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Sudan Law Reform Advocacy Briefing

May 2013

Welcome to the first issue of the Sudan Law Reform Advocacy Briefing. This Briefing will be published quarterly to highlight and reflect on development and issues critical to the promotion and protection of human rights in Sudan. Its aim is to inform and engage those working on, and interested in, law reform and human rights in Sudan. The present issue focuses on the prohibition of torture; it identifies shortcomings in Sudan's legal regime and recommends a series of changes, drawing on an alternative report submitted by REDRESS, the African Centre on Justice and Peace Studies and the Democracy First Group to the African Commission on Human and Peoples' Rights in 2012 (see <http://www.redress.org/downloads/publications/1204%20Comments%20to%20Sudans%204th%20and%205th%20Periodic%20Report.pdf>). The annex contains key extracts from the concluding observations of the Commission, which Sudan is bound to implement as a state party to the African Charter. The issue also contains a list of reports recently published by international and regional organisations, NGOs and others.

Yours,

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I. Implementing the Prohibition of Torture in Sudan

The prevalence of torture in Sudan is a long-standing concern. In the wake of the end of the Interim Period of the Comprehensive Peace Agreement and the separation of the country in 2011, the human rights situation has deteriorated, characterised by the outbreak and intensification of armed conflicts, as well as repression of protests and civil society. Recourse to torture continues unabated, and there are a series of well documented cases of torture by national security agents and others targeting political opponents, human rights defenders, students, and members of marginalised communities.

Sudan is a party to several relevant international treaties prohibiting torture, including the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights. These treaties are also an integral part of Sudan's Bill of Rights. Sudan is therefore obliged to take measures aimed at preventing torture, responding to allegations of torture by means of prompt, impartial and effective investigations and prosecutions, and providing effective remedies and reparation.

Over the last decade, national, regional and international actors have identified a series of problems in the Sudanese legislative and institutional framework and practice in relation to the prohibition of torture. However, the Government of Sudan has not taken measures to effectively combat torture. No anti-torture policy or coordinated efforts are in place that tackle the causes of torture through legislative and institutional reforms or adequate responses in individual cases.

Such a policy would need to be based on Sudan's obligations under international law and its constitution. To this end, it would include the adequate prohibition of torture in Sudanese law, the provision of safeguards, as well as measures to ensure accountability and reparation. It would also benefit from the ratification of treaties to which Sudan is not yet a party, particularly the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the Optional Protocol thereto, which provides for additional monitoring of the prohibition of torture.

Effectively combating the legacy of torture in Sudan, and the structural factors contributing to its persistence, requires fundamental reforms. Legislative reform, such as the adoption of an anti-torture law, is an important component of these broader reforms. Many aspects of Sudan's laws fall short of international standards, and thereby facilitate torture and/or undermine if not negate accountability and reparation for this serious violations of human rights. The following is a brief summary of key areas of concern and recommendations as to what steps Sudan should take with a view to implementing the prohibition of torture by means of legislative reform:

Prevention

Sudanese criminal law does not contain a criminal offence of torture in line with the internationally recognised article 1 of the UN Convention against Torture. Provisions governing rape and sexual violence, including the absence of a criminal offence of female genital mutilation, are inadequate and fail to effectively repress gender-based violence against women.

Conversely, Sudanese criminal law and public order law recognise a series of corporal punishments, including stoning, amputations and whippings, which are contrary to the prohibition of torture under international law, as held by the UN Human Rights Committee and the African Commission on Human and Peoples' Rights.

The Criminal Procedure Act provides some custodial safeguards. However, it does not stipulate a right of access to a lawyer of one's choice from the beginning of criminal proceedings. Also, the prosecuting attorney can extend the initial 24 hours period of arrest to 96 hours, which is an unduly long period compared to the 24-48 hours that are widely seen as best practice. The longer period enhances the risk of torture at a time when arrested and detained persons are known to be most vulnerable.

The National Security Act (NSA) adopted in 2010 largely fails to address the concerns that had been expressed in respect of its predecessor, the 1999 National Security Forces Law. The Act gives National Intelligence and Security Services (NISS) members 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. As detainees do not have an unequivocal right to communicate with family member or lawyers, and do not have the right to appear before a judge to challenge the legality of detention or lodge a complaint within the period set out above (up to four and a half months), they are frequently subject to incommunicado detention. Being cut off from the outside world considerably enhances vulnerability to being subjected to torture, and also constitutes a form of ill-treatment in its own right. The lack of substantial reforms of national security legislation constitutes a visible failure to enhance much needed protection against the well documented practices of torture and ill-treatment at the hands of NISS members.

There have been a number of recent cases, including death penalty cases, where Sudan's Constitutional Court effectively dismissed allegations raised by defendants that confessions had been extracted under torture. This jurisprudence, which concerned cases where defendants had been held in prolonged incommunicado detention during which the risk of torture and ill-treatment is particularly evident, fails to act as disincentive so that investigating authorities refrain from using torture to extract confessions or obtain evidence. These cases highlighted the shortcomings in legal protection provided by Sudanese laws against forced confessions.

Accountability

There has been almost complete impunity for torture, including acts of rape and sexual violence, in Sudan. A series of interrelated factors contribute to this impunity: lack of a criminal offence of torture, rape and other forms of sexual violence in line with international standards; immunities for officials; brief statutes of limitations; lack of victim and witness protection; and the absence of a system aimed at holding officials accountable for wrongdoing, i.e. by means of prompt, impartial and effective investigations and prosecutions.

The granting of immunity is the most visible means of shielding alleged perpetrators from accountability. It reflects a system dominated by the executive at the expense of effective oversight, be it judicial or otherwise. This institutionalised lack of accountability is deeply engrained. Immunities were maintained in the Armed Forces Act of 2007, the Police Act of 2008, and the National Security Act of 2010, notwithstanding repeated calls to abolish immunity laws by the UN Human Rights Committee, the African Commission, various UN Charter bodies, the AU High-Level Panel on Darfur and others. Immunities continue to act as reassurance that officials are above the law, also because the judiciary, including the Sudanese Constitutional Court, have upheld such immunities in practice. This situation has frequently led to impunity, including for serious human rights violations, as legal remedies are neither clear nor effective. In addition, there is a lack of adequate protection of victims, witnesses and human rights defenders, which undermines the prospect of safely bringing complaints relating to torture. By maintaining the current system, the state party fails in its positive obligation to prevent, investigate and prosecute serious violations, and to provide effective remedies to victims thereof.

Lack of effective remedies and reparation

There have been some isolated instances of out of court settlements in torture cases, and the Government of Sudan has agreed to provide some form of reparation in relation to the conflict in Darfur. However, 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. The law does not provide for an explicit right to reparation for torture. Immunities, short statutes of limitation and lack of adequate protection, in combination with systemic shortcomings that undermine effective access to justice, render existing remedies ineffective, a fact recognised by the African Commission on Human and Peoples' Rights in its jurisprudence. In addition, there are no effective national human rights institutions or administrative mechanisms providing at least some form of reparation for torture survivors.

Recommendations

In light of the above considerations, the Government of Sudan should urgently take a series of measures to ensure the effective implementation of the prohibition of torture:

Adopting an anti-torture policy designed to effectively prevent torture, based on legislative and institutional reforms, measures to ensure accountability and justice for torture victims, and a public commitment to refrain from any form of torture, cruel, inhuman or degrading treatment or punishment. To this end, consider the adoption of an anti-torture law and/or targeted legislative reforms with a view to bringing legislation in line with Sudan's obligations under international law:

Enshrining the unequivocal prohibition of torture and other inhuman or degrading or cruel treatment or punishment in the revised constitution;

Making torture a criminal offence in line with the definition of article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which has been widely recognised in international law, and stipulate punishments commensurate with the seriousness of the offence;

Removing the reference to adultery in article 149 of the Criminal Act (rape), enacting legislation that adequately criminalises other forms of sexual violence, including female genital mutilation, and making involvement of a public official an aggravating circumstance in case of rape and other sexual violence;

Ensuring adequate custodial safeguards in the Criminal Procedure Act, including access to a lawyer of one's choice from the beginning of proceedings and the right to be brought before a judge within 48 hours;

Removing the power of the NISS to arrest and detain individuals; or reforming the National Security Act to ensure adequate custodial safeguards, including the prohibition of arbitrary arrest and detention, including incommunicado detention, access to a lawyer of one's choice from the beginning of proceedings and the right to be brought before a judge within 48 hours;

Amending the 1993 Evidence Act to stipulate an unequivocal prohibition of using evidence extracted as a result of torture or other ill-treatment;

Removing barriers to accountability for torture by (i) repealing immunities provisions in the Armed Forces Act, the Police Act and the National Security Act; (ii) removing statutes of limitation for the offence of torture; and (iii) enacting laws providing adequate protection against threats, harassment and assaults on victims, witnesses and human rights defenders;

Enacting legislation providing for an explicit right to reparation for torture and related human rights violations, including effective access to justice;

Promoting a culture of accountability within the NISS, the police and the army by adopting codes of conduct prohibiting torture and ill-treatment, the breach of which is subject to disciplinary sanctions, and making human rights training an integral part of their curricula;

Establishing, by law, an independent oversight body vested with sufficient resources and mandated to investigate allegations of torture and ill-treatment in line with best practices, including the Istanbul Protocol;

Abolishing all forms of corporal punishment in Sudanese laws;

Ratifying the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the Optional Protocol to the Convention.

II. African Commission on Human and Peoples' Rights: Recommendations forming part of the Concluding Observations on Sudan's 4th and 5th Periodic Reports, 2008-2012

The following are the recommendations contained in the Concluding Observations, the full text of the ACHPR's concluding observations is available at http://www.achpr.org/files/sessions/12th-eo/conc-obs/4thand5th-2008-2012/concluding_observation_.pdf:

The African Commission recommends that the Government of Sudan:

NISS [National Intelligence and Security]

1. Takes adequate measures in combating insecurity, violence, and police and law enforcement excesses, especially those of the NISS.

2. Ensures that the conditions of arrest, preliminary interrogation and detention of suspects comply with the principles of the Robben Island Guidelines.

Judiciary

3. Undertakes to train members of the judiciary at all levels, state prosecutors, and members of the bar, police and prison officials on human rights law.

4. Put in place the reforms to strengthen the judiciary especially as it relates to human rights training for judges.

Press Freedoms

5. Take the necessary measures that ensure freedom of expression and access to information.

Death Penalty and Torture and Cruel and Inhuman Treatment and Punishment

6. In its next report provide the number of persons on death row.
7. To observe the moratorium on the death penalty and take measures for its total abolition.
8. Takes urgent and concrete measures to abolish laws that allow corporal punishment including stoning, amputation, cross-amputation and whipping.
9. Should include standards like the Robben Island Guidelines in the human rights program of Sudan Police College and the training of prison officers.
10. Consider enacting a law criminalizing torture.
11. Appoints an independent commission to investigate all extrajudicial executions, enforced disappearances and torture by the police and make public its findings.

National Security Act

12. Repeal Article 52(3) of the National Security Act 2010 that provides members of the NISS and their associates with immunity from criminal and civil procedures.
13. Takes immediate steps to close down all unofficial places of detention.
14. Adopts a holistic approach to prison decongestion and conditions of detention in the prisons, ensuring that the Prison Service get adequate resources, including funding to improve living conditions and access to health care in prisons and places of detention.

Women

15. Enacts legislation prohibiting female genital mutilations, violence and other discriminatory practices against women.
16. Takes measures to ensure female participation at all levels of decision making, including considering enacting a law on affirmative action.
17. In its next Periodic Report provides gender disaggregated data with its narrative Report.
18. Ratify the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.
19. Ratifies the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).
20. Takes legislative and other measures that address rape in Sudan.
21. Takes measures that address the low level of literacy amongst the girl-child.
22. Enact a law that encourages and promote women's participation in the political affairs of the State.
23. Takes measures to ban child labour and recruitment of child soldiers.
24. Should indicate the participation of NGOs in the preparation of its next Periodic Report.

25. Takes the necessary legislative measures and material preparations to extend free legal assistance to all crimes where the accused person cannot afford to pay legal representation fees.

26. Open up constructive dialogue, with the full involvement of the AU, with all factions of the various conflicts in Sudan, in particular South Sudan, in a bid to find a comprehensive solution to the problems in the country.

27. Ensure that the deportation of refugees within its territory conforms to international and regional human rights standards. It should explore measures such as voluntary repatriation, integration or resettlement as durable solutions for long standing refugees' problems.

Ratification of International / Regional Instruments

28. Takes measures to ratify international and regional human rights instruments, including:
the Convention Against Torture;
the International Convention on Economic, Social and Cultural Rights;
the Additional Protocol to the African Charter on Human and Peoples' Rights on Establishment of an African Court on Human and Peoples' Rights;
the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa,
and the African Union Convention on Preventing and Combating Corruption;
Charter on Democracy, Elections and Good Governance.

29. Should undertake to make a declaration accepting the competence of the African Court under Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.

30. Domesticates all the relevant regional and international instruments it has ratified in line with its international obligations.

Rights of Older Persons and the Disabled

31. In its next reporting period the report should outline how the rights of older persons and disabled people are protected.

General

32. Ensures that Sharia law is not applied to Christians and other non-Muslims groups.

33. Requests Sudan to respond to its request for Provisional Measures on Southern Kordofan.

34. In its next Periodic Report provide information on the measures taken by the authorities to deal with excesses of the police and other security agents.

35. Finally, the African Commission requests that the Republic of Sudan in its next Periodic Report inform the African Commission how it has implemented the recommendations in this Concluding Observations.

Adopted at the 12th Extra-ordinary Session of the African Commission on Human and Peoples' Rights held from 29 July to 4 August 2012, Algiers, Algeria

III. Selected Documents (January to May 2013)

United Nations

15 February 2013

Sudan: UN expert calls for further efforts to protect human rights after visit to Khartoum and Darfur

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13001&LangID=E>

January- May 2013

Three UN Secretary-General reports on the situation in Abyei (S/2013/59, 15 January 2013; S/2013/198, 28 March 2013 and S/2013/299, 17 May 2013), two reports on the AU-UN Hybrid Operation in Darfur (S/2013/22, 15 January 2013 and S/2013/225, 10 April 2013) and one report on South Sudan (S/2013/140, 8 March 2013)

<http://www.un.org/en/sc/documents/sgreports/2013.shtml>

Others

27 March 2013

Amnesty International: 10 years on, Violence remains widespread in Darfur

http://www.amnestyusa.org/sites/default/files/darfur_brief_-_10_years_on.pdf

27 February 2013

African Centre for Justice and Peace Studies, Human Rights Watch, Physicians for Human Rights and REDRESS:

Sudan: Doctors perform amputations for courts

End corporal punishment, reform laws

http://www.redress.org/downloads/PR_Sudan_Doctors-Perform-Amputations-for-Courts_270213.pdf

12 January 2013

Jok Madut Jok

Mapping the Sources of Conflict and Insecurity in South Sudan: Living in Fear under a Newly-Won Freedom

<http://suddinstitute.org/publications/show/mapping-the-sources-of-conflict-and-insecurity-in-south-sudan-living-in-fear-under-a-newly-won-freed/>