concern, such as in the case of *Kamal Mohammed Saboon v Sudan Government*.⁵¹ The case concerned the raid by forces of the Darfurian Justice and Equality Movement (JEM) on Omdurman in 2008, which was followed by the arrests of thousands of suspects of Darfuri origin. Several hundred of these persons were charged to stand trial before six special courts in the capital. The Chief Justice and Minister of Justice formulated the rules of procedure of the trial courts (Oder No.82, 2008) pursuant to the provisions of the Combating Terrorism Act but in breach of the principles of the independence of the judiciary. The Rules themselves restrict the right of the defence to meet the accused person, permit trials in absentia, empower courts to convict on the basis of (retracted) confessions without investigating the circumstances under which they have been made, and limit the right of appeal to the Special Court of Appeal (rather than the Court of Appeal and Supreme Court). It is apparent that these rules raise serious concerns regarding their compatibility with the right to defend oneself and the right to a fair hearing, including the inadmissibility of confessions obtained as a result of torture or ill-treatment.

Recommendations:

In light of these considerations, the Sudanese Human Rights Monitor and REDRESS recommend that Sudan:

- Abolish Special Courts and not subject civilians to trials before any special courts or military courts; and – should Special Courts be retained -;
- Ensure that applicable procedures are compatible with the African Charter.

⁵¹ *Kamal Mohammed Saboon v Sudan Government*, Constitutional Court No.60 of 2009.