



Human Rights Concerns and Barriers to Justice in Sudan: National, Regional and International Perspectives

A compilation of Sudan Law Reform Advocacy Briefings

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I. Introduction

The reforms aimed at strengthening human rights protection and the rule of law set out in Sudan's 2005 Comprehensive Peace Agreement and the Interim National Constitution have largely remained unfulfilled. Developments following the separation and independence of South Sudan in 2011 demonstrate the persistence of deep-seated structural problems. These developments have been characterised by a deepening political and economic crisis, multiple conflicts on both sides of the border and ongoing human rights violations. The need for respect for human rights and the rule of law in Sudan is therefore as strong as ever. The current constitutional review and legal and institutional reforms are at the heart of this process.

The Project for Criminal Law Reform (www.pclrs.org), a joint initiative by REDRESS and the Sudanese Human Rights Monitor, has identified a series of shortcomings in Sudan's legal system, particularly in respect of Sudan's international human rights obligations, and advocated reforms over the last seven years. This Compilation of Advocacy Briefings, which covers four briefings published in the period May 2013 to January 2014 (available at <http://www.pclrs.org/english/updates>), highlights a number of key areas of concern. These includes torture, immunities as a barrier to justice and the right to protest, which have been the subject of concerns and debates in the period covered. In addition, this Compilation draws together the multiple recommendations made by regional and international human rights bodies, which serve as a yardstick for any measures taken by Sudan and advocacy tool for civil society actors. Many of these recommendations reflect the suggestions made in various publications and submissions by the Project over the years, most of which are referenced when discussing specific recommendations (see below at V). The implementation of these recommendations remains an imperative and prerequisite for a state committed to respect for human rights, justice and accountability.

II. 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:

1. 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.

2. 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.

3. 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.

4. 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.

III. Reforming Sudan's Law on Immunities

1. Reviewing Sudan's immunity laws

The prevalence of torture and other serious violations of human rights in Sudan has been a long-standing concern. Impunity for these violations is an important factor that contributes to the lack of their effective prevention. As highlighted by national actors as well as regional and international bodies, the granting of immunities for officials in Sudan's law is incompatible with the right to an effective remedy and the state's obligation to hold perpetrators of serious human rights violations to account and provide reparation to victims. Effectively, authorities are given the right to police themselves and the resulting lack of accountability perpetuates violations. The UN Human Rights Committee, the African Commission on Human and Peoples' Rights (African Commission), various UN bodies, the AU High-Level Panel on Darfur and others have called on Sudan to abolish immunities.¹

Sudan had the opportunity to do so in the Armed Forces Act of 2007, the Police Act of 2008, and the National Security Act of 2010, but has not done so. The Sudanese Constitutional Court has justified immunities by emphasising their conditional nature and the possibility of judicial review.² However, in practice, immunities have frequently led to impunity, including for serious human rights violations, and legal remedies are neither clear nor effective.³ This was recognised in cases brought before the African Commission, such as *Osman Hummida, Amir Suliman and Monim El-Jak v. Sudan*⁴, and other cases documented by various bodies and organisations over the years.⁵

Against this background, it is welcome that Sudan's Ministry of Justice has reportedly announced a review of the current system amidst concerns over the adverse impact of immunities on the administration of justice.⁶ Considering the limited progress made in legislative reform initiatives since 2005, any such review process should be participatory, transparent and expeditious. The review should be guided by Sudan's international human rights obligations as reflected in the Bill of Rights that forms an integral part of Sudan's Interim National Constitution, and be undertaken with a view to bringing Sudan's law in conformity with such obligations.

¹ See e.g. *UN Human Rights Committee: Sudan*, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para.9 (e) and *Darfur: The Quest for Peace, Justice and Reconciliation*, Report of the African Union High-Level Panel on Darfur (AUPD), PSC/AHG/2 (CCVII), 29 October 2009, xix, para.25 (c) and (d); 56-63, paras.215-238; and 91, 92, para.336; African Commission on Human and Peoples' Rights, *Concluding Observations and Recommendations on the 4th and 5th Periodic Report of the Republic of Sudan*, 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, para.66.

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

³ *UN Human Rights Committee: Sudan*, above note 1, para.9 and Tenth periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan, *Arbitrary arrest and detention committed by national security, military and police*, Geneva, 28 November 2008.

⁴ *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan*, Communication 379/09, Admissibility Decision, August 2012, see <http://www.fidh.org/African-Commission-on-Human-and-12386>.

⁵ See REDRESS, African Centre for Justice and Peace Studies and Sudan 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, at <http://www.redress.org/downloads/publications/1204%20Comments%20to%20Sudans%204th%20and%205th%20Periodic%20Report.pdf>

⁶ See Sudan Tribune, 'Senior Sudanese judicial official slams immunity granted to president and VP', 6 September 2013, at <http://www.sudantribune.com/spip.php?article47957>.

2. The nature and role of immunities in Sudan's legislation

This Briefing examines the compatibility of immunities with Sudan's international human rights obligations and the Bill of Rights, taking into consideration the practical application of immunities laws. It highlights that, in order for Sudan to meet its international obligations, immunities need to be removed for officials accused of serious human rights violations by repealing the provisions concerned. Such step would pave the way for Sudan's authorities to effectively investigate allegations of torture and other serious human rights violations past and present, and to prosecute those against whom sufficient evidence is available.

The granting of immunities in Sudan dates back to colonial times. At present, immunities for a range of officials is granted in particular in article 42(2) of the Armed Forces Act of 2007, article 45(1) of the Police Act of 2008, and article 52 of the National Security Act (NSA) of 2010.

By way of example, taking the most recently enacted provision on immunities, article 52 of the NSA provides that:

(3) Without prejudice to the provisions of this Act and any right to claiming compensation against NSS [National Security Service], no civil or criminal procedures may be brought against a member or associate unless upon the approval of the Director. The Director shall give such approval whenever it appears that the subject of such accountability is not related to official business, provided that the trial of any staff or associates shall be before a closed criminal court, during their service or after its termination, with regards to acts committed by them.

(4) Subject to the provisions of Article (46) of this Act, and without prejudice to any right to claiming compensation against NSS, no civil or criminal procedures may be brought against a member as a result of an act associated with the official duty of the member unless upon the approval of the Director. The Director shall give such approval whenever it appears that the subject of such accountability is not related to NSS official business.

(6) Associates shall enjoy the same immunities provided for in this Article.

Article 52(3) of the NSA provides immunity for any acts done in an official capacity, covering criminal and civil proceedings. It does not specify which acts are "related to official business" and does not explicitly exempt torture or other serious violations from its remit. In practice, it is for the director of the National Security and Intelligence Services (NISS) to decide whether anything done while on duty falls within the scope of this article and whether immunities should be lifted. The Armed Forces Act and the Police Act follow a similar system of conditional immunities. The procedures for the lifting of immunity are not set out in legislation and have not been clarified in jurisprudence, as the Constitutional Court has upheld immunities legislation without providing further guidance.⁷ There is, therefore:

- (i) neither judicial guidance nor publicly available guidelines for the criteria to be taken into account by the director of the forces concerned in determining whether or not to lift immunities;
- (ii) no timeframe for making any decision on the matter; and

⁷ See *Farouq Mohamed Ibrahim Al Nour v (1) Government of Sudan; (2) Legislative Body*, above note 6.

- (iii) no clearly established procedure of judicial review, or a judicial standard of reviewing the exercise of discretion in such cases.

3. Compatibility of immunities with Sudan's obligation to investigate and prosecute torture and other serious human rights violations

3.1. Overview

Sudan is party to the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR) as well as a series of other treaties. The ICCPR and ACHPR recognise the right to an effective remedy and, as developed in the respective jurisprudence, the corresponding duty of States parties to investigate and prosecute allegations of torture. Such an obligation is also recognised in customary international law, and forms part of the international effort to prevent torture and other serious violations and to provide justice to victims of such violations⁸.

Investigations must be commenced immediately, i.e. without undue delay upon receipt of a complaint, unless it is manifestly ill-founded, or upon receiving credible information that acts of torture or ill-treatment have occurred⁹. The requirement of effective investigations imposes a duty on states to conduct an investigation that is capable of leading to the identification and punishment of those responsible for any ill-treatment and permitting effective access for the complainant to the investigatory procedure¹⁰. Investigations may not be thwarted by legislation and/or practice¹¹.

States have an obligation under international law to make torture a criminal offence subject to appropriate penalties¹² and to prosecute torture irrespective of where the crime was committed, the nationality of the victim or the alleged perpetrator (unless the suspect is extradited)¹³. Although victims of torture do not have an objective right to the prosecution of alleged perpetrators they do have a right of access to justice: "As the [Human Rights] Committee has repeatedly held, the Covenant does not provide a right for individuals to require that the State criminally prosecute another person ... The Committee nevertheless considers that the State Party is under a duty to investigate thoroughly alleged violations of human rights... and to prosecute criminally, try and punish those held responsible for such violations. This duty applies a fortiori in cases in which the perpetrators of such violations have been identified."¹⁴

⁸ See "III. Accountability for International Crimes", in Lutz Oette (ed.), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (Ashgate, Farnham, 2011), 155-60.

⁹ UN Human Rights Committee, *General Comment 20 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7)*, 10 March 1992.

¹⁰ See for example the judgment by the European Court of Human Rights, *Aksoy v. Turkey* (1997) 23 EHRR 553, para. 98.

¹¹ *Ibid.*, para.95.

¹² See UN Human Rights Committee, *General Comment 20*, above note 10, paras.8 and 13, and ACHPR, *Guidelines for the Prohibition and Prevention of Cruel, Inhuman or Degrading Treatment or Punishment in Africa - Robben Island Guidelines*, paras.4-14.

¹³ See Robben Island Guidelines, *ibid.*, and ; Articles 4-9 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

¹⁴ *Case of Nydia Erika Bautista*, Communication No. 563/1993, UN Doc. CCPR/C/55/D/563/1993, 13 November 1995.

3.2. *Compatibility of Sudan's immunities laws with relevant international standards*

3.2.1. *The requirement to investigate allegations of torture 'promptly'*

The Attorney-General as the legal authority responsible for criminal investigations, upon receiving information that an act of torture has been committed, can only carry out a preliminary inquiry. The subsequent procedure of requesting approval from the head of the respective forces inevitably results in delays. Given the lack of any recognised and enforceable obligation on the part of the forces concerned to take any decision and the absence of any time frame for the making of such decision, delays are potentially open-ended, resulting in an indefinite delay. In practice, most cases are either terminated upon refusal to grant approval to open an investigation or are pending for months and years on end without any resolution of the matter. In both instances, full investigations are not commenced immediately and the system of prior approval is such that there is an inbuilt failure to meet the requirement of 'prompt' investigations.

3.2.2. *The requirement to investigate allegations of torture 'impartially'*

While investigations are carried out under the supervision of the Attorney-General, the forces concerned play a crucial role in the investigatory process as their respective director is effectively tasked with determining whether or not a full investigation should take place. The law therefore puts the forces concerned in a position to block any investigations irrespective of available evidence and findings of the Attorney-General and the actual investigating bodies. The director of forces, such as the NISS, is not impartial because he¹⁵, as a superior of those suspected of having committed the crimes, not only has close links to the actual perpetrators, and may even be implicated in any offences committed, but also an institutional interest in preventing criminal proceedings of its members in order to preserve the integrity of the forces. There is a clear conflict of interest, which is compounded by the fact that the head of the forces concerned has seemingly unfettered discretion in making the decision on whether or not to grant approval. Moreover, as an executive body subordinate to the President of the Republic, the head of the forces concerned lack institutional independence. The institution is potentially subject to political considerations in its decision-making that may run counter to pursuing criminal proceedings against members of the forces concerned for alleged torture even where credible evidence is available.

3.2.3. *The requirement to investigate allegations of torture 'effectively'*

There is neither a clear policy nor legal duty of the relevant authorities to investigate fully and effectively alleged acts of torture. Following a preliminary inquiry, the decision whether any investigative measures are to be taken rests with the head of the forces concerned. Pending approval, no measures can be taken, which, given the lengthy delays, enhances the likelihood that it results in the loss of evidence. With the passage of time, it is more difficult to collect accurate victim(s) and witness statements as well as the requisite medical evidence. Crucially, perpetrators of torture are given the opportunity to frustrate justice by destroying evidence, threatening victims and witnesses or escaping the grasp of the law altogether. In practice, the lack of approval frequently equates with a complete lack of investigations, let alone effective investigations. The end result is that no steps are taken to establish the facts of the crime or to establish the identity of the perpetrators, which in turn undermines the effectiveness

¹⁵ Note that directors of the respective forces in Sudan have commonly been male.

of existing complaints procedures, as victims of torture have limited confidence in the ability of the system to take their complaints seriously and render justice.

3.2.4. *The requirement to prosecute and punish those responsible for torture*

The conditional immunity granted to members of the forces concerned has de facto resulted in an almost complete lack of prosecutions of torture cases even where credible evidence was available.¹⁶ The immunity provisions in Sudanese laws therefore undermine and frustrate any prosecutions of officials.

3.3. *Findings*

In its practical effects, the immunities laws resemble amnesty laws that make it impossible to investigate and prosecute perpetrators of torture or other serious human rights violations. It is well established that amnesties for serious human rights violations violate international standards, in particular states' obligations to investigate such violations.¹⁷ Regional and international human rights bodies have recognised equally that immunities for serious violations contravene the duty to investigate.

The United Nations Human Rights Committee, in its General Comment 31, stated that:

...where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties (see General Comment 20) and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility...¹⁸

In its practice, the Human Rights Committee has repeatedly found immunity legislation to be incompatible with the right to an effective remedy and the concomitant duty to investigate and prosecute torture,¹⁹ including in the case of Sudan:

It [the Human Rights Committee] is particularly concerned at the immunity provided for in Sudanese law and untransparent procedure for waiving immunity in the event of criminal proceedings against state agents.²⁰

¹⁶ See for example cases referred to in note 3 above.

¹⁷ UN Human Rights Committee, *General Comment 20 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7)*, 10 March 1992, para.15: "The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible."

¹⁸ UN 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.18.

¹⁹ Concluding observations of the UN Human Rights Committee: India, UN Doc. CCPR/C/79/Add.81, 4 August 1997, para.21: "The Committee notes with concern that criminal prosecutions or civil proceedings against members of the security and armed forces, acting under special powers, may not be commenced without the sanction of the central Government. This contributes to a climate of impunity and deprives people of remedies to which they may be entitled in accordance with article 2, paragraph 3, of the Covenant."

²⁰ UN Human Rights Committee: Sudan, above note 1, para.9.

Other international and regional human rights bodies have shared these views in their jurisprudence and practice. The African Commission, in the Robben Island Guidelines, stated that:

In order to combat impunity States should:

Ensure that those responsible for acts of torture or ill-treatment are subject to legal process.

Ensure that there is no immunity from prosecution for national suspected of torture...²¹

In its recent Concluding Observations and Recommendations on the 4th and 5th Periodic Report of the Republic of Sudan, the African Commission recommended that Sudan:

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.²²

The Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment or Punishment also stated that:

Legal provisions granting exemptions from criminal responsibility for torturers, such as amnesty laws (including laws in the name of national reconciliation or the consolidation of democracy and peace), indemnity laws, etc. should be abrogated.²³

4. Compatibility of immunities with Sudan's obligation to provide effective remedies and the right to reparation

4.1. Overview of applicable standards

The right to reparation for torture is recognised both as a matter of international treaty and customary international law. Under the ICCPR, states have an obligation to provide effective remedy for torture under Article 2 (3) in conjunction with Article 7 and 10. The African Commission has grounded such an obligation in Articles 1 and 5 of the ACHPR. In 2005, the UN General Assembly, in a landmark resolution, adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.²⁴

The right to reparation for torture encompasses both the procedural right to an effective access to a court and the substantive right to reparation. As stated by the UN Human Rights Committee in its General Comment 31:

Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by

²¹ Robben Island Guidelines, above note 13, para.16.

²² African Commission on Human and Peoples' Rights, *Concluding Observations and Recommendations on the 4th and 5th Periodic Report of the Republic of Sudan*, 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, para.66.

²³ General Set of Recommendations of the *UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. E/CN.4/2003/68, 17 December 2002, para.26 (k).

²⁴ *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law*, UN Doc. A/RES/60/147, 16 December 2005.

articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.²⁵

In its jurisprudence, the African Commission has repeatedly held that states must provide remedies and reparation in case of a violation of the prohibition of torture, such as in the case of *Law Office of Ghazi Suleiman v. Sudan*.²⁶

4.2. Compatibility of Sudan's immunities laws with relevant international standards

Immunities effectively bar victims of torture from claiming compensation and other forms of reparation for torture in the course of criminal proceedings and/or from filing an independent civil lawsuit for reparation against the individual official concerned. There is neither an established judicial procedure for reviewing the exercise of discretion by the director of the forces concerned nor any jurisprudence as to under what circumstances approval to proceed with legal proceedings should be granted. As a result, victims' access to court is subject to the unfettered discretion of the director, who, as the head of the very same forces alleged to be responsible for torture, lacks impartiality. In practice, there are few if any cases in which torture victims have been able to bring reparation claims against individual officers before courts because the head of the forces concerned routinely refuses to grant approval or takes no action, which effectively amounts to a refusal.

Immunities are without prejudice to any right to compensation against the state. While it is important that a victim can still sue the state under existing law, the provision fails to provide for an effective remedy. Firstly, individual perpetrators cannot be sued, thereby depriving the victim of specific forms of reparation connected to the personal responsibility of the perpetrator of torture. Secondly, the fact that there are routinely no criminal investigations puts a victim of torture in a disadvantageous position, as the evidence required to prove a claim will often not be available in the absence of any such criminal proceedings. Thirdly, the immunity accorded to the perpetrators of torture, in combination with a lack of victim and witness protection, makes victims who pursue their case vulnerable to threats and harassment. These factors combine in practice where there has been a marked absence of suits against the state. Even where they have an arguable claim, torture victims are routinely deprived of access to a court and have not received reparation, contrary to Sudan's obligations under international law.

5. Conclusion and recommendations

Any review of immunities in Sudan's legislation should be guided by Sudan's obligations under international treaty and customary international law, taking into consideration the jurisprudence

²⁵ UN 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.16.

²⁶ *Law Office of Ghazi Suleiman v. Sudan*, African Commission on Human and Peoples' Rights, Comm. Nos. 222/98 and 229/99 (2003). The African Commission on Human and Peoples' Rights, in its 2003 resolution Principles and Guidelines on the Right to a Fair Trial affirmed that everyone has the right to an effective remedy that includes: "(1) access to justice; (2) reparation for the harm suffered; (3) access to the factual information concerning the violations. (a) Every State has an obligation to ensure that: (1) any person whose rights have been violated, including by persons acting in an official capacity, has an effective remedy by a competent judicial body; (2) any person claiming a right to remedy shall have such a right determined by competent judicial, administrative or legislative authorities; (3) any remedy granted shall be enforced by competent authorities; (4) any state body against which a judicial order or other remedy has been granted shall comply fully with such an order or remedy. (b) The granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy.

and recommendations of relevant bodies. It should also examine the practical application of immunities laws. This includes: (i) the number of cases in which requests for immunities to be lifted were made; (ii) the length for which such requests were pending; (iii) number and nature of decisions made in relation to immunities, if any; and (iv) the outcome of any prosecutions brought, if any. To this end, the experiences and views of relevant actors, particularly complainants, should be sought and fully considered in determining the impact of immunities on the administration of justice.

As this Briefing demonstrates, immunities raise a series of concerns; for any review to be meaningful, it needs to take these concerns seriously and recommend measures that are both in line with Sudan's international obligations and result in actual changes to the effective administration of justice in Sudan.

Partial reforms as reportedly suggested by the Ministry of Justice in workshops on the subject in Khartoum, 4-5 September 2013, will not be sufficient. Even if a system of immunities were to be put in place that specifies timeframes and is subject to judicial review, the fact that officials enjoy immunity, even if conditional, constitutes a barrier that is contrary to Sudan's duty to investigate allegations of torture and other serious human rights violations promptly and effectively. Further, there is a lack of judicial practice of independently and effectively reviewing executive decisions. Any reforms that would make the decision on whether or not to lift immunities subject to judicial review therefore carries the risk that immunities will continue to equate with impunity. If the review and subsequent reforms are to be genuine, they need to form an integral part of a policy and measures capable of combating torture and other serious human rights violations effectively. This applies particularly to ensuring accountability and justice to the victims of such violations.

IV. Protecting the right to peaceful protest in Sudan

1. Introduction

Sudanese authorities reacted drastically to recent demonstrations that erupted in September 2013 across Sudan. The responses of Sudanese authorities raise familiar concerns: the excessive use of force, resulting in a large number of casualties; subsequent arrests, detention and torture; and the prosecution of individuals for organising/taking part in demonstrations. Since 1989, when a coup brought the then National Islamic Front (now National Congress Party) to power, the repression of dissent and protest has been an integral part of the exercise of power, facilitated if not sanctioned by a panoply of laws. These laws include those that on the one hand restrict freedom of assembly and on the other provide the police and security services with extremely broad powers to use force. These laws can be, and have been construed so as to criminalise the exercise of freedom of expression and assembly. In addition, in the case of alleged violations, Sudanese officials enjoy immunities and victims do not have access to effective remedies.

As recognised in international human rights law and jurisprudence, freedom of expression and assembly are central to a democratic society and play a key role in ensuring the protection of all human rights. Sudan's Bill of Rights makes international human rights treaties an integral part of the Interim National Constitution and stipulates that "[l]egislation shall regulate the rights and freedoms enshrined in this Bill and shall not detract from or derogate any of these rights."²⁷ Sudan has also committed itself to law reform as part of its action plan to implement the recommendations of its 2011 Universal Periodic Review.²⁸

This Advocacy Briefing sets out the reforms needed to ensure the conformity of Sudanese law applicable in the context of protests and demonstrations with binding international human rights standards, with a particular focus on the right to freedom of assembly, the prohibition of torture and ill-treatment and the right to life.

2. Protest and human rights in Sudan

As one of the first steps after taking power in June 1989, the Government of Sudan issued presidential decree no.2, which declared a state of emergency. In addition to dissolving all political parties and unions and taking other measures, the Decree prohibits "express[ing] any political dissent, in any form, to the regime of the National Salvation Revolution" and "hold[ing] a gathering or meeting for a political purpose, in a public or private place, without a special permission."²⁹ Further,

[p]ersons who would violate any regulations of this decree or would show resistance to them will be punished by a prison term not less than one year and no more than ten years, they can be also fined. If the violation or the resistance is in conspiracy with, or is in criminal association with others, the perpetrator can be sentenced to die. In case the

²⁷ Article 27(4) of the Bill of Rights, Interim National Constitution of Sudan, 2005.

²⁸ 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, para.18.

²⁹ The Second Constitutional Decree: The Procedural Law and the Transitional Powers of 1989 (30 June 1989), English text in Amin M. Medani, *Crimes against International Humanitarian Law in Sudan: 1989-2000* (Egyptian Book House, 2001) 255-258.

violation or resistance involves the use of force or arms or military equipment, the perpetrator will be sentenced to die and his properties will be seized.³⁰

For the prosecution of such offences, the then Revolutionary Council was mandated to set up special courts. As held by the African Commission on Human and Peoples' Rights in the case of *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*, the Decree was incompatible with Sudan's human rights obligations on several grounds:

Section 7 of The Process and Transitional Powers Act, 1989 [Decree No.2] prohibits effecting without special permission, any assembly for a political purpose in a public or private place. This general prohibition on the right to associate in all places is disproportionate to the measures required by the government to maintain public order, security and safety. In addition, there is evidence from the Complainants, which is not contested by the government, that the powers were abused.³¹

As stated above, the [African] Charter contains no derogation clause, which can be seen as an expression of the principle that the restriction of human rights is not a solution to national difficulties: the legitimate exercise of human rights does not pose dangers to a democratic state governed by the rule of law.³²

Notwithstanding its apparent incompatibility with international human rights standards, domestically the Decree legally sanctioned the crackdown on civil society. This took the form of using live ammunition against unarmed protesters, mass arrests and prosecutions before special courts, which resulted in several cases in which the death penalty was imposed in the period from late 1989 to 1991.³³

There have been recurring concerns over respect for the rights of peaceful protesters throughout the last two decades. More recently, in the lead up to national elections and the referendum concerning the independence of South Sudan, police and security forces were reported to have repeatedly used excessive force, including tear gas and batons, to break up peaceful demonstrations in late 2009 and throughout 2010.³⁴ A wave of student and youth protests in January 2011 was reportedly equally met with excessive use of force, and followed by subsequent arrests, detention and torture of activists.³⁵ Following the independence of South Sudan in July 2011, the worsening economic situation and austerity measures prompted repeated protests in various parts of the country, such as in June and July 2012, which largely followed the pattern described above.³⁶ On 23 and 24 September 2013, protests erupted in Wad Madani, Khartoum, Kassala, Port Sudan, Gadarif, Sinaar, Al Obeid and Nyala in response to the Government of Sudan's decision to lift fuel subsidies. Reportedly, the protests were largely peaceful but some of the protesters apparently set fire to several National Congress Party (NCP)

³⁰ Article 7 *ibid.*

³¹ *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*, Communications 48/90-50/91-52/91-89/93, para.82.

³² *Ibid.*, para.79.

³³ See Human Rights Watch/Africa, *Behind the Red Line: Political Repression in Sudan* (1996), 184-188.

³⁴ Amnesty international, 'Sudan must end violent crackdown on protesters', Press Release, 7 December 2009, available at <http://www.amnesty.org/en/news-and-updates/news/sudan-must-end-violent-crackdown-protestors-20091207>.

³⁵ See case of Safia Ishaq Mohammed Issa v Sudan, Complaint filed by REDRESS on 16 February 2013, <http://www.redress.org/downloads/complaintsafia-ishaq-mohammed-issa-v-sudan18february2013nosig.pdf>.

³⁶ See Sudan Law Reform Updates for the relevant periods, available at <http://www.pclrs.org/english/news-and-events> and African Centre on Justice and Peace Studies (ACJPS) 'Excessive force, mass arbitrary detention, ill treatment and torture used to crackdown on popular protests Sudan', 27 July 2012, available at <http://www.acjps.org/?p=1042>

offices and petrol stations in Khartoum and Wad Madani. The police and security forces reportedly responded to these protests by using tear gas and rubber batons as well as by firing live ammunition, which resulted in an estimated 200 persons killed in Khartoum, Wad Madani and Nyala combined. Several hundred persons were arrested and detained following the demonstrations and charged with various offences. The authorities also closed down several newspaper offices.³⁷ The violent response to the protest triggered calls from UN bodies and civil society, requesting the Government of Sudan to respect rights and conduct an inquiry.³⁸ In response, on 29 September 2013 and again on 4 November 2013, the Government of Sudan pledged to establish a commission of inquiry.³⁹ If such a commission were to be established, and it were to investigate these alleged violations in line with Sudan's obligations under international human rights law and best practices, this would be a positive step. It would help to ensure that perpetrators of violations would be held to account and that victims could obtain redress; it could also identify what legislative and institutional reforms would be required to ensure respect for human rights in the context of protests and demonstrations.

3. Sudan's international obligations pertaining to demonstrations

3.1. Freedom of assembly

3.1.1. International Standard and the Bill of Rights

The rights to freedom of expression, assembly and association are key political and civil rights. According to the United Nations (UN) Human Rights Committee

Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. [footnotes omitted].⁴⁰

The right to freedom of assembly is recognised in article 21 of the International Covenant on Civil and Political Rights (ICCPR) and article 11 of the African Charter on Human and Peoples' Rights (ACHPR) to which Sudan is a state party. It is also an integral part of Sudan's Bill of Rights by virtue of article 27(3) of the Interim National Constitution.⁴¹ Article 40 (1) of the Bill of Rights stipulates:

³⁷ See Sudan Law Reform Updates for the relevant periods, available at <http://www.pclrs.org/english/news-and-events> and African Centre on Justice and Peace Studies (ACJPS) 'Excessive force, mass arbitrary detention, ill treatment and torture used to crackdown on popular protests Sudan', 27 July 2012, available at <http://www.acjps.org/?p=1042>

³⁸ UN Expert deeply concerned at mass arrests and heavy media censorship during protests in the Sudan', Press Release, 3 October 2013.

³⁹ See statement by Information minister Ahmed Balal, available (in Arabic) at: http://arabic.china.org.cn/china-arab/txt/2013-09/29/content_30174880.htm and statement of the governor of Khartoum state, available (in Arabic) at <http://suna-sd.net/suna/showNews/5X-RgaMOecWW6Fh-r4q2na09MKV9zQ2dV4XwxgNLuiQ/1>. See also Khartoum state police statement at: <http://akhirlahza.info/akhir/index.php/joomla-overview.html?start=255>. See in this regard also Human Rights Watch, 'Dozens held without charge, African Commission should investigate alleged torture and ill-treatment', 27 November 2013, available at <http://www.hrw.org/news/2013/11/27/sudan-dozens-held-without-charge-0>.

⁴⁰ UN Human Rights Committee, General Comment 34, Article 19: *Freedom of opinion and expression*, UN Doc.CCPR/C/GC/34, 12 September 2011, para.2.

⁴¹ Article 27(3): "All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill."

The right to peaceful assembly shall be guaranteed; every person shall have the right to freedom of association with others, including the right to form or join political parties, associations and trade or professional unions for the protection of his/her interests.

Freedom of assembly protects the right to organise and take part in peaceful assemblies. An assembly is defined as “an intentional and temporary gathering in a private or public space for a specific purpose. It therefore includes demonstrations, inside meetings, strikes, processions, rallies or even sits-in” (footnotes omitted).⁴² Importantly, “an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour”.⁴³

Guaranteeing freedom of peaceful assembly is the rule, and restrictions are only allowed in exceptional circumstances. The right to peaceful assembly may only be subject to restrictions that are

imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.⁴⁴

According to the UN Human Rights Committee, any laws imposing restriction

must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression [which applies equally to freedom of assembly] on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not (footnotes omitted).⁴⁵

The state must demonstrate that a legitimate ground, such as a threat to national security or public order, justifies interfering with freedom of assembly in the specific situation and that laws such as on treason or sedition are not used to stifle the exercise of the right.⁴⁶ Any interference must be necessary, i.e, it must be the least restrictive measure needed to achieve the legitimate ground sought, such as protecting public order. Further, it must not be out of proportion, for example, banning a demonstration outright where a small group of persons acts disorderly instead of taking measures against the individuals concerned.

3.1.2. Sudanese law and practice

- *Criminal Procedure Act*

⁴² See *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, Maina Kiai UN Doc. A/HRC/20/27, 21 May 2012, para.21.

⁴³ European Court of Human Rights, *Ziliberberg v. Moldova*, application No. 61821/00 (2004), cited *ibid*.

⁴⁴ Article 21 ICCPR.

⁴⁵ General Comment 34, above note 15 , para.25.

⁴⁶ See *ibid.*, para.30, in respect of freedom of expression.

In 2009, amendments to article 127 of Sudan's Criminal Procedure Act of 1991 vested the Wali (Governor) of the state or the Mutamad (provincial ruler) with further powers to issue an order that prevents or restricts any meeting or public assembly that may disturb public order. The then UN Special Rapporteur on Human Rights in the Sudan, Sima Samar, considered that these amendments were "not in conformance with the guarantees of freedom of assembly and association enshrined in the CPA, INC and ICCPR."⁴⁷ In addition, article 124 of the Criminal Procedure Act gives a police officer or prosecutor the power to order the dispersal of any unlawful assembly or assemblies that is likely to result in a riot or disturbance of public peace.

These provisions are problematic because, prior to any demonstration, local officials are given broad powers to prevent or restrict any assembly on "public order" grounds, a notion that is not clearly defined under Sudanese laws. The applicable law therefore provides the competent authorities with considerable discretionary powers that are not subject to adequate judicial review. Equally, with regard to the powers of dispersal, the offences of "rioting" or "disturbance of public peace" (see below) are broad and vaguely worded and hence open to abuse, particularly considering that it is sufficient that an assembly "is likely to commit" such an offence.

It is important to note that in practice the authorities frequently presume that any announcement of an assembly, rally or meeting by opponent is likely to disturb the public peace. In some instances, the director of the Khartoum state police or the minister of interior or the governor has declared pre-emptively that an assembly would be unlawful. This is what happened in relation to the 2009, 2012 and September 2013 protests mentioned above. Police and national security forces used force to disperse these assemblies, using the powers bestowed on them under article 129A of the Criminal Procedure Act of 1991, which had been amended in 2002. Effectively, since 1989, peaceful demonstrations perceived to be opposed to the government have not been allowed to proceed, notwithstanding the rights to freedom of assembly granted under the 1998 Constitution and the 2005 Interim National Constitution.

- *Criminal Act*

Demonstrators and protesters are frequently charged with one or several of three offences under Sudan's Criminal Act of 1991, namely rioting, disturbance of peace and public nuisance.

Under the heading "Offences relating to Public Tranquility", article 67 of the Criminal Act of 1991 defines rioting as:

There shall be deemed to commit the offence of rioting whoever participates in any assembly of five persons, or more whenever such assembly shows, or uses force, intimidation or violence and whenever the prevailing intention therein is achieving any of the following objects:

- (a) Resisting the execution of the provisions of any law or legal process;
- (b) Committing the offence of criminal mischief, criminal trespass or any other offence;
- (c) Exercising any existing, or alleged right in a manner which is likely to disturb public peace;

⁴⁷ See *Report of the UN Special Rapporteur on the situation of human rights in the Sudan*, Sima Samar, UN Doc. A/HRC/11/14, June 2009, para.24.

- (d) Compelling any person to do what he is not bound by law to do, or to refrain from doing what he is authorised by law to do.

The penalty for rioting is imprisonment for up to six months, a fine, or whipping (up to twenty lashes) and imprisonment for up to one year or a fine if the offender carries a weapon or an instrument that may cause hurt.⁴⁸

Article 69 of the Criminal Act of 1991 defines disturbance of public peace as:

Whoever causes a breach of public peace, or does any act with intent, or which is likely to cause a breach of public peace, or tranquility, in a public place, shall be punished, with imprisonment, for a term, not exceeding three months, or with fine, or whipping, not exceeding twenty lashes.

Article 77 of the Criminal Act of 1991 defines public nuisance as:

(1) ... any act which is likely to cause public injury, or danger, or annoyance to the public, or to those persons, who occupy, or reside, in a neighbouring place, or to persons exercising any of the public rights.

(2) The court may, whenever it deems fit, issue an order to the offender, for stopping, and not repeating the nuisance, and may punish him, with imprisonment, for a term, not exceeding three months or with fine, or with both.

The definitions of these offences are problematic. "Rioting" (article 67) covers vaguely worded acts such as "intimidation" and refers to "disturb[ing] public peace". The "disturbance of public peace" (article 69) is not defined, and the law even covers "acts with intent ... to cause a breach of public peace". "Public nuisance" is also broadly defined, including causing "annoyance to the public". These vaguely worded provisions criminalise a potentially wide range of acts and have not been clearly defined in Sudanese jurisprudence in conformity with principles of legality and the right to freedom of assembly. In addition, the offences of "rioting" and "disturbance of public peace" are subject to the penalty of whipping, a form of corporal punishment incompatible with applicable international standards.⁴⁹ The offences in question therefore give the authorities considerable latitude to prosecute demonstrators.

According to articles 125 and 126 of the Criminal Procedure Act of 1991, the police, the National Security and Intelligence Services (NISS) and the armed forces are authorised to disperse assemblies and arrest demonstrators for vague offences such as rioting and breach of public peace. In practice, the mere taking part in a demonstration, or being found near the location, is frequently considered sufficient evidence of having committed these offences. Those charged are routinely subjected to summary trials pursuant to articles 176 and 177 of the Criminal Procedure Act. In respect of the demonstrations of September 2013 mentioned above, on 3 October 2013, 35 protesters were charged with public nuisance and disturbing public peace.⁵⁰ In Sennar state,

⁴⁸ Article 68 of the Criminal Act of 1991.

⁴⁹ See 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.redress.org/downloads/publications/Corporal%20Punishment%20-%20English.pdf>.

⁵⁰ See [Abdelmoneim Abu Edris Ali](http://www.dailystar.com.lb/News/Middle-East/2013/Oct-03/233446-children-women-rally-for-sudan-protest-detainees-afp.ashx#axzz2mzncB4iJ), 'Trial underway for Sudan protest lawyers', *Daily Start*, 3 October 2013, available at <http://www.dailystar.com.lb/News/Middle-East/2013/Oct-03/233446-children-women-rally-for-sudan-protest-detainees-afp.ashx#axzz2mzncB4iJ>.

Blue Nile, the Sennar criminal court summarily tried protesters and sentenced each of them to whipping - twenty lashes - and a fine of 100SDG.⁵¹

Sentences imposed, such as whipping, are executed on the spot,⁵² and can only be appealed following enforcement. For example, Rania Mamoun and others were arrested during the September 2013 protests in Wad Madani–Jazeera state, and charged with committing the offence of disturbing the public peace. On 5 December 2013, the Wad Madani criminal court relied solely on the testimony of police officers, the prosecutor, and witnesses from the police station, and sentenced Rania Mamoun to a fine of 500 Sudanese pounds or one month imprisonment in the alternative. In the similar case of Samar Merghani, on 28 November 2013, the Bahri criminal court sentenced her to a fine of 5,000 Sudanese pounds. In both cases, the defence lawyer in the circumstances of the summary trial procedure was unable to call on witnesses for the defence.⁵³

3.2. Use of force: Prohibition of torture and ill-treatment and right to life

3.2.1. International standards and the Bill of Rights

The state's monopoly on the use of force goes hand in hand with safeguards against its abuse. The use of force by law enforcement officials is therefore governed by the principles of necessity and proportionality. International instruments such as the Code of Conduct for Law Enforcement Officials (Code of Conduct),⁵⁴ and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Basic Principles),⁵⁵ provide guidance in this respect. Article 3 of the Code of Conduct sets out the principle that "law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty." In respect of the dispersal of "assemblies that are unlawful but non-violent", principle 13 of the Basic Principles provides that:

Law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.

Moreover, in respect of violent assemblies, article 14 of the Basic Principles stipulates that:

Law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum necessary. Law enforcement officials shall not use firearms in such cases, except under the conditions stipulated in principle 9.⁵⁶

⁵¹ Information provided by lawyer interviewed by REDRESS in November 2013.

⁵² *Ibid.*, 15.

⁵³ Information provided to REDRESS in December 2013 by defence lawyer.

⁵⁴ Code of Conduct for Law Enforcement Officials adopted by GA res 34/169 (1979) 17 December 1979.

⁵⁵ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990).

⁵⁶ Principle 9 of the Basic Principles provides that: "Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life."

The use of force that is not necessary and proportionate under international law may amount to a violation of the prohibition of torture and ill-treatment and, where it results in death, of the right to life.

- *Prohibition of torture and ill-treatment*

The prohibition of torture and ill-treatment is recognised in a series of treaties to which Sudan is a party, including article 5 of the ACHPR and articles 7 and 10 of the ICCPR. It is also stipulated in article 33 of the Sudanese Bill of Rights: “No person shall be subjected to torture or to cruel, inhuman or degrading treatment”. The UN Special Rapporteur on Torture summarised concerns and standards applicable in respect of protests as follows:

The Special Rapporteur has received many allegations of excessive violence, during apprehension of a suspect and during demonstrations or public turmoil, including in pre-election and election periods. In many of those cases, people have been peacefully exercising their right to assembly when police or security officers violently dispersed the demonstration by beatings, the use of pepper and tear gas, sound bombs, water cannons, rubber bullets or firearms indiscriminately used on the masses. This all too often has led to persons being injured or killed. Of particular concern are reports of police brutality against vulnerable, disadvantaged groups and minorities. The Special Rapporteur has therefore repeatedly stated that the use of force must be exercised with restraint and only once nonviolent means have been exhausted. Law enforcement bodies shall refrain from the use of firearms, except in self-defence or defence of others from an imminent threat of death or serious injury. In this regard, strict rules on the use of force for police and security forces should be applied. Furthermore ways to improve the recording and monitoring of arrests and the control of demonstrations should be explored.⁵⁷

Regional and international human rights treaty bodies repeatedly found that a state is responsible for having breached the prohibition of ill-treatment where its forces have used force that was unnecessary or disproportionate.⁵⁸ Where this is the case, the authorities are required to investigate any breaches, hold the perpetrators to account and provide reparation to the victims of violations.⁵⁹ In addition, the state needs to take measures to protect the right to be free from torture and ill-treatment, including by means of legislative and institutional reforms where necessary.⁶⁰

- *Right to Life*

The right to life is protected, inter alia, in article 4 ACHPR and article 6 ICCPR as well as article 28 of the Sudanese Bill of Right. As set out by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions:

The guiding principle in respect of the lethal use of force or firearms is defence of one’s own life or that of others. The only circumstances warranting the use of including during

⁵⁷ Report by the *UN Special Rapporteur on Torture*, UN Doc. A/HRC/13/39, 9 February 2010, para.61.

⁵⁸ See *Ali Günes v. Turkey*, App. No. 9829/07, European Court of Human Rights, Judgment of 10 April 2012, paras.37-43.

⁵⁹ *Ibid.*, para.45.

⁶⁰ See UN 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, paras.15, 18, and UN Committee against Torture, *General Comment 2, Implementation of article 2 by States parties*, UN Doc. CAT/C/GC/2, 24 January 2008, para.7.

demonstrations, is the imminent threat of death or serious injury, and such use shall be subject to the requirements of necessity and proportionality. In principle shooting indiscriminately into a crowd is not allowed and may only be targeted at the person or persons constituting the threat of death or serious injury. The use of firearms cannot be justified merely because a particular gathering is legal and has to be dispersed, or to protect property. This is often not reflected in domestic laws. In terms of the Code and the Basic Principles, the norm in respect of the intentional use of lethal force is the same under all circumstances, whether in self-defence, arrest, quelling a riot or any other circumstances, namely, protection of life (footnotes omitted).⁶¹

In case of an alleged breach, the authorities must carry out a prompt, effective and impartial investigation with a view to establishing the facts and holding the perpetrators accountable, in addition to providing reparation to the victims of a violation of the right to life.⁶²

3.2.2. Sudanese law and practice

Demonstrations are commonly policed by the riot police. However, the NISS and the army may also, and do at times exercise policing powers in the context of demonstrations, as during the recent protests of September 2013 in Khartoum.⁶³

Article 125 of the Criminal Procedure Act of 1991 vests the officer in charge with the power to use the “least necessary force” where an assembly fails to disperse (see article 124 of the Criminal Procedure Act). Article 15 (j) of the Police Act of 2008 clarifies that the police forces have the power to “use appropriate force in accordance the rules of the Criminal Procedure Act”. The officer in charge may only use fire arms “upon the permission of the Prosecution Attorney”. However, article 129A, introduced by way of amendment of the Criminal Procedure Act of 1991 in 2002, considerably extends the power of the officer in charge to order the use of firearms “in the absence of the Prosecution Attorney or the Judge” and “for the purpose of arresting offenders, or preventing the occurrence of any offence”. The only limit on such use of force is that it “shall not warrant intentional causing of death”.⁶⁴

Pursuant to article 126 of the Criminal Procedure Act of 1991, the Superior Prosecution Attorney or superior officer in charge may call on the armed forces to use military force if deemed necessary for the dispersal of an assembly. Article 6 (2) of the People’s Armed Forces Act of 2007 stipulates that the armed forces “help law enforcement organs, upon need, in the time of peace and emergencies, in accordance with the provisions of the law; and shall have for the sake of that, such powers and legal protection, as may be granted to such forces.”

The NISS may use force pursuant to article 50 (1)(c) of the National Security Act of 2010, which vests it with the “[p]owers of the policemen as provided for in the Police Forces Act and the Criminal Procedures Act”.

The regulation of the use of force by the Sudanese police recognises principles such as necessity and sets limits on a shoot to kill policy. However, the use of force in Sudanese law is linked to the grounds for dispersal. These grounds are broad, including breach of public peace.

⁶¹ *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, Christof Heyns, UN Doc. A/HRC/17/28, 23 May 2011, paras.60-62.

⁶² See generally UN Human Rights Committee, General Comment 31, above note 36 , paras.15-18.

⁶³ See ACJPS, ‘Over 170 dead, including 15 children, and 800 detained as demonstrations spread throughout Sudan’, Press Release, 4 October 2013, available at <http://www.acjps.org/?p=1663>.

⁶⁴ Article 125(4) of the Criminal Procedure Act of 1991.

Therefore, they considerably lower the threshold for the use of force beyond international standards as reflected in the UN principles set out above, according to which it should be a measure of last resort. Sudanese law also does not specifically refer, nor fully reflect, the principle of proportionality. The lack of specificity and safeguards in law must be considered as a factor that has contributed to the recourse to the excessive use of force in a series of demonstrations. The fact that several agencies have concurrent powers to use force is also problematic. These agencies may act, and have acted in parallel, which may hamper coordination and enhances the risk of excessive use of force. In response to the September 2013 demonstrations, the Government of Sudan reportedly deployed military vehicles and joint forces of the central reserve forces and the NISS to residential neighbourhoods and blocked access to hospitals.⁶⁵ Witnesses stated that armed men in plain clothes, whom they believed were pro-government militia, joined in the use of armed force against demonstrators, although the government denied its involvement in the resulting deaths.⁶⁶ The Khartoum state governor claimed that the police opened fire to defend their stations.⁶⁷

3.3. Accountability and remedies in case of breach

Law enforcement officials are subject to the Criminal Act of 1991 and may therefore be charged with various offences in cases where they exceed their powers. They may, however, not be charged with murder but only semi-intentional homicide⁶⁸ under article 130 of the Criminal Act of 1991 where, even if a public official or someone charged with a public service acts intentionally, he or she “exceeds, in good-faith the limits of the power authorized thereto, believing that his act which has caused the death, is necessary for the performance of his duty.” Moreover, pursuant to article 11 of the Criminal Act of 1991 (performance of duty and exercise of right): “No act shall be deemed an offence if done by a person who is bound, or authorized to do it by law, or by a legal order issued from a competent authority, or who believes in good faith that he is bound, or authorized so to do.”

In practice, immunities are the main obstacle to accountability of law enforcement officials. Police officers, as well as members of the NISS and the armed forces are granted conditional immunity for any act done in the course of their duties, which can only be lifted by the respective head of the forces. These immunity provisions largely equate with impunity, and there are no known cases in which a law enforcement official has been charged for the excessive use of force in the context of demonstrations.⁶⁹

In response to criticism of the excessive use of force in response to the demonstrations of July/August 2012 and September 2013, and the killing of several students in two separate incidents in late 2012, the Government of Sudan announced the formation of committees of inquiry.⁷⁰ However, to date, the outcome of these investigations is unknown; no findings have been published and none of the perpetrators has been charged or held accountable.

⁶⁵ See ACJPS Press Release, above note 64.

⁶⁶ See Jehanne Henry, ‘Dispatches: Sudan denies killing of protesters’, Human Rights Watch, 3 October 2013, available at: <http://www.hrw.org/news/2013/10/03/dispatches-sudan-denies-killing-protesters>

⁶⁷ See ‘Sudan defends crackdown amid more protests’, Al Jazeera, 1 October 2013, available at: <http://www.aljazeera.com/news/africa/2013/10/sudan-defends-crackdown-amid-more-protests-20131015534486705.html>

⁶⁸ Article 130 (1) of the Criminal Act of 1991: “Homicide is deemed to be semi-intentional when the offender causes it by a criminal act on the human body without intending to cause death, and death is not a probable consequence of such act.”

⁶⁹ See REDRESS and SHRM, ‘Reforming Sudan’s Laws on Immunities’, Sudan Law Reform Advocacy Briefing, October 2013, available at <http://www.pclrs.org/downloads/sudan-advocacy-briefing--october-2013.pdf>

⁷⁰ See “‘Why do you insist on lying about NCP killing protesters?’ journalist confronts Sudanese officials’, *Sudan Tribune*, 30 September 2013, available at <http://www.sudantribune.com/spip.php?article48254>; ACJPS, ‘Call for

4. The need for reforms

Sudanese law privileges security and public order over freedom of assembly. Official bodies and law enforcement officials are vested with considerable powers to ban or disperse assembly on loosely defined grounds. Judicial oversight is weak and demonstrators themselves are frequently subject to summary trials and punishments. The use of force is inadequately regulated, leaving considerable operational latitude to those empowered to use it while providing limited safeguards and accountability in case of abuse. In practice, the numerous incidents in which the authorities were alleged to have used excessive force have not resulted in any accountability or review of law and practice; indeed, calls for such steps have often met with further repressive measures. In short, the current system fails to effectively guarantee international standards that are binding on Sudan and form an integral part of its legal order by virtue of the Bill of Rights. A full review of law and practice with a view to ensuring its conformity with international human rights standards is therefore overdue, together with effective steps taken to hold perpetrators of violations to account and to provide justice and reparation for the victims of any such acts.

5. Recommendations

Based on the foregoing considerations, the Government of Sudan should:

1. Undertake a thorough review of its laws governing assemblies and the use of force, and their practical application, and collaborate with the UN Independent Expert on Sudan in doing so;
2. Reform applicable laws, particularly articles 67-69 and 77 of the Criminal Act of 1991 with a view to ensuring that demonstrators are not subject to unwarranted or disproportionate criminal sanctions;
3. Abolish corporal punishment, which has been frequently imposed as a punishment in summary trials against demonstrators;
4. Reform articles 124-129A of the Criminal Procedure Act of 1991 with a view to ensuring that peaceful assemblies are not subject to bans or dispersals and that any use of force is subject to the strict application of the principles of necessity and proportionality;
5. Clarify, by law, the competence of agencies to police assemblies and use force in that context;
6. Repeal provisions granting immunities to police officers, members of the NISS and members of the Sudanese armed forces respectively;
7. Set up an independent commission of inquiry, with a clearly defined mandate and timeline in conformity with international best practices, to investigate violations of international human rights standards and/or Sudanese law alleged or reported to have been committed by public officials and others acting in an official capacity in the context of demonstrations since 2005;
8. Take steps to hold accountable any officials or others serving in an official capacity responsible for violations committed in the course of demonstrations and to provide adequate reparation to the victims of such violations;

immediate independent investigation into student deaths and excessive use of force by Sudanese authorities', 10 December 2012, available at <http://www.acjps.org/?p=1127>. See for the statement of the Minister of Justice and the General Prosecutor on the investigation into the killing of twelve protesters in Nyala (in Arabic) in July 2012, Al Sahafa, 9 May 2013, available at: <http://www.alsahafasd.net/details.php?type=a&scope=a&version=1155&catid=20>.

9. Ensure that, as part of the constitutional review process, freedom of assembly is recognised as a fundamental right and guaranteed in conformity with the ICCPR and other binding international standards.

V. Compilation of Key Recommendations Made by Regional and International Humans Rights Bodies to the State Party

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.⁷¹

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.⁷²

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 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.

⁷¹ 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.

⁷² *Ibid.*, para.15.

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.⁷³ 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.⁷⁴

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 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

⁷³ See for further information the website of the Office of the High Commissioner for Human Rights, [www.ohchr.org](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CCPR), at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CCPR.

⁷⁴ 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.

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.⁷⁵ 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 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.⁷⁶

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..."⁷⁷

⁷⁵ 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.

⁷⁶ 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.

⁷⁷ Report of the Independent Expert, above n. 5, para.78 (e).

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:⁷⁸

“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).”⁷⁹

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 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).⁸⁰ 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.⁸¹

2.2. Statutory Law

2.2.1. 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.⁸² 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.

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

⁷⁹ See *Report of the Working Group on the Universal Periodic Review: Sudan*, UN Doc. A/HRC/18/16, 11 July 2011.

⁸⁰ 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>

⁸¹ Ibid, recommendations at 76, 77.

⁸² See e.g. 386/10: *Dr. Farouk Mohamed Ibrahim v. Sudan*.

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*)⁸³

Torture: “consider enacting a law criminalising torture” (African Commission); “provide a legal definition of torture in its legislation, in accordance with article 7 of 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”⁸⁴ 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.

⁸³ Cases decided by the African Commission are available on its website at www.achpr.org

⁸⁴ A/HRC/18/16/Add.1, above n.7, para.18.

Also a new Armed forces Act was issued in 2007 incorporating many of Humanitarian Law principles and standards.⁸⁵

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 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.⁸⁶ 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.⁸⁷

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.⁸⁸

⁸⁵ Ibid.

⁸⁶ 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.

⁸⁷ See above n. 13.

⁸⁸ 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.⁸⁹

“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.⁹⁰ 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.

2.2.2 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.⁹¹

(i) Offences

“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

⁸⁹ 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>

⁹⁰ See for latest developments on the Doha peace process, <http://www.darfurconference.com/DDPD>.

⁹¹ Nabil Adib, ‘At the State’s Mercy: Arrest, Detention and Trials under Sudanese Law’, in Oette, above n.17, 121-138.

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.⁹²

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.⁹³

(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.⁹⁴ 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.⁹⁵

(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.

Sudan emphasised that “the Constitution and the Child Act of 2010 prohibit the application of death penalty on persons below 18 years”.⁹⁶ 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.”⁹⁷ 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

⁹² A/HRC/18/16/Add.1, above n.7, para.16.

⁹³ Amin M. Medani, ‘A Legacy of Institutionalised Repression: Criminal Law and Justice in Sudan’, in Oette, above n.17, 67-88.

⁹⁴ 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>

⁹⁵ 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.

⁹⁶ A/HRC/18/16/Add.1, above n. 7, para.22.

⁹⁷ *Ibid.*, para.24.

been extracted under torture.⁹⁸ 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".⁹⁹ 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 consequences and wastes employment opportunities. Moreover, flogging is not carried out in public.¹⁰⁰

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.¹⁰¹ Further, the penalty of amputation was imposed in several recent cases.¹⁰² 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".¹⁰³

(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

⁹⁸ See Medani, above n.24, 79-82.

⁹⁹ A/HRC/18/16/Add.1, above n. 7, para.23.

¹⁰⁰ *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.

¹⁰¹ See REDRESS and SHRM, *No More Cracking of the Whip*, above n. 94.

¹⁰² 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

¹⁰³ See REDRESS and SHRM, *No More Cracking of the Whip*, above n.94.

persistent reports about NISS abuses, especially torture. The national security law was earmarked for reform in the CPA and the Interim National Constitution.¹⁰⁴ 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.¹⁰⁵ 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:

“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 Guidelines¹⁰⁶” (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.¹⁰⁷

As has been examined in detail elsewhere, the Act does not accord judicial oversight in conformity with international standards;¹⁰⁸ further, a prosecutor is not a judicial body as

¹⁰⁴ 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>

¹⁰⁵ 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>

¹⁰⁶ *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

¹⁰⁷ A/HRC/18/16/Add.1, para.16.

¹⁰⁸ See REDRESS and Sudanese Human Rights Monitor, *Comments*, above n.20, 8, 9.

required by the ICCPR.¹⁰⁹ 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).

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.¹¹⁰ A further development of concern is a legislative amendment in 2013 according to which civilians were made subject to the jurisdiction of military courts,¹¹¹ 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”.¹¹²

(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).

¹⁰⁹ 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.

¹¹⁰ Dr. Amil Saeed, *Legal Aid Bill*, Analytical Study, October 2010, available at http://www.pclrs.org/downloads/1206_legal_aid_bill_oct_2010.pdf

¹¹¹ 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

¹¹² 222/98-229/99: Law Office of Ghazi Suleiman v Sudan.

Sudan's emergency laws are flawed,¹¹³ 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.

2.2.3. 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)).

"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 violence¹¹⁴ 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.¹¹⁵

2.2.4. 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:

¹¹³ Medani, above n.24, 82-84.

¹¹⁴ A/HRC/18/16, above n.7, para.33.

¹¹⁵ 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>

“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, 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.¹¹⁶

2.2.5. 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.¹¹⁷ 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 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

¹¹⁶ 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.

¹¹⁷ Sudan Law Reform Advocacy Briefing, Issue No.3, December 2012, available at <http://www.pclrs.org/downloads/sudan-advocacy-briefing--december-2013.pdf>

(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 2009,¹¹⁸ 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.

¹¹⁸ A/HRC/18/16/Add.1, above n.7, para.15.