



## SUDAN: AMENDMENT OF ARMED FORCES ACT RUNS COUNTER TO INTERNATIONAL STANDARDS AND RISKS FOSTERING FURTHER HUMAN RIGHTS VIOLATIONS

### I. THE AMENDMENT OF THE ARMED FORCES ACT

1. On 2 July 2013, Sudan's parliament adopted an amendment to Sudan's Armed Forces Act, 2007. Its coming into force depends on the President's assent but will be automatic within 30 days "if the President withholds assent for thirty days without giving reasons".<sup>1</sup> The amendment raises serious concerns about its compatibility with Sudan's Interim National Constitution and international human rights standards binding on Sudan. It envisages subjecting civilians to the jurisdiction of military courts in relation to a large number of broad and vaguely worded offences, which risks violating a series of rights. This includes freedom of expression, association and assembly, the rights of defendants, including the right to liberty and security, the right to be free from torture and ill-treatment and the right to a fair trial, and the right to life, particularly where the accused faces the death penalty.
2. The amendment stipulates that every person who commits or is suspected of committing any act undermining the security of the state is subject to the jurisdiction of Sudan's military courts. This applies to persons irrespective of their military status or connection with Sudan's armed forces. The crimes for which persons may under the amendment be brought before military courts include sixteen offences under Part V ("Offences against the State), Part VI ("Offences relating to Disciplined Forces") and Part VII ("Sedition") of the Criminal Act of 1991, including offences such as "undermining the constitutional system" (article 50) and "publication of false news" (article 66).<sup>2</sup> It also creates a number of new offences subject to the jurisdiction of the military courts, namely: "(A) Formation of an armed organization under any name to wage military war against the state through either gathering individuals or training them or collecting arms or military hardware, or incitement to do so. (B) Any attacks by arms or any warfare means against units or camps of the armed forces or other regular forces, or incitement to do so. (C) Taking up arms or any other warfare mean to commit an act that threaten

<sup>1</sup> See article 108 (1) Interim National Constitution of Sudan, 2005, setting out a thirty period for the assent of the President of the Republic.

<sup>2</sup> An English version of Sudan's 1991 Criminal Act is available at <http://www.pclrs.org/downloads/bills/Criminal%20Law/Criminal%20Act%201991%20English.pdf>.

stability and security of the country, or endangering its independence and unity.”<sup>3</sup> In addition, the amendment envisages changes to a series of provisions of the armed forces law.<sup>4</sup>

3. The justification put forward for these amendments is that the current law is inadequate to deal with the threat faced as a result of armed conflict in Sudan, and that subjecting civilians to military courts is a suitable response and deterrent. This amendment, together with the mass conscription envisaged under the armed reserves law adopted by Sudan’s parliament on 3 July 2013, will further militarise civilian life. It strengthens the military and the executive at the expense of, and with the result of further undermining ordinary courts.
4. The explanatory note to the amendment of the armed forces law refers to the United Kingdom, the United States of America, Jordan, Syria, Egypt and Yemen as countries with a similar system in place, presumably to show that subjecting civilians to the jurisdiction of military courts conforms to acceptable state practice. However, in the United Kingdom and the United States of America, it is military personnel who are subject to military courts, with few exceptions closely related to a person’s connection to the military.<sup>5</sup> Special courts set up in the course of counter-terrorism efforts are an exception but these courts, such as the US Military Commissions,<sup>6</sup> have been subject to sustained criticism by international bodies for their failure to conform to international standards.<sup>7</sup> The use of military and special courts by Jordan, Syria, Egypt and Yemen has repeatedly given rise to concerns over the lack of fair trials and their abuse, reflecting the poor record of these countries in protecting human rights of suspects and defendants. The concluding observations and decisions by treaty bodies, as well as reports by national and international human rights organisations, show that these approaches do not provide models of best practice.<sup>8</sup>

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<sup>3</sup> Unofficial translation.

<sup>4</sup> Articles 132, 139, 150, 183, 193 of the Armed Forces Law of 2007.

<sup>5</sup> See sections 50 and 51 of the United Kingdom Armed Forces Act 2006 and articles 817-821 of the US Uniform Code of Military Justice 1949. See on the compatibility of the then applicable UK law in a case where a family member residing with a member of the Armed Forces was tried by court-martial, *Martin v. United Kingdom* (2006) 44 EHRR 31 (finding a violation of article 6 (right to a fair trial)).

<sup>6</sup> *Report of the Special Rapporteur on extrajudicial, summary or arbitrary execution: Mission to the United States of America*, Philip Alston, UN Doc. A/HRC/11/2/Add.5, 28 May 2009, paras.38-41.

<sup>7</sup> See Human Rights Watch, *Jordan: End Protester Trials in State Security Courts*, 30 November 2012, <http://www.hrw.org/news/2012/11/30/jordan-end-protester-trials-state-security-courts>; *ICJ Submission to the Universal Periodic Review of Syria*, United Nations Human Rights Council 12th Session of the Working Group on the Universal Periodic Review (October 2011), <http://lib.ohchr.org/HRBodies/UPR/Documents/session12/SY/ICJ-InternationalCommissionJurists-eng.pdf>; *Concluding observations of the Human Rights Committee: Yemen* (May 2012), Advanced Unedited Version, para.17 (on the state of Yemen’s judiciary); *Concluding observations of the UN Human Rights Committee : Egypt*, UN Doc. CCPR/CO/76/EGY, 28 November 2002. para.16 (b): “(b) The Committee notes with alarm that military courts and State security courts have jurisdiction to try civilians accused of terrorism although there are no guarantees of those courts’ independence and their decisions are not subject to appeal before a higher court (article 14 of the Covenant).”

<sup>8</sup> See *ibid.* and sources under II.

5. Given persistent concerns over respect for human rights in Sudan, including the very use of offences such as “publication of false news” to stifle freedom of expression (see below at IV.), any amendment of the armed forces act should be firmly guided by ensuring the adequate protection of rights. Indeed, this is warranted by the Interim National Constitution, which binds Sudanese organs of states to adhere to internationally recognised human rights standards forming part of Sudan’s Bill of Rights.<sup>9</sup>

## II. SUBJECTING CIVILIANS TO THE JURISDICTION OF MILITARY COURTS AND ITS COMPATIBILITY WITH SUDAN’S INTERIM NATIONAL CONSTITUTION AND INTERNATIONAL LAW

6. International law is generally hostile to subjecting civilians to the jurisdiction of military courts due to a legacy of abuse of such proceedings, which have targeted political opponents and others. As noted by the UN Special Rapporteur on the Independence of Judges and Lawyers: “[s]ome of the most serious problems recorded, which have given rise to numerous complaints, concern the trial of civilians before military courts ...”<sup>10</sup>
7. The African Commission on Human and Peoples’ Rights’ *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* unequivocally state that:  
“a) The only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel. b) While exercising this function, Military Courts are required to respect fair trial standards enunciated in the African Charter and in these guidelines. c) Military courts should not in any circumstances whatsoever have jurisdiction over civilians. Similarly, Special Tribunals should not try offences which fall within the jurisdiction of regular courts.”<sup>11</sup>
8. The African Commission on Human and Peoples’ Rights, in *Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt*, ruled that Egypt had breached a series of rights under the African Charter on Human and Peoples’ Rights (ACHPR), including the right to a fair trial and the independence of the judiciary. Notably, it held that “[t]ribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”<sup>12</sup> This rationale applies in equal measure to moves that broaden the jurisdiction of existing military courts over civilians.
9. The European Court of Human Rights, in *Incal v. Turkey*, found that even the presence of one military judge on a bench of three judges in a National Security

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<sup>9</sup> See article 27(3) of the Bill of Rights forming part of Sudan’s Interim National Constitution of 2005.

<sup>10</sup> *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, UN Doc. A/HRC/4/25, 18 January 2007, para.29.

<sup>11</sup> *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2001, G.

<sup>12</sup> *Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt*, 334/06 (2011).para.204. See also principle 5 of the Basic Principles on the Independence of the Judiciary, UN Doc. A/CONF.121/22/Rev.1 at 59 (1985).

Court resulted in a breach of the right to a fair trial under article 6 of the European Convention on Human Rights.<sup>13</sup> It attached “great importance to the fact that a civilian had to appear before a court composed, even if only in part, of members of the armed forces. It follows that the applicant could legitimately fear that because one of the judges of the Izmir National Security Court was a military judge it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case.”<sup>14</sup> In *Martin v. United Kingdom*, it stressed that “[w]hile it cannot be contended that the Convention absolutely excludes the jurisdiction of military courts to try cases in which civilians are implicated, the existence of such jurisdiction should be subjected to particularly careful scrutiny, since only in very exceptional circumstances could the determination of criminal charges against civilians in such courts be held to be compatible with Article 6. The power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation, and if so only on a clear and foreseeable legal basis. The existence of such reasons must be substantiated in each specific case. It is not sufficient for the national legislation to allocate certain categories of offence to military courts in abstracto” [cross-references omitted].<sup>15</sup>

10. The Inter-American Court of Human Rights, in *Palamara Iribarne v. Chile*, was equally clear in finding that subjecting civilians to military courts constitutes a violation of the right to a fair trial under the American Convention on Human Rights. It stressed that: “[i]n a democratic constitutional State the military criminal jurisdiction should have a restricted and exceptional scope and should be aimed at the protection of special legal interests related to the duties the law assigns to the military. Therefore, only military members should be tried for the commission of criminal offenses or breaches which, due to their own nature, constitute an attack on military legal interests.”<sup>16</sup> Consequently, it found that “under no circumstances may a civilian be subjected to the jurisdiction of military criminal courts.”<sup>17</sup>
11. The UN Human Rights Committee has noted that the International Covenant on Civil and Political Rights (ICCPR) requires that “such trials [of civilians before military or special courts] are in full conformity with the requirements of article 14 [right to a fair trial] and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. The Committee also notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in

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<sup>13</sup> *Incal v. Turkey* (2000) 29 EHRR 449, paras.65-73.

<sup>14</sup> *Ibid.*, para.72.

<sup>15</sup> *Martin v. United Kingdom*, above note 5, para.44.

<sup>16</sup> *Case of Palamara Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of 22 November 2005. Series C No. 135, para. 124.

<sup>17</sup> *Ibid.*, para.14.

article 14. Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials” [footnotes omitted].<sup>18</sup> Individual members of the Committee have gone further, arguing that only the absolute prohibition of trying civilians before military courts would be in conformity with article 14 of the Covenant, also considering the legacy of abuse of military courts.<sup>19</sup>

12. Sudan’s Interim National Constitution stipulates that international treaties binding on Sudan are an integral part of Sudan’s Bill of Rights.<sup>20</sup> As this applies, *inter alia*, to the ICCPR) and the ACHPR, the amendment is incompatible with Sudan’s constitution and treaty obligations. The use of military courts to try civilians is contrary to the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (article 7 ACHPR). It also violates article 14 ICCPR as this measure is not “necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials”. The Government of Sudan has not put forward any evidence why it should be necessary to subject a potentially large number of civilians to a broad range of vaguely worded offences, and why ordinary courts cannot try such cases.

### III. CONCERNS OVER THE VIOLATION OF OTHER HUMAN RIGHTS RESULTING FROM THE AMENDMENT OF THE ARMED FORCES ACT

13. The UN Human Rights Committee has repeatedly expressed concerns over the compatibility of broad and vaguely worded offences with the right to freedom of expression: “Extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information. Nor is it generally appropriate to include in the remit of such laws such categories of information as those relating to the commercial sector, banking and scientific progress. The Committee has found in one case that a restriction on the issuing of a statement in

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<sup>18</sup> See UN 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.22.

<sup>19</sup> See Opinion of Fabian Omar Salviola in *Akwanga v. Cameroon*, UN Doc. CCPR/C/101/D/1813/2008 (22 March 2011).

<sup>20</sup> Article 27(3) Interim National Constitution.

support of a labour dispute, including for the convening of a national strike, was not permissible on the grounds of national security”[footnotes omitted].<sup>21</sup> This reasoning applies to a number of the offences listed above (para.2), which have been criticised for their broad remit, which may stifle freedom of expression and related rights, such as freedom of assembly and association, and result in criminal prosecutions and trials in violation of the right.<sup>22</sup>

14. Vague laws, such as the ones set out in Sudan’s Criminal Act of 1991 (see above at para.2), stifling freedom of expression are of particular concern where applied to human rights defenders.<sup>23</sup> Combined with the envisaged amendments to the armed forces law, this system is incompatible with the UN Declaration on Human Rights Defenders.<sup>24</sup> The Declaration, besides guaranteeing a series of rights, including the right to seek the protection and realisation of human rights, states in its article 17: “[i]n the exercise of the rights and freedoms referred to in the present Declaration, everyone, acting individually and in association with others, shall be subject only to such limitations as are in accordance with applicable international obligations and are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”
15. The UN Working Group on Arbitrary Detention raised concerns about the use of military and special courts, whose existence was “was one of the most serious causes of arbitrary detention [because] none of [them] respects the guarantees of the right to a fair trial.”<sup>25</sup>
16. The subjection of civilians to military tribunals takes place in a context where defence rights, and custodial safeguards against torture and ill-treatment, are undermined. UN treaty and charter bodies have therefore expressed concern over the use of military or special courts in situations where detainees are exposed to conditions in which their rights are not guaranteed, particularly under security legislation and anti-terrorism legislation.<sup>26</sup>

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<sup>21</sup> See communication No. 518/1992, *Sohn v. Republic of Korea* (18 March 1994), referred to in General Comment 34, para.33.

<sup>22</sup> See Amin M. Medani, ‘A Legacy of Institutionalized Repression: Criminal Law and Justice in Sudan’, in Lutz Oette (ed.), *Criminal Law and Transitional Justice: Human Rights Perspectives for Sudan* (Ashgate, Farnham, 2011), pp.67-88.

<sup>23</sup> See *Report of the UN Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya*, UN Doc. A/HRC/13/22 (30 December 2009), para.34: “[t]he activities of defenders are also often criminalized and their freedom of association and expression violated through the use of extremely broad provisions of criminal codes.” See also the recent resolution adopted by the UN Human Rights Council, *Protecting Defenders*, UN Doc. A/HRC/22/L.13, 15 March 2013, particularly para.4.

<sup>24</sup> *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, UN Doc. A/RES/53/144 (8 March 1999).

<sup>25</sup> *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/2004/3 (15 December 2003), para. 67.

<sup>26</sup> *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. A/63/223 (6 August 2008), paras.23-28.

17. The use of military or special courts that lack sufficient independence have also raised concerns over their compatibility with the right to life. Where the death penalty is still in force, it may only be imposed for the most serious crimes and only by an independent court in proceedings meeting international fair trial standards.<sup>27</sup> As military courts trying civilians commonly fail to meet these standards, their judgments are bound to violate the right to life if they impose the death penalty.<sup>28</sup>

#### IV. THE IMPACT OF THE AMENDMENT OF THE ARMED FORCES ACT ON HUMAN RIGHTS PROTECTION IN SUDAN

18. The concerns set out in the preceding paragraphs are very real in the Sudanese context. There have been several trials of journalists, human rights defenders and others for broad and vaguely worded offences. A number of individuals have been tried before special courts in proceedings that did not meet fair trial standards, including by accepting evidence alleged to have been extracted under torture.<sup>29</sup> These courts have in several cases imposed the death penalty, thereby violating the right to life of the convicts.<sup>30</sup> The constitutionality of such trials before the special courts was upheld by Sudan's Constitutional Court in 2009.<sup>31</sup> This practice raises concern that proceedings for the relevant offences before military courts will facilitate subjecting a large number of civilians to trials before courts, with no reason to believe that they will be independent or impartial, or will respect the rights of the defence.

19. Subjecting civilians to the jurisdiction of military courts risks a violation of several rights, including freedom of expression, right to liberty and security, freedom from torture and ill-treatment, the right to a fair trial and the right to life. These rights are part of Sudan's Bill of Rights, both in their own right and by virtue of article 27(3) of Sudan's Interim National Constitution, as they are recognised in international treaties, particularly the ICCPR and the ACHPR. It is for these reasons that the contemplated legislation should not be enacted, as it would run counter to article 27(4) of Sudan's Interim National Constitution, which provides that:" [l]egislation

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<sup>27</sup> See article 6 ICCPR. See further on relevant international standards the materials from reports by the former UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, available <http://www.extrajudicialexecutions.org/application/media/Handbook%20Chapter%206%20The%20death%20penalty.pdf>

<sup>28</sup> *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v. Nigeria*, 137/94-139/94-154/96-161/97 (1998), para.103.

<sup>29</sup> See Amin, above note 22.

<sup>30</sup> See also Human Rights Committee, *Concluding Observations: Sudan*, UN Doc. CCPR/C/SDN/CO/3/CRP.1 (26 July 2007), para.25.

<sup>31</sup> See *Kamal Mohammed Saboon v Sudan Government*, CS (Constitutional Court) (60) of 2009, discussed further in Amin, above note 22, pp.79-82. See further REDRESS and Sudanese Human Rights Monitor, *Arrested Development: Sudan's Constitutional Court, Access to Justice and the Effective Protection of Human Rights*, August 2012, available at [http://www.redress.org/downloads/publications/1208arrested\\_development\\_sudan.pdf](http://www.redress.org/downloads/publications/1208arrested_development_sudan.pdf)

shall regulate the rights and freedoms enshrined in this Bill and shall not detract from or derogate any of these rights.”

V. INSTEAD OF SUBJECTING CIVILIANS TO THE JURISDICTION OF MILITARY COURTS, SUDAN SHOULD UNDERTAKE COMPREHENSIVE LEGISLATIVE REFORMS TO PROTECT HUMAN RIGHTS

20. The “Sudanese crisis”,<sup>32</sup> which has been characterised by systemic violations, is one of the causes, as well as a manifestation, of the recurring conflicts in Sudan. As repeatedly highlighted by civil society and regional and international bodies, reforming Sudan’s laws with a view to bringing them in conformity with the Interim National Constitution and international standards would be an important step towards addressing this crisis.<sup>33</sup> The amendment of the armed forces act is a clear move in the opposite direction. Instead of enhancing the security of Sudan’s people, it risks further repression, and, in turn, fuelling cycles of protest, conflict and violence.

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<sup>32</sup> AUPD’s mandate *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), 2, para.9, referred to the situation as the “Sudanese crisis in Darfur” but this characterisation applies equally to several other parts of the country.

<sup>33</sup> See for example REDRESS and Sudanese Human Rights Monitor, *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, available at <http://www.redress.org/downloads/publications/1204%20Comments%20to%20Sudans%20Report%20-%20Legislative%20Reforms.pdf>