



Ending Torture. Seeking Justice for Survivors



Sudan Law Reform Advocacy Briefing

January 2014

Welcome to the fourth issue of the Sudan Law Reform Advocacy Briefing.¹ This Briefing is published quarterly to highlight and reflect on law reform developments 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 contains an annotated compilation of key recommendations made by regional and international human rights bodies, as well as states during the Universal Periodic Review process, and, in so far as available, responses by Sudan thereto. It focuses on legislative reforms, particularly in relation to serious human rights violations. This issue seeks to provide a useful reference document for all actors concerned and to identify priority areas for engagement, particularly in the context of the pending review of Sudan's state party report by the UN Human Rights Committee.

Yours,

Lutz Oette

For further information, please visit our dedicated project website at www.pclrs.org/

Please contact Lutz Oette (REDRESS) at lutz@redress.org (Tel +44 20 77931777) if you wish to share information or submit your comments for consideration, or if you do not wish to receive any further issues of the advocacy briefing.

¹ The Advocacy Briefings are available online at: <http://www.pclrs.org/english/updates>.

I. The implementation of international human rights treaty obligations, legislative reforms and effective protection of rights in Sudan: International perspectives and Sudan's responses in context

1. Introduction

The question of human rights in Sudan has engaged a large number of regional and international bodies. Sudan is a party to several human rights treaties at the international and regional level. This includes the International Covenant on Civil and Political Rights (ICCPR), with the United Nations (UN) Human Rights Committee as monitoring body, and the African Charter on Human and Peoples' Rights, the supervision of which is entrusted to the African Commission on Human and Peoples' Rights (African Commission). Sudan is also subject to the UN Human Rights Council's Universal Periodic Review (UPR) and a special procedure, i.e. the Independent Expert on the situation of human rights in Sudan. In addition, the various armed conflicts in Sudan, particularly in Darfur, prompted the engagement of several bodies, including the UN Group of Experts mandated by the UN Human Rights Council in resolution 4/8 and the African Union High-Level Panel on Darfur.

These bodies effectively monitor Sudan's compliance with its human rights (and, in some instances, humanitarian law) obligations under international law, either as a matter of treaty law or customary international law, or both. As a general rule, Sudan has to implement these obligations in good faith. As highlighted by the UN Human Rights Committee in its General Comment 31,

Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations.²

This general obligation requires that all branches of government take the required measures to promote and protect human rights. Importantly, individuals who allege that they are at risk of violations or whose rights have been violated must be given effective access to justice to protect or vindicate their rights.³

The regional and international bodies and mandate-holders, whose members combine considerable expertise, have issued a large number of recommendations on various aspects of the effective protection of human rights in Sudan. States have also made recommendations as part of the Universal Periodic Review (UPR), i.e. a process within the UN Human Rights Council in which states are subject to periodic peer review. Importantly, reviewed states indicate which recommendations they accept. This provides an important

² Human Rights Committee, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13 (26 May 2004), para.7.

³ *Ibid.*, para.15.

baseline for Sudan's commitment, as well as a reflection of stumbling blocks, i.e. recommendations not accepted. A careful scrutiny of these recommendations shows that many of the issues raised by regional and international bodies, often repeatedly, remain unaddressed. Further, in some instances, recommendations made have been explicitly objected to by Sudan.

This Advocacy Briefing takes stock of recommendations made by several key bodies over the last seven years. It uses the Concluding Observations of the Human Rights Committee of 2007 as starting point, which is opportune as the Committee is in the process of considering Sudan's fourth periodic report.⁴ The purpose of this Briefing is to identify priority areas, focusing on outstanding key recommendations, and to assess the position taken by various actors and Sudan's responses. This analysis can then be used by actors involved to develop appropriate strategies to advance the implementation of Sudan's international obligations.

The review is selective given the number of recommendations that numerous bodies have made on a range of issues. Besides addressing questions of protection of rights, such as calling for an end to torture and ill-treatment, recommendations have also focused on structural issues such as legislative and institutional reforms, measures to ensure justice and accountability and the ratification of international treaties by Sudan. These recommendations constitute an important source and play a critical role in monitoring Sudan's implementation of its international obligations; they provide a baseline, give expression to shared concerns and allow identifying priority areas for prompt/overdue action to be taken. The combined recommendations form part of what should be a "constructive dialogue" between international bodies and states (particularly in the context of the UPR peer review) on the one hand and Sudan on the other. The limited implementation of recommendations by Sudan demonstrates persistent obstacles in this process. Some bodies, such as the Independent Expert on the situation of human rights in Sudan, now place increasing emphasis on specific outcomes, adopting a result-oriented approach.⁵

Some observers may view this monitoring process, and recommendations made in the course of it, as a futile, bureaucratic exercise. Depending on the view taken, it either unduly infringes state sovereignty or fails to ensure effective protection of human rights. However, irrespective of its inherent limitations, the process plays an important role for the various actors involved. It enables the Government of Sudan to identify shortcomings in its national system and take remedial action. Responding to the recommendations made also enables Sudan to demonstrate its level of its commitment to uphold its international obligations. For civil society in Sudan, the monitoring process, particularly an intimate knowledge of recommendations made, provides an important advocacy tool to call for outstanding

⁴ See for further information the website of the Office of the High Commissioner for Human Rights, www.ohchr.org, at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CCPR

⁵ See *Report of the Independent Expert on the situation of human rights in the Sudan*, Mashood A. Baderin, UN Doc. A/HRC/24/31, 18 September 2013.

reforms at the national level, and to engage with actors at the regional and international level to generate the momentum needed to bring about change. Further, for international bodies themselves, as well as for states, particularly in the UPR process, awareness of the key recommendations made in this process provides for an important institutional memory across regional and international bodies. It also provides a tool to critically assess the impact of recommendations made and to review strategies of engagement with Sudan.

The Briefing focuses on legislative reforms, particularly in relation to serious violations, women's rights and the administration of justice that have been at the heart of the Project for Criminal Law Reform in Sudan. It also considers the ratification of international human rights treaties whose close relationship with the implementation of international standards is readily apparent. Legislative reforms cannot be divorced from institutional reforms and measures to ensure justice and accountability as they are often a prerequisite or integral part of such reforms and measures taken. In the area of institutional reforms, this applies particularly to security sector reform, whereby the reform of Sudan's National Intelligence and Security Services has long been recognised as a priority. Further recommendations concern the independence of the judiciary and the establishment and/or strengthening of other bodies, such as the National Human Rights Commission. The issue of justice and accountability has been discussed particularly in the Darfur context, with the UN Group of Experts mandated by the UN Human Rights Council in resolution 4/8 and the AU High-Level Panel on Darfur generating a large number of detailed proposals and recommendations, including on legislative reforms.⁶ While clearly of critical importance, given the legacy of conflict and the ongoing conflicts in various parts of Sudan, there has been an almost complete failure to implement any of these recommendations.

The recommendations made in relation to the various issues examined in this Briefing are indented in quotation marks, with the body or state concerned in brackets. Links to the full text of recommendations made can be found in the Annex to the Briefing.

2. Legislative Reform

The Independent Expert on the situation of human rights in Sudan identified law reform as a priority area, and several states highlighted areas for legislative reform during the UPR process. This focus on law reform is an acknowledgment of its importance, both as a prerequisite and a component of the implementation of international standards in Sudan. However, it comes against the backdrop of limited progress made since law reform was identified as a priority area in Sudan's Comprehensive Peace Agreement (CPA) in 2005, and

⁶ See *Report prepared by the Special Rapporteur on the situation of human rights in the Sudan on the status of implementation of the recommendations compiled by the Group of Experts mandated by the Human Rights Council in resolution 4/8 to the Government of the Sudan for the implementation of Human Rights Council resolution 4/8 pursuant to Human Rights Council resolution 6/34*, UN Doc. A/HRC/9/13/Add.1, 2 September 2008, and African Union High-Level Panel on Darfur, *Darfur: The quest for peace, justice and reconciliation*, Report to the African Union, PSC/AHG/2 (CCVII), 29 October 2009.

a subsequent failure to enact legislation in areas of major concern as set out below. The lack of diligence and what can only be described as delaying tactics is reflected in Sudan's views on recommendations made during the UPR in 2011:

The legislative reform in Sudan is a continuous process. After the promulgation of the new Constitution, new laws will be enacted and a number of laws will undergo reform and compliance with the Constitution and Sudan's international obligations.⁷

2.1. Constitutional Review

The secession of South Sudan resulted in a constitutional review process, which is aimed at adopting a new constitution to replace the 2005 Interim National Constitution. Since 2011, the Independent Expert on the situation of human rights in Sudan and states during the UPR made recommendations concerning the constitutional review process. These recommendations have focused mainly on the process, emphasising that it should be pursued "in a transparent and inclusive manner..."⁸

In contrast, there have been limited references concerning the substance of any new constitution, with the exception of some general recommendations made by several states during the UPR:⁹

"Draft their Constitutions [Sudan and South Sudan] in an inclusive process with the participation of civil society, women and minorities. Also, ensure that the new Constitutions include a catalogue of human rights, in particular the freedom of speech and assembly, and take the multiethnic and multireligious background of their population into account" (Austria); "guarantee the human rights of citizens under the new Constitutions and establish effective mechanisms to ensure these are respected, including through the establishment of a national human rights institution in line with the Paris Principles" (United Kingdom); "bring all constitutional provisions and relevant laws into line with the CPA and international obligations" (Norway); "incorporate robust provisions for the protection of human rights in the new Constitution, including articles on the prevention of discrimination and protection of minorities (Canada)."¹⁰

This dearth of specific recommendations may be explained by several factors. Constitutions are seen as the outcome of unique national processes, embodying core arrangements of state and society; commenting on issues of substance may be considered premature

⁷ See *Report of the Working Group on the Universal Periodic Review: Sudan, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, UN Doc. A/HRC/18/16/Add.1, 16 September 2011, para.15.

⁸ Report of the Independent Expert, above n. 5, para.78 (e).

⁹ *Ibid.*, para.78 (h), "uphold the guarantee of the rights of women and children contained in the interim constitution".

¹⁰ See *Report of the Working Group on the Universal Periodic Review: Sudan*, UN Doc. A/HRC/18/16, 11 July 2011.

without there being even a draft constitution; and an emphasis on process may be viewed as the best means of ensuring that a constitution reflects key human rights standards. However, the new constitution of Sudan will invariably address a number of issues that are critical to the protection and realisation of human rights. This includes in particular the status of international treaties in the domestic legal system, the definition of specific fundamental rights, the institutional machinery for the protection of rights and broader institutional reforms, such as reform of the National Intelligence and Security (NISS).¹¹ It will therefore be critical that the Constitution both grants fundamental rights that reflect international standards and puts in place the institutional framework to ensure their protection.¹²

2.2. Statutory Law

2.3. Serious human rights violations

(i) *Criminalising serious human rights violations*

Regional and international bodies have repeatedly expressed concerns over the prevalence of, and impunity for serious human rights violations in Sudan. The African Commission found, mainly in relation to official responses to allegations of torture, that there are no effective remedies in Sudan.¹³ This impunity is facilitated by laws that fail to adequately criminalise serious violations, and by barriers to accountability, particularly immunities and short statutes of limitation that block effective prosecutions.

Regional and international bodies have therefore repeatedly called on Sudan to adopt legislation that would criminalise violations that have given rise to serious concern, particularly:

International crimes: “[should take steps to provide] an adequate body of substantive law, consistent with the Constitution, and which reflects international crimes” (African Union High-Level Panel on Darfur (AUHLPD); “undertake major reforms of its legislative and judicial framework in order to handle cases of serious and massive human rights violations” (African Commission, in 279/03-296/05: *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*)¹⁴

Torture: “consider enacting a law criminalising torture” (African Commission); “provide a legal definition of torture in its legislation, in accordance with article 7 of

¹¹ See University of Khartoum, Sudanese Human Rights Monitor and REDRESS, *The constitutional protection of human rights in Sudan: Challenges and Future Perspectives*, January 2014, available at <http://www.pclrs.org/downloads/140127final-sudan-uok-report.pdf>

¹² Ibid, recommendations at 76, 77.

¹³ See e.g. 386/10: *Dr. Farouk Mohamed Ibrahim v. Sudan*.

¹⁴ Cases decided by the African Commission are available on its website at www.achpr.org

the Covenant” “prohibit the use of confessions obtained in violation of article 7 of the Covenant in any Sudanese court” (both UN Human Rights Committee (HRC)).

Rape: “take legislative and other measures that address rape in Sudan” (African Commission); “undertake to review its legislation, in particular articles 145 and 149 of the 1991 Criminal Code, so that women are not deterred from reporting rapes by fears that their claims will be associated with the crime of adultery” (HRC); “take steps to provide special measures, including legislation, for dealing with rape and other sexual crimes at all stages of the criminal justice process” (AUHLPD); “amend the definition of rape in Art.149 of Criminal Act 1991 in a way ensuring that no links it [sic] to the substantive or evidentiary requirements of adultery or sodomy exist. Reform law of criminal evidence to ensure that it is legally inadmissible to regard victim’s allegation of rape as a confession of adultery (Article 145 of Criminal Act 1991)(UN Group of Experts).

Other sexual violence: “enact... legislation prohibiting female genital mutilations, violence and other discriminatory practices against women” (African Commission); “pass legislation at the federal level to expressly prohibit female genital mutilation and early marriage and ensure that such legislation is enforced in practice” (Committee on the Rights of the Child (CRC)); “prohibit in its legislation the practice of female genital mutilation, and step up its efforts to completely eradicate the practice, in particular in communities where the practice remains widespread” (HRC).

Sudan has largely failed to act on any of these recommendations. It has not taken any steps to criminalise torture in conformity with internationally recognised standards. Sudan “formulated a National Plan of Action to Combat Violence against Women”¹⁵ and held several workshops on reforming legislation governing rape and sexual violence as far back as 2007 and 2008. However, to date, inexplicably, no progress has been made in this regard.

In 2007 and 2009, Sudan criminalised international crimes:

a whole Chapter was added to the Criminal Act of 1991 providing for the protection of civilians in armed conflict and criminalising acts which constitute war crimes and crimes against humanity in accordance with the [sic] International Humanitarian law. Also a new Armed forces Act was issued in 2007 incorporating many of Humanitarian Law principles and standards.¹⁶

These amendments were designed to show Sudan’s capacity to prosecute international crimes committed in Darfur. However, the definitions of international crimes used are at variance with those recognised in international criminal law, and therefore do not fully

¹⁵ A/HRC/18/16/Add.1, above n.7, para.18.

¹⁶ Ibid.

implement the recommendations made by the AU High Level Panel on Darfur. Further, the amendments did not remove barriers to prosecutions, such as the prohibition of retroactive application and immunities.¹⁷ In the circumstances, the law has not resulted in enhanced accountability for international crimes in Sudan.

(ii) Removing legal barriers to accountability

The system of immunities, according to which the prosecution of officials is subject to permission by the heads of their force, has long been recognised as a major obstacle to accountability. In practice, most complaints into serious violations do not result in effective investigations let alone prosecutions, which is also due to the operation of immunity laws. Unsurprisingly, the African Commission found that the system of immunities means that effective remedies are not available in Sudan.¹⁸

Recommendations to Sudan pre-2010

“Ensure that there are no laws that provide legal immunities for state agents for human rights violations; in particular, repeal article 33 National Security Forces Act of 1999 (criminal and civil immunity), and article 46 of the 1999 Police Forces Act (immunity for police on official duty)” (UN Group of Experts); “take steps to provide for the removal of legal and *de facto* immunities and other legal impediments to prosecutions, such as periods of limitation” (AUHLPD); “undertake to abolish all immunity in the new legislation governing the police, armed forces and national security forces” (HRC).

Recommendations post-2010

“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” (African Commission); “amend the 2010 National Security Act, by removing immunities for members of the National Intelligence and Security Services and withdrawing its powers of arrest and detention” (Canada, UPR).

Sudan has not acted on, or accepted any UPR recommendations to abolish immunities. In 2013, the Ministry of Justice initiated a review of immunity laws though a closer examination of proposals made shows that they are aimed at regulating, rather than abolishing immunities.¹⁹

¹⁷ Mohamed Abdelsalam Babiker, ‘The Prosecution of International Crimes under Sudan’s Criminal and Military Laws: Developments, Gaps and Limitations’, in Lutz Oette (ed.), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (Ashgate, Farnham, 2011), 161-181, and briefing papers available on the website of the Project for Criminal Law Reform in Sudan, www.pclrs.org.

¹⁸ See above n. 13.

¹⁹ See further Sudan Law Reform Advocacy Briefing, Issue No.2, October 2013, available at <http://www.pclrs.org/downloads/sudan-advocacy-briefing--october-2013.pdf>

(iii) Effective remedies and reparation

The Interim National Constitution of 2005 grants the right to litigation (article 48). However, in statutory law, there is no explicit right to reparation for human rights violations. The system of remedies, such as tort law, which victims may have recourse to is ineffective; besides generic problems of effective access to justice, legal barriers, particularly immunity provisions, and judicial deference, particularly by the Constitutional Court, have resulted in a situation characterised by impunity and lack of reparation.²⁰

“ensure that its legislation gives full effect to the rights recognised in the Covenant. It should in particular ensure that remedies are available to safeguard the exercise of those rights” ... “undertake to ensure, in all circumstances, that the victims of violations of human rights are guaranteed effective remedy, which is implemented in practice, including the right to as full compensation and reparations as possible” (both HRC); “take measures to ensure that the victims of human rights abuses are given effective remedies, including restitution and compensation” (African Commission in 279/03-296/05: *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*)

Sudan has not acted upon these recommendations since, as there has been a distinctive lack of reparation for victims of violations. The only exception has been limited measures taken in the context of the Darfur peace process.²¹ In addition, and this issue was not explicitly mentioned by the African Commission in its concluding observations, Sudan has failed to implement the decisions of the Commission; there are no specific legislative provisions that those obtaining a favourable decision would be able to use to seek its enforcement.

2.4. Administration of justice, particularly criminal justice

The administration of justice in Sudan has been beset by serious legislative and institutional shortcomings. In respect of criminal justice, areas of concern include repressive legislation, including the system of penalties, and inadequate guarantees of key rights such as the right to liberty and security, the right to a fair trial and the prohibition of torture and other ill-treatment.²²

(i) Offences

²⁰ 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>

²¹ See for latest developments on the Doha peace process, <http://www.darfurconference.com/DDPD>.

²² Nabil Adib, 'At the State's Mercy: Arrest, Detention and Trials under Sudanese Law', in Oette, above n.17, 121-138.

“abolish the crime of apostasy, which is incompatible with article 18 of the Covenant”(HRC); “enact a religious freedom act expressly excluding the application of sharia to non-Muslims and decriminalizing apostasy which is considered a crime under the Penal Code (1991)” (Spain, UPR); “revise the 1991 Penal Code and abolish the penalization of apostasy (Poland, UPR)”.

Sudan rejected recommendations to abolish the crime of apostasy, stating that

Freedom of religion is guaranteed by the Constitution and the laws. Law provisions which are based on *Shariaa* are not applicable on [sic] non-Muslims.²³

Beyond the crime of apostasy, a number of broad and vaguely drafted offences, particularly “offences against the state” and crimes such as “publications of false news” have given rise to repeated concerns; these offences have frequently been relied on when prosecuting journalists, protestors and/or (purported) political opponents even in case of a legitimate exercise of freedom of expression, association and assembly.²⁴

(ii) Punishments

Sudan’s criminal law prescribes several forms of corporal punishments that are incompatible with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. The frequent recourse to whipping in particular has raised repeated concerns, particularly in the context of its use against women accused of public order offences following summary trials that do not meet fair trial standards.²⁵ The continuing use of the death penalty, often in cases that have been marred by procedural irregularities and lack of respect for the right to a fair trial, has equally been of concern.²⁶

(a) Death penalty:

“to observe the moratorium on the death penalty and take measures for its total abolition” (African Commission); “ensure that the death penalty, if used at all, should be applicable only to the most serious crimes, in accordance with article 6 [ICCPR], and should be repealed for other crimes” “guarantee that the death penalty will not be applied to persons aged under 18 years” (HRC); “ensure that the death penalty is not carried out on children, including in cases of retribution or *hudud*, and to replace any death sentences already passed on persons under 18 with an appropriate alternative

²³ A/HRC/18/16/Add.1, above n.7, para.16.

²⁴ Amin M. Medani, ‘A Legacy of Institutionalised Repression: Criminal Law and Justice in Sudan’, in Oette, above n.17, 67-88.

²⁵ REDRESS and Sudanese Human Rights Monitor, *No more cracking of the whip: Time to end corporal punishment in Sudan*, March 2012, available at <http://www.pclrs.org/downloads/Corporal%20Punishment%20-%20English.pdf>

²⁶ African Centre on Justice and Peace Studies, *Widening the Scope: The expanding use of the death penalty in law and practice in Sudan*, December 2010, available at: http://www.acjps.org/Publications/Reports/2010/WideningtheScope_ExpandingUseofCapitalPunishment.pdf. See also 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.

sanction” (CRC); “abolish the death penalty, corporal punishment and other cruel, inhuman or degrading treatment from its national legislation” (Ecuador, UPR) (several states called for the abolition of the death penalty or a moratorium during the UPR).

Sudan emphasised that “the Constitution and the Child Act of 2010 prohibit the application of death penalty on persons below 18 years”.²⁷ It did, however, not accept any recommendations to abolish the death penalty or to establish a moratorium. Instead, Sudan stressed that “in compliance with Sudan’s commitment under the ICCPR, the death penalty in the Sudanese laws is confined to the most serious crimes. In murder cases there is room for pardoning by the relative(s) of the deceased and in such case the death penalty will not be imposed.”²⁸ This position ignores concerns previously raised by the UN Human Rights Committee in 2007 to the effect that the death penalty applies to crimes considered to be not “the most serious”, which have not been followed up by any legislative changes. It is also silent on serious concerns over procedural shortcomings, such as in the anti-terrorism laws, and practices, such as reliance on confessions in death penalty cases that defendants alleged had been extracted under torture.²⁹ Any death penalty imposed following an unfair trial constitutes a violation of the right to life contrary to Sudan’s obligations under the ICCPR and other relevant treaties.

(b) Corporal punishment:

“taking urgent and concrete measures to abolish laws that allow corporal punishment including stoning, amputation, cross-amputation and whipping” (African Commission); “explicitly prohibit corporal punishment by law in all settings, ensure effective implementation of the law and prosecute offenders” (CRC); “abolish all forms of punishment that are in breach of articles 7 and 10 of the Covenant”(HRC); “immediately amend the Criminal Law of 1991, in conformity with its obligations under the African Charter and other relevant international human rights instruments; Abolish the penalty of lashes” (African Commission in 236/00: *Curtis Francis Doebbler v Sudan*); “take appropriate measures to reform its penal code, particularly aiming at eliminating corporal punishment” (Brazil, UPR) (see also position of Ecuador above);

Sudan categorically stated that it does “not accept the part of the recommendation that calls for eliminating the corporal punishment from the penal code”.³⁰ Earlier, in 2009, Sudan stated that:

The State does not impose the penalty of amputation under any circumstances. It views the penalty of flogging, which is carried out on condition that it does not cause excruciating pain or leave a mark and only after consultation with a doctor, as a much better option than the alternative, namely, imprisonment, which has social

²⁷ A/HRC/18/16/Add.1, above n. 7, para.22.

²⁸ Ibid., para.24.

²⁹ See Medani, above n.24, 79-82.

³⁰ A/HRC/18/16/Add.1, above n. 7, para.23.

consequences and wastes employment opportunities. Moreover, flogging is not carried out in public.³¹

Sudan has not given any explanation as to why or how this practice could be seen as being compatible with its obligations under the ICCPR and other relevant international treaties.³² Further, the penalty of amputation was imposed in several recent cases.³³ There are also serious doubts as to the veracity of claims that flogging does not “cause excruciating pain or leave a mark” and “is not carried out in public”.³⁴

(iii) Arbitrary arrest and detention; torture; right to a fair trial

- National Security Law

The NISS’ broad powers of arrest and detention, coupled with a lack of accountability (immunities) and effective oversight, have prompted calls for reforms, particularly in light of persistent reports about NISS abuses, especially torture. The national security law was earmarked for reform in the CPA and the Interim National Constitution.³⁵ However, the 2010 National Security Act introduced largely cosmetic changes only; concerns over its compatibility with the right to liberty and security, the right to a fair trial and the prohibition of torture are therefore all too real.³⁶ Recommendations to reform the national security law have therefore been a priority:

Recommendations pre-2010:

“Ensure institutional and legislative reform of the National Security Service in accordance with the CPA and Interim National Constitution. In particular, broad powers of arrest and detention should be reformed (art. 31 and art. 33 of the national security act) and judicial oversight mechanism established” (UN Group of Experts).

Recommendations post-2010:

³¹ Information received from Sudan on the implementation of the concluding observations of the Human Rights Committee, UN Doc. CCPR//C/SDN/CO/3/Add.1, 18 December 2009, para.14.

³² See REDRESS and SHRM, No More Cracking of the Whip, above n.

³³ See 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*, 27 February 2013, available at http://www.redress.org/downloads/PR_Sudan_Doctors-Perform-Amputations-for-Courts_270213.pdf

³⁴ See REDRESS and SHRM, No More Cracking of the Whip, above n.25.

³⁵ REDRESS and SORD, *Security for All: Reforming Sudan’s National Security Services*, September 2009, available at <http://www.pclrs.org/downloads/Resources/Resources/Security%20for%20all%20Final.pdf>

³⁶ See African Centre for Justice and Peace Studies, REDRESS, and Sudanese Democracy First Group, *Comments to Sudan’s 4th and 5th 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, available at <http://www.pclrs.org/downloads/1204%20Comments%20to%20Sudans%204th%20and%205th%20Periodic%20Report.pdf>

“amend the 2010 National Security Act to ensure that the powers of the National Security Service to arrest and detain persons do not usurp the legitimate role of the police and are in conformity with the Sudan’s international human rights obligations” (Independent Expert); “ensure that the conditions of arrest, preliminary interrogation and detention of suspects comply with the principles of the Robben Island Guidelines³⁷” (African Commission); several states made recommendations to abolish or amend the 2010 law as part of the UPR process, for example “amend the 2010 National Security Act, by removing immunities for members of the National Intelligence and Security Services and withdrawing its powers of arrest and detention (Canada, UPR); “amend the 2010 National Security Act to ensure that the powers to arrest and detain of the National Intelligence and Security Service (NISS) are in line with the human rights obligations of Sudan” (Switzerland, UPR).

Sudan did not accept any recommendations made to amend or abolish the National Security Act. Instead, it maintained that:

The current National Intelligence and Security Services Act provide [sic] for judicial oversight and there is now a prosecutor appointed by the Minister of Justice who assumes the oversight and ensure the compliance of the Security Services with the Constitution particularly with regard to the rights of detainees.³⁸

As has been examined in detail elsewhere, the Act does not accord judicial oversight in conformity with international standards;³⁹ further, a prosecutor is not a judicial body as required by the ICCPR.⁴⁰ As a result, concerns over arbitrary arrest, detention and torture by the NISS, coupled with virtually complete impunity, are as acute as ever.

- Criminal Procedure Code

International bodies have also expressed concerns over the limited safeguards enjoyed by detainees in respect of their right to liberty and security and the prohibition of torture in the Criminal Procedure Code of 1991:

“ensure that the permitted legal duration of detention in police custody (*garde à vue*) is restricted by the Code of Criminal Procedure in accordance with the Covenant, and guarantee that permitted duration will be respected in practice. The right of detainees to have access to a lawyer, a doctor and family members should be laid down in the Code of Criminal Procedure” (HRC).

³⁷ Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines), available at:

http://www.achpr.org/files/sessions/32nd/resolutions/61/achpr32_robben_island_guidelines_eng.pdf

³⁸ A/HRC/18/16/Add.1, para.16.

³⁹ See REDRESS and Sudanese Human Rights Monitor, Comments, above n.20, 8, 9.

⁴⁰ UN Human Rights Committee, *Draft General Comment No.35: Article 9: Liberty and Security of Person*, UN Doc. CCPR/C/107/R.3, 28 January 2013, para.33.

Further,

“take... 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” (African Commission).

Some of these rights, such as the right to a lawyer, to medical care and to contact family members are contained in the Criminal Procedure Code. However, the scope of rights is not in full conformity with Sudan’s international obligations, and Sudan has not taken any further steps to amend the Code to address outstanding concerns, including on the provision of legal aid.⁴¹ A further development of concern is a legislative amendment in 2013 according to which civilians were made subject to the jurisdiction of military courts,⁴² notwithstanding a 2003 decision by the African Commission, in which it found these practices to violate the African Charter and urged Sudan “to bring its legislation into conformity with the African Charter”.⁴³

(iv) Emergency Laws

Sudan has repeatedly enacted states of emergency that raised concerns over the curtailment of rights and safeguards, particularly in conflict areas:

“Emergency laws should not grant security agencies broad powers to arrest and to restrict freedom of movement, assembly and expression” (UN Group of Experts); “take the necessary measures to end attacks against civilians and to ensure unimpeded humanitarian access to the camps of internally displaced persons in Darfur, including by lifting the state of emergency” (Canada, UPR).

Sudan’s emergency laws are flawed,⁴⁴ and their use in the context of armed conflicts, which have been characterised by allegations of serious human rights violations, further undermines human rights protection. No steps have been taken to date to reform the system of emergency legislation.

2.5. Rights of women

Regional and international bodies have repeatedly raised concerns about the violation of women’s rights in Sudan, particularly various forms of discrimination and lack of adequate protection against rape and other forms of sexual violence (see on the latter, above at 2.3.(i)).

⁴¹ Dr. Amil Saeed, *Legal Aid Bill, Analytical Study*, October 2010, available at http://www.pclrs.org/downloads/1206_legal_aid_bill_oct_2010.pdf

⁴² REDRESS and Sudanese Human Rights Monitor, *Sudan: Amendment of Armed Forces Act runs counter to international standards and risks further human rights violations*, July 2013, available at http://www.pclrs.org/downloads/Submission-on-Amendment_Sudan-Armed-Forces-Act_23July2013.pdf

⁴³ 222/98-229/99: *Law Office of Ghazi Suleiman v Sudan*.

⁴⁴ Medani, above n.24, 82-84.

“Enact... legislation prohibiting ... discriminatory practices against women ... take... measures to ensure female participation at all levels of decision making, including considering enacting a law of affirmative action” (African Commission); “speed up the adaptation of its laws governing the family and personal status to articles 3, 23 and 26 of the Covenant, in particular with regard the institution of the *wali* (guardian) and the rules on marriage and divorce”(HRC); “repeal all laws that discriminate against women” (Austria, UPR); “adjust legislation and practices affecting women and children to international law obligations assumed by Sudan” (Honduras, UPR); “take measures to raise awareness of the police, other authorities, and general public about gender-based violence against women and girls, as well as women’s rights, and ratify without any limiting reservations the CEDAW and its Optional Protocol, as well as repeal all laws that discriminate against women” (Finland, UPR); “amend its laws, including those on marriage, custody, divorce, property rights, and indecency, to ensure compliance with international human rights law” (Canada, UPR); “review national legislation in light of its provisions to eliminate all discriminatory laws against women” (Uruguay, UPR).

Sudan accepted the UPR recommendations calling on it to reform discriminatory legislation and laws to combat gender-based violence⁴⁵ but has yet to put this into practice.

One area of concern that has not been explicitly captured in the recommendations made by regional and international bodies is the regime of public order laws. As examined in detail elsewhere, public order laws have been discriminatory and have resulted in the imposition of whipping for offences, which in the circumstances constitutes a form of gender-based violence.⁴⁶

2.6. Rights of the child

Sudan adopted a new Child Act in 2010 that guaranteed a number of children’s rights and was welcomed by the Committee on the Rights of the Child. In its recommendations, the Committee focused on remaining gaps and inconsistencies, and recommended that Sudan:

“adopt a comprehensive regulatory and policy framework, including the appropriate enabling legislation, to facilitate the implementation of the Child Act (2010)”; “while welcoming the definition of a child as any person under the age of 18 years under the Child Act (2010), the Committee is concerned at the lack of consistency in the State party’s legislation and practice with regard to the definition of the child. In particular,

⁴⁵ A/HRC/18/16, above n.7, para.33.

⁴⁶ 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, available at <http://www.pclrs.org/downloads/Miscellaneous/Public%20Order%20Submission%20Paper%20MASTER%20FINAL.pdf>

the Committee is concerned that adulthood is, in practice, determined by reference, inter alia, to the attainment of puberty in conformity with sharia law... recommends that the State party harmonise its legislation and practice with the Convention in this area.”

Sudan has yet to act on these recommendations. The Committee raised further concerns regarding the practice of the death penalty on children, corporal punishment, female genital mutilation and forced marriage, as well as juvenile justice, which primarily relate to the effective implementation of the 2010 Child Act.⁴⁷

2.7. Press and Civil society

The media and civil society organisations have faced an array of restrictions as well as various forms of intimidation and harassment that have hampered their ability to exercise their freedom of expression, association and assembly. This also applies to protest movements as (largely peaceful) demonstrations have been met with bans, excessive use of force and criminal prosecutions of protesters.⁴⁸ Regional and international bodies, as well as states during the UPR, have repeatedly expressed concern about these practices, as well as the inadequate legislative framework that enables the arbitrary curtailment of rights:

“requests the government of Sudan to amend its existing laws to provide for de jure protection of the human rights to freedom of expression, assembly, association and movement” (African Commission in 228/99: *Law Offices of Ghazi Suleiman v Sudan*); “remove restrictions in the National Press Laws that can be used to threaten the work and independence of journalists acting as human rights defenders and bring them into line with the Interim Constitution, the International Covenant on Civil and Political Rights and other applicable international standards” “reform the Organisation of Voluntary and Humanitarian Work Act of 2006 so as to not restrict the work of groups through unnecessary procedural requirements confined definitions of what humanitarian organisations should do, and lack of judicial oversight of decisions by Ministry of Humanitarian Affairs and HAC [Humanitarian Aid Commission]” (both UN Group of Experts); “respect the right to express opinions and ... protect peaceful demonstration” “respect and protect the activities of human rights organisations and defenders. ... ensure that any governmental regulation is compatible with articles 21 and 22 of the Covenant, and make sure that the 2006 Act is consistent with the Covenant” (both HRC); “take the necessary measures that ensure freedom of expression and access to information” (African Commission); “cease arbitrary curtailment of the activities of civil society organisations, press censorship and all arbitrary arrests and detentions” (Independent Expert); “bring the 2009 Press and

⁴⁷ Committee on the Rights of the Child, *Concluding Observations: Sudan*, UN Doc. CRC/C/SDN/CO/3-4, 1 October 2010, at paras. 35/36, 39/40, 56/57 and 89/90.

⁴⁸ Sudan Law Reform Advocacy Briefing, Issue No.3, December 2012, available at <http://www.pclrs.org/downloads/sudan-advocacy-briefing--december-2013.pdf>

Publications Act in line with its international obligations, and put in place effective enforcement measures” (Canada, UPR); “adjust its national legislation to be compatible with the Comprehensive Peace Agreement and the Interim National Constitution adopted in 2005, especially the following laws and codes: National Security Act (2010); Press and Printing Act (2009); Volunteer and Humanitarian Work Act (2006); Criminal Code; Criminal Procedure Code” (Ecuador, UPR).

Sudan accepted the recommendation to reform the Press and Printing Act of 2009,⁴⁹ which remains outstanding, but has not acted on (or accepted) the recommendation to amend the 2006 Volunteer and Humanitarian Work Act. As the National Security Act and the Criminal Code have also been used to harass journalists, human rights defenders and others, an effective guarantee of their rights requires wholesale legislative reforms.

3. Ratification/accession to international and regional human rights treaties

Several bodies and states have recommended that Sudan becomes a party to international and regional human rights treaties that:

(i) Guarantee women’s rights:

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (CRC; several states during UPR) and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (African Commission)

Sudan commented that:

The Government has subjected the Convention on the Elimination of All Forms of Discrimination against Women to a wide consultative process with a view to bring [sic] on board the view points of the different sects of the society.⁵⁰

In light of concerns that existing legislation and practice falls short of CEDAW requirements, this comment does not instil confidence that Sudan is seriously considering becoming a party to CEDAW (or the Protocol to the African Charter on the Rights of Women).

(ii) Prohibit torture and ill-treatment and provide preventive mechanisms:

The Convention against Torture and other cruel, inhuman or degrading treatment or punishment (African Commission, CRC, several states during UPR)

⁴⁹ A/HRC/18/16/Add.1, above n.7, para.15.

⁵⁰ Ibid., para.12.

The Optional Protocol to the Convention against Torture and other cruel, inhuman or degrading treatment or punishment (CRC; CRC, several states during UPR).

Sudan commented that the:

Government does not think of acceding to ... the Optional Protocol to the [Convention against Torture] at the meantime.⁵¹

However, its comments were silent on becoming a party to the Convention against Torture, an issue that has been under consideration for some time without any tangible progress.

(iii) Prohibit and protect against enforced disappearance

International Convention for the Protection of All Persons from Enforced Disappearance (France, Spain and Ecuador during UPR).

Sudan did not accept this recommendation.

(iv) Abolish the death penalty

Second Optional Protocol to the ICCPR (Switzerland and Australia during the UPR).

Sudan did not accept this recommendation.

(v) Provide for an international mechanism to prosecute international crimes

The Rome Statute of the International Criminal Court (Australia, Ecuador, Poland during the UPR)

Sudan did not accept this recommendation.

(vi) Give monitoring bodies jurisdiction to consider complaints brought against Sudan under the respective treaties

Optional Protocols to the International Covenants (CRC; Spain, UPR);
Additional Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Commission)

⁵¹ Ibid., para.13.

Sudan did not accept any recommendations to become subject to individual complaints procedures. In respect of the First Optional Protocol to the ICCPR, it stated that:

Sudan has a Constitutional Court which is the guardian for the human rights stipulated in the Constitution and the international human rights treaties to which Sudan is a party.⁵²

This explanation fails to acknowledge that the UN Human Rights Committee would only hear complaints once effective remedies have been exhausted. It would therefore not hear cases where the Constitutional Court exercises its role as guardian. This does not mean, however, that there may be situations where the Constitutional Court fails to do so, be it because of its limited mandate, delays or a misconstruction of applicable standards, as the jurisprudence of the African Commission on Sudan shows.⁵³ It would be in those cases that the Human Rights Committee could play an important role as supervisory body ensuring respect of Sudan's obligations under the ICCPR.

⁵² Ibid.

⁵³ See above n.13. See also 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.pclrs.org/downloads/Resources/1208arrested_development_sudan.pdf

II. Annex

1. UN Treaty Bodies

UN Human Rights Committee

Concluding observations: Sudan (UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007)

<http://www.ohchr.org/EN/countries/AfricaRegion/Pages/SDIndex.aspx>

UN Committee on the Rights of the Child

Concluding Observations: Sudan (UN Doc. CRC/C/SDN/CO/3-4, 1 October 2010)

<http://www.ohchr.org/EN/countries/AfricaRegion/Pages/SDIndex.aspx>

2. UN Charter Bodies

Report of the Independent Expert on the situation of human rights in the Sudan, Mashood A. Baderin, UN Doc. A/HRC/24/31, 18 September 2013

<http://www2.ohchr.org/english/countries/sd/mandate/index.htm>

Universal Periodic Review-Sudan (2011)

<http://www.ohchr.org/EN/HRBodies/UPR/Pages/SDSession11.aspx>

Report prepared by the Special Rapporteur on the situation of human rights in the Sudan on the status of implementation of the recommendations compiled by the Group of Experts mandated by the Human Rights Council in resolution 4/8 to the Government of the Sudan for the implementation of Human Rights Council resolution 4/8 pursuant to Human Rights Council resolution 6/34, UN Doc. A/HRC/9/13/Add.1, 2 September 2008

<http://www.ohchr.org/EN/countries/AfricaRegion/Pages/SDIndex.aspx>

3. African Commission on Human and Peoples' Rights

African Commission on Human and Peoples' Rights

Concluding Observations and Recommendations on the 4th and 5th Periodic Report of the Republic of Sudan (2012)

<http://www.achpr.org/states/sudan/reports/4thand5th-2008-2012/>

Information on cases decided by the African Commission on Human and Peoples' Rights

<http://www.achpr.org/communications/>

4. African Union

African Union High-Level Panel on Darfur

Darfur: The quest for peace, justice and reconciliation, Report to the African Union, PSC/AHG/2 (CCVII), 29 October 2009

[http://www.africa-](http://www.africa-union.org/root/AR/index/AUPD%20Report%20on%20Darfur%20%20 Eng%20 %20Final.pdf)

[union.org/root/AR/index/AUPD%20Report%20on%20Darfur%20%20 Eng%20 %20Final.pdf](http://www.africa-union.org/root/AR/index/AUPD%20Report%20on%20Darfur%20%20 Eng%20 %20Final.pdf)