

REDRESS

Ending Torture. Seeking Justice for Survivors

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Written Evidence submitted by the Redress Trust
to the UK Associate Parliamentary Group on
Sudan:

Parliamentary Hearings: Sudan's Comprehensive
Peace Agreement

Promoting law reform in Sudan to enhance
human rights protection, strengthen the rule
of law and foster democratic processes

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1. The work of the Redress Trust on law reform in Sudan

The Redress Trust is an international human rights organisation seeking justice for torture survivors (www.redress.org). It has been implementing two projects on criminal law reform in Sudan (funded by DFID and the FCO respectively), having worked on the question of law reform in Sudan since 2007. This is a joint initiative with Sudanese partners, initially the Khartoum Centre for Human Rights and Environmental Development (KCHRED), and following KCHRED's closure in early 2009, the Sudanese Organisation for Research and Development (SORD). The work seeks to advance the legal recognition of the rights of the most marginalised people in Sudan. To this end, it aims at strengthening civil society's capacity to advocate for human rights protections in Sudan and to contribute to criminal law reform. The project partners work closely with various stakeholders in Sudan. Project publications on various aspects of criminal law reform are available at www.pclrs.org and http://www.redress.org/country_sudan.html

2. Abstract

Legislative reforms are key to the enhanced protection of human rights and the strengthening of the rule of law in Sudan. They are also an essential prerequisite for holding free and fair elections in 2010. The importance of such reforms for the implementation of the Comprehensive Peace Agreement (CPA) has not received adequate attention by international actors to date. A concerted effort is needed to better support, monitor and evaluate law reform. This is both an integral part of the CPA assessment and an indicator of the process referred to as 'democratic transformation.' Neglecting the area of law reform facilitates rights violations and risks undermining the legitimacy of elections, related democratic processes, and the CPA.

3. Main submission

I. Rule of law and human rights as part of progress of CPA implementation

The multitude of international actors engaged in various capacities the process of CPA implementation need to develop a stronger focus on legislative reforms as an integral part of the process of ‘democratic transformation.’ Such reforms are a crucial component of establishing the rule of law.¹ Conversely, inadequate reforms threaten to undermine the overall objectives of the CPA, particularly a successful transition to lasting peace (see Chapeau of the CPA).

The CPA adopts a forward looking model of addressing human rights violations. It is silent on accountability and justice for past violations but has a strong emphasis on the protection of human rights. Enshrining these rights in the Interim National Constitution (INC) and in statutory law is one of the key components of the rule of law.² The CPA identifies specific laws that need to be reformed, in particular the National Security Act.³ It also provides for the establishment of the Constitutional Review Commission (CRC).⁴ The latter’s mandate includes ‘the preparation of a Legal and Constitutional Framework text’⁵ and ‘to prepare such other legal instruments as is required to give effect to the Peace Agreement.’⁶

The INC was duly adopted in 2005. Subsequently, several laws have been amended or newly enacted, including in particular the:

- Armed Forces Act (2007);
- Political Parties Act (2007);
- National Police Act (2008);
- Election Act (2008);
- Press and Publication Act (2009);
- National Human Rights Commission Act (2009);
- Child Act (2009);
- Criminal Procedure Code Amendment (2009); and the

¹ The rule of law has been defined as a ‘principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.’ United Nations, *The rule of law and transitional justice in conflict and post-conflict societies*, Report of the Secretary-General, UN Doc. S/2004/616, 23 August 2004, para.6.

² See in particular Chapter II, 1.6. (Naivasha protocol).

³ 2.7.1.1. CPA

⁴ 2.12.4.2 and 2.12.4.3 *ibid.*

⁵ 2.12.5 *ibid.*

⁶ 2.12.9 *ibid.*

- Criminal Code Amendment Act (2009).

However, several shortcomings have become apparent in the process of law reform:

1. There have been substantial delays in the enactment of legislation. The reform of a number of the most important laws, in terms of sources of violations, is still outstanding. As noted by the Assessment and Evaluation Commission (AEC):

The delay ... is creating a bottleneck in the progressive implementation of the CPA at national, southern and state levels. Furthermore, much of the outstanding legislation mentioned will be important in underpinning the Bill of Rights, which is a central element in the Interim National Constitution.⁷

This concerns in particular the National Security Act, which has been the subject of controversy and negotiations between the National Congress Party (NCP) and the Sudan People's Liberation Movement/Army (SPLM/SPLA), as well as of opposition by other political parties and civil society organisations. The extent to which the extremely broad powers of arrest and detention should be retained, if at all, is one of the major areas of disagreement.⁸ Emergency and anti-terrorism legislation incompatible with international standards remains in place and in use.⁹ No substantial reforms have been advanced to guarantee women's rights. This includes legislation pertaining to rape and other forms of sexual violence,¹⁰ female genital mutilation (FGM),¹¹ public order laws¹² and personal laws,¹³ all of which have contributed to pervasive discrimination and gender-based violence.¹⁴

⁷ Assessment and Evaluation Commission, Mid Term Evaluation Report, Submitted pursuant to the CPA, July 2008, pp.11, 12.

⁸ See REDRESS and SORD, *Security for all- Reforming Sudan's National Security Services*, September 2009, at <http://www.pclrs.org/Resources/Security%20for%20all%20FinalENG.pdf>

⁹ Report by the Special Rapporteur on the situation of human rights in the Sudan, Sima Samar, UN Doc.A/HRC/9/13, 2 September 2008, paras.29, 30.

¹⁰ REDRESS and KCHRED, *Time for Change-Reforming Sudan's Legislation on Rape and Sexual Violence*, November 2008, at <http://www.redress.org/reports/Position%20Paper%20Rape.pdf>

¹¹ REDRESS, *Comments on the ban of female genital mutilation in Sudan's Legislation*, February 2009, at http://www.redress.org/documents/FGM_Bill_Commen_Eng.pdf

¹² See the recent case of Lubna Hussein and others and others who faced (or received) lashes for wearing trousers (article 152 of the Sudanese Criminal Act 1991: Indecent and immoral acts). See 'Sudanese girls including Southerners get 10 lashes for "provocative dressing"', Sudan Tribune, 13 July 2009.

¹³ Muslim Personal Matters Act of 1991.

¹⁴ Concluding observations of the UN Human Rights Committee: Sudan, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, paras.13-15.

2. The laws adopted are deficient. The lawmakers have overly focused on the distribution of powers instead of addressing the causes of violations. The laws retain provisions incompatible with binding international standards even though the latter form an integral part of the INC by virtue of article 27 (3).¹⁵ The definition of international crimes incorporated by virtue of the Criminal Code Amendment Act 2009 is partially at variance with international standards.¹⁶ The amendment also fails to provide for a framework in which there would be a reasonable prospect for its effective application, as acts governing the army and the police have retained immunity provisions that have facilitated impunity for human rights violations.¹⁷ In other areas, such as gender based violence, the complete ban on FGM envisaged in the Child Act failed because of opposition by the Islamic Jurisprudence Council.¹⁸ In some instances, such as in case of the recently amended article 127 of the Sudan Criminal Procedure Code, reforms have been made to restrict rights, namely freedom of assembly.¹⁹

3. The law reform process itself is flawed. It is marked by a lack of public consultation and inadequate media coverage. The latter can in large parts be attributed to the degree of state control and censorship. The process and contents of any legislation that has been proposed or adopted largely reflect the allocation of power.²⁰ It is often the result of negotiations between the two main parties, namely the NCP and the SPLM/SPLA. rather than that of an informed public and parliamentary debate. The composition of the bodies tasked with law reform, such as the CRC, equally reflects the existing balance of power.²¹ The work of such bodies has suffered from capacity constraints and lack of coordination and has had limited impact to date. As a result, the process of law reform has failed to provide for 'political inclusiveness and public participation' as envisaged in the CPA.²² Civil society has taken the initiative to enhance public participation, and several campaigns on press freedom and women's rights have raised awareness and influenced debates. However, civil society operates under

¹⁵ Article 27 (3) Interim National Constitution of 2005: 'All 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'.

¹⁶ REDRESS and KCHRED, *Comments on the proposed amendment of the Sudanese Criminal Act*, Position Paper, September 2008, http://www.redress.org/reports/Penal_Code_Amendment_Position%20Paper%202_2_.pdf

¹⁷ Ibid. See also REDRESS and KCHRED, *Police Forces Act falls short of the Bill of Rights*, Press Statement, 18 June 2008, at http://www.redress.org/news/08-06-13%20P%20R_Police_Act_English%20Press%20Release%20-%202017%20June.pdf

¹⁸ REDRESS, *Comments on the ban of female genital mutilation in Sudan's Legislation*, February 2009, at http://www.redress.org/documents/FGM_Bill_Commen_Eng.pdf

¹⁹ 'Parliament Passes Criminal Procedures Law, Article 127 Sparks Wide Controversy', Sudan Vision, 21 May 2009.

²⁰ The NCP has 52% of the seats in the National Assembly and the SPLM/SPLA 28% seats pursuant to the CPA.

²¹ 2.12.4.3. CPA.

²² 2.12.10. *ibid.*

considerable constraints, particularly in the current climate of increased security surveillance, which hampers its effectiveness.²³

The combination of a lack of discernible political will, the weakness of the reform process and shortcomings in drafting have resulted in little progress towards achieving the CPA objectives. This negatively impacts the enhanced recognition and protection of rights and the strengthening of the rule of law. Recent developments have not changed the fabric of the system in place, which is marked by executive bodies vested with broad powers without any strong safeguards or accountability mechanisms in place. This framework facilitates the arbitrary exercise of power and impunity for serious violations. Credible allegations of arbitrary arrests, torture and the growing number of capital punishments after proceedings seemingly in violation of fair trial standards are testimony to the continuing failure of the legal system.²⁴

It is critical that four years after the signing of the CPA one of its key objectives has not been advanced. This failure is indicative not simply of problems of capacity and coordination but raises more fundamental questions: Is it still possible that the elements of the CPA pertaining to human rights and the rule of law can be achieved during its envisaged life span? Is there a tacit readiness, not only on the part of the Government of National Unity but also international actors, to sacrifice these components if seen necessary for the completion of certain CPA milestones, namely elections in 2010 and the referendum in South Sudan in 2011?

International actors working on the CPA implementation and in the area of law reform have succeeded only partially in highlighting the importance of, and contributing to, a successful reform process. The AEC dedicated only four sentences of a 59 page report to the issue of legislative reforms outside of the specific election context.²⁵ Other actors, such as the United Nations Mission in Sudan (UNMIS), the United Nations Development Programme (UNDP) and the African Union/United Nations Hybrid Operation in Darfur (UNAMID) have engaged in capacity building, technical assistance and dialogue on relevant legislative reforms. Their impact has been marginal due to various constraints and the difficulties of pursuing an integrated strategy. The structural and systemic nature of underlying problems may have also contributed to the limited close attention paid to legislative reforms. There has been no independent assessment of the role and position of international actors in this regard. A stronger diplomatic interest at the national, regional and international level may spur the parties to the CPA to take legislative reforms more seriously and may result in a strengthened role of civil society in any initiatives in this context.

²³ Report of the Special Rapporteur on the Situation of Human Rights in the Sudan, Sima Samar, UN Doc. A/HRC/11/14, June 2009, paras.35, 36 and 90.

²⁴ Ibid., paras.10 and 29-35.

²⁵ AEC Report, above n.7, p.11.

- **Recommendations**

Legislative reforms and their role in the protection of human rights and the advancement of the rule of law should be made a centrepiece of assessing and evaluating CPA implementation. This should extend beyond a mechanical evaluation of whether a particular piece of legislation has been enacted to a more comprehensive analysis of the impact of legislation on rights protection. It requires a holistic and contextual approach, comprising a careful analysis of both process and substance. This includes an assessment as to whether the process of reform is itself both ‘inclusive and participatory’ and whether any changes made are compatible with international human rights standards. This should be undertaken by the UN and AU missions in Sudan as well as the AEC, and form part of external monitoring. Efforts made to support adequate law reform should include ongoing consultation with civil society, capacity building of a broad range of actors involved in the law reform process (including various political parties) and technical assistance as needed.

- II. **Need to focus on legislative reforms as precondition for free and fair elections**

International actors need to recognise, and should contribute to the recognition of, legislative reforms as an integral part of the election process (and, subsequently, the referendum on the status of Southern Sudan). The focus should be on the whole legal system and not just on legislation that has an explicit bearing on elections, such as laws on political parties and the election law. A broader understanding includes legislation affecting the exercise of civil and political rights and other rights that are crucial prerequisites for free and fair elections.

Some international actors have focused largely on capacity building and technical assistance to allow the elections to proceed as part of the broader CPA process.²⁶ While important, this approach may result in a rather narrow conception of elections as a one-time event. It raises the prospect that elections become a formal and technical exercise. The shift in language, according to which elections should be ‘credible,’²⁷ seemingly lowers the requirements that need to be in place if compared to free and fair elections. This may in turn result in flawed elections that command limited legitimacy. In contrast, other actors have highlighted the need to ‘strengthen the democratic

²⁶ For example, USAID Africa: Sudan, Democracy & Governance, http://www.usaid.gov/locations/sub-saharan_africa/countries/sudan/governing_justly.html

²⁷ ‘US envoy says wants credible elections,’ Sudan Tribune, 8 May 2009.

process.’²⁸ This includes legislative reforms to enhance human rights protection, which are a crucial component of promoting the rule of law and governance.

An emphasis on elections as a primarily technical process culminating in the casting of votes at the ballot box is prone to ignore the importance of having conditions in place that enable the democratic process to materialise. At a minimum, political actors need to be able to formulate and communicate their policies and positions freely and to engage peacefully in public life without unwarranted interference. Citizens need to be able to freely inform themselves and contribute to the public debate. As recently stressed by the UN Special Rapporteur on the situation of human rights in the Sudan:

As Sudan prepares for a general election scheduled for February 2010, it is essential that fundamental freedoms of expression, association, assembly and movement are guaranteed and respected across the country.²⁹

This sentiment was echoed by the UN Secretary-General in a recent report on elections in the Sudan where he expressed his concerns

...that a number of basic steps have yet to be taken. The most important requirement at this juncture is that the Government of National Unity, the National Assembly and the Government of Southern Sudan take the necessary steps to provide a free and fair electoral environment. They must guarantee basic political freedoms, including the freedom of assembly, speech and the press, as provided for under the [CPA] and the [INC].³⁰

A rights-based approach, according to which any restrictions would have to be based on recognised human rights standards,³¹ would be best suited to provide a framework within which the democratic process leading up to elections can unfold and would be in line with the human rights conception underpinning the CPA.

It is our recommendation that any legislation undermining the broader democratic process should be abolished or changed. This includes a number of laws, such as:

²⁸ For example UNDP Sudan, 'Support to Elections and Democratic Processes': <http://www.sd.undp.org/projects/dg16.htm>, and UNDP Sudan, 'Democratic Governance': http://www.sd.undp.org/focus_democratic_governance.htm.

²⁹ SR Report, above n.23, para.90.

³⁰ Report of the Secretary-General on elections in the Sudan, UN Doc. S/2009/391, 28 July 2009, para.66.

³¹ For example article 19 of the International Covenant on Civil and Political Rights on freedom of expression.

- press restrictions as provided for in the Press and Publication Act;³²
- offences criminalising the legitimate exercise of freedom of expression or assembly;³³
- the recently amended article 127 of the Criminal Procedure Code unduly interfering with freedom of assembly;³⁴
- the Security Forces Act, emergency legislation and anti-terrorism legislation, all of which facilitate arbitrary arrest and detention and lack fundamental safeguards against ill-treatment and torture;³⁵
- provisions fostering impunity for violations, in particular immunity legislation;³⁶
- public order offences, which can be used to intimidate certain groups in society, particularly women.³⁷

International policies or engagement that ignore these laws and focus solely on legislation pertaining directly to elections are too narrow. They allow those that have a majority in parliament and institutions to use existing powers for their own end to ensure favourable outcomes. The political dimension of law reforms has recently been highlighted by the announcement of the All Political Party Conference (APPC) that they will boycott elections if substantive changes to key legislation are not made beforehand.³⁸ A policy that fails to fully consider these underlying dynamics would do little to promote a level playing field as one of the prerequisites for free and fair elections. It would also constitute a missed opportunity to link support for elections with broader reforms necessary to genuine democratic development and to monitor efforts made in this regard accordingly. The UN Secretary-General eloquently warned of the risks inherent in adopting a narrow focus of elections:

Recent experience has demonstrated that holding elections without adequate political and security preparation and disengaging too soon can undermine, rather than facilitate, the process of building the rule of law. Yet, the international community still sometimes

³² SG Report, above n.30, at para.33.

³³ This applies to articles 67 Disturbance, 66 Propagating False News, 69 Breach of Public Peace and 77 Public Nuisance of the Criminal Act.

³⁴ SG Report, above n.30, at para.32.

³⁵ See above at 3 I. 2.

³⁶ Article 33 (b) National Security Forces Act, 1999; article 42 (2) of the Armed Forces Act, 2007; and article 45 (1) Police Act, 2008.

³⁷ Protection of Public Safety Act of 1997 and article 152 of the 1991 Criminal Act.

³⁸ Juba Declaration on Dialogue and National Consensus, 2 October 2009: “(4) (ii) Amendment of all laws related to freedoms and democratic transformation and bringing them in consonance with the INC, namely the National Security Law, Criminal Procedures Law, Trade Unions Law, Immunities Law, Personal Status Law, Press and Publications Law, Public Order Laws, (iii) Amendment of the above laws within a period not exceeding November, 30, 2009 as conditional to the participation of all the political parties participating at the APPC in the upcoming general elections.” See also SG Report, above n.30, at para.31.

encourages early elections in post-conflict States in an attempt to lend legitimacy to political leaders, processes and institutions. But premature elections can bring about only cosmetic electoral democracies, at best. In many cases, elections held in non-permissive security conditions exclude the meaningful participation of key groups, while exposing people to undue personal risk. In others, candidates and parties from the old political order, lacking a commitment to democratic principles and human rights, use premature elections to consolidate their power. At worse, they can radicalize political discourse and even lead to renewed conflict.³⁹

International actors should promote an understanding of elections that focus on the broader political process as an important factor in its own right in addition to the preparation and execution of national elections. Financial and political support for elections should be directly linked both to tangible reforms in key areas of legislation and the absence of human rights violations in the run-up to elections. Civil society and political forces should be consulted with a view to identifying laws that have been, or lend themselves to being used to interfere, and in some cases frustrate altogether, the exercise of rights that are critical to the democratic process. The Bill of Rights and international standards binding on Sudan provide suitable reference points to assess relevant laws and practice in this regard.

- **Recommendations**

Continuing financial support and acceptance of the results of elections should be contingent upon prior reforms of legislation and adherence to human rights standards in practice within a realistic timeframe. Such a policy may result in further delays to elections as it would require the Government of Sudan to undertake the necessary reforms. However, such a delay would be preferable to the alternative outcome, namely elections that do not command legitimacy in Sudan. The latter development would enhance the risk of an adverse fallout and political violence. This, in turn, could jeopardise implementation of the remainder of the CPA with potentially serious consequences.

³⁹ UN S/2004/616, above n.1, para.22.