



Seeking Reparation for Torture Survivors



BRIEFING NOTE ON CHAPTER 9 OF THE DRAFT POLICE FORCES BILL Published as part of the Criminal Law Reform Project in Sudan¹

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KCHRED and REDRESS are pleased that the Government of Sudan has prepared this important Bill on the Police forces. The Bill, once adopted and subject to the concerns raised below, provides a unique opportunity to enshrine the rule of law. This principle is reflected in Article 148 (1) of the Interim National Constitution, which reads:

“[The Police] shall discharge its duties with impartiality and integrity in compliance with the law and the nationally and internationally accepted standards.”

Significantly, the Bill has the potential to advance the protection of human rights in Sudan, as provided in its article 5 (b), according to which the police shall respect and promote human rights in accordance with the constitution.

1. The system of police courts envisaged in Chapter 9 of the Police Forces Bill should be consistent with the rule of law

Under the Police Forces Bill (hereinafter the Bill), police courts are: established by the Director General or the Police Director; composed of police officers; and have jurisdiction over any criminal offences committed by members of the police

¹ The Criminal Law Reform Project is a joint initiative of REDRESS and KCHRED aimed at advancing the process of bringing Sudanese law in conformity with the National Interim Constitution and international standards as stated in article 27 of the Bill of Rights.

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forces, except for Hudud and Quisas crimes.² Effectively, the Bill maintains the system of self-policing under which trials against members of the Police constitute an internal affair. As an institution, the police thus is a law unto itself whose members are not subject to any external judicial review.³ This system raises poses real concerns about its conformity with the rule of law,⁴ the very principle that the Police are duty-bound to strengthen according to article 7 (d) of the Bill.

The Police are part of the executive that fulfils the public service of maintaining law and order. In this sense it is not an autonomous institution. The Police exercises its powers based on the law, in particular article 148 of the National Interim Constitution, and is accountable to the law. However, no corresponding mechanism is in place to ensure that the application of the law by the Police is independently adjudicated as required by the doctrine of the separation of powers inherent in the rule of law. Legal accountability is arguably best served by procedures before independent judges in public proceedings that avoid any appearance of bias, arbitrariness and lack of transparency. Proceedings such as before the police courts in which the judge and the person to be judged belong to the same forces clearly give rise to such an appearance.

Most countries recognise the need for external police accountability. This means that in countries such as Bangladesh, Egypt, Kenya and Morocco,⁵ the Police is subject to the jurisdiction of ordinary courts in criminal proceedings and that police courts or similar tribunals commonly only have jurisdiction to deal with disciplinary matters.⁶ In addition, several countries, such as Pakistan and Northern Ireland, have established independent police complaints authorities

² Hudud: fixed punishments prescribed by Shari'a laws; Quisas: the offences of homicide and inflicting bodily harm subject to retribution (or payment of diya (blood money)).

³ Unless the executive itself refers a criminal action to an ordinary competent court, as provided for in section 46 (2) of the Bill.

⁴ According to the Report of the UN Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, UN Doc.S/2004/616, 23 August 2004, para.6: "The 'rule of law' (...) refers to the principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness and legal transparency."

⁵ See reports on respective countries available at http://www.redress.org/country_reports.html.

⁶ See Renate Weber, *Police Organization and Accountability: A Comparative Study*, in András Kádár (ed.), 'Police in Transition, Essays on the Police Forces in Transition Countries,' Central European University Press, 2001, pp.39-69 and Commonwealth Human Rights Initiative, *Police Accountability: Too important to neglect, to urgent to delay*, 2005, available at http://www.humanrightsinitiative.org/publications/chogm/chogm_2005/chogm_2005_full_report.pdf.

tasked with investigating complaints against the police and recommending appropriate action to ensure police accountability.⁷

2. The system of police courts envisaged in Chapter 9 of the Police Forces Bill should be made compatible with the right to an effective remedy and the state's obligation to bring perpetrators of serious human rights violations to justice

Victims of serious human rights violations, such as torture, have the right to an effective remedy, and the state has a corresponding obligation to investigate such violations and to bring perpetrators to justice. These rights are recognised in the National Interim Constitution, in particular in article 27 (3) of the Bill of Rights in conjunction with article 2 (3) of the International Covenant on Civil and Political Rights as well as articles 1 and 5 of the African Charter on Human and Peoples' Rights. They are also guaranteed in the Bill of Rights in articles 28 (right to life and human dignity), 33 (prohibition of torture) and 35 (right to litigation).

The fact that members of the police forces sit as judges over other members of the same institution raises concerns regarding the impartiality of the police courts because of the lack of institutional independence. It is also prone to impact adversely on the effectiveness of police courts as a mechanism for holding perpetrators of serious violations to account. Concerns over the impartiality of police courts are not counter-balanced by any elements of external judicial oversight as the system of police courts is autonomous and not subject to review by ordinary courts. The complete control of the executive over proceedings is underscored in section 55 of the Bill, which provides the Director General with the power to stop the procedure at any time before the judgment, and in section 56 of the Bill. According to the latter, the President of the Republic may drop the punishment imposed by any police court upon recommendation from the Minister.

The lack of institutional independence is particularly worrying given that the police courts have the power to try all offences (except hudud and quisas crimes), even if they constitute serious human rights violations such as torture. The UN Human Rights Committee has frequently held that special courts should not have jurisdiction to try serious human rights violations committed by members of the armed forces or the Police. For example, with regards to Lebanon, the Committee stressed that ordinary rather than military courts [which are similar in nature to police courts] should try cases of human rights violations,

⁷ See for Pakistan, the Police Order of 2002, http://www.nrb.gov.pk/publications/police_order_2002.pdf; for Northern Ireland, the Police Ombudsman, www.policeombudsman.org, and, for a general overview, REDRESS, *Taking complaints of torture seriously, Rights of Victims and Responsibilities of Authorities*, 2004, pp.37 et seq.

even if such violations had been committed by members of the military.⁸ The UN Committee on the Rights of the Child took a similar stance with respect to Colombia, noting “with concern the unbroken pattern of impunity and the continuous tendency to refer serious violations of human rights to the military justice system.”⁹ The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions reached a similar conclusion, namely that “[a]s an empirical matter, subjecting allegations of human rights abuse to military jurisdiction often leads to impunity.”¹⁰ The Dakar Declaration on the right to fair trial in Africa identified special tribunals - such as the Sudanese police courts – and military courts as factors undermining the realisation of this fundamental right.¹¹ The Declaration recommended that military courts should only try “offences of a pure military nature committed by military personnel...and not try offences which fall within the jurisdiction of regular courts.”¹²

A further concern is the lack of clear definition of the position and rights of victims in proceedings before the police courts. According to the Bill, the Minister, i.e. an executive organ, may make regulations for the procedures of the police courts. There is no involvement of legislative bodies, parliamentary scrutiny or other safeguards to ensure that the rights of victims to participate in proceedings are granted effectively in the relevant regulations. This puts victims of police crimes at a potential disadvantage if compared to criminal proceedings governed by the Criminal Procedure Code of 1991, for example with regards to the right to cross-examine witnesses.¹³ The lack of independence of the police courts also raises concerns about the effectiveness of available remedies for victims of any violations committed by police officers who are parties to proceedings.

3. The system of police courts envisaged in Chapter 9 of the Police Forces Bill should be made compatible with the right to fair trial

Article 34 (3) of the Bill of Rights stipulates that “every person shall be entitled to a fair and public hearing by an ordinary competent court of law in accordance with procedures prescribed by law.” This right is complemented by article 14 (1)

⁸ Concluding Observations of the Human Rights Committee: Lebanon, UN Doc. CCPR/C/79/Add.78, 5 May 1997, para. 14.

⁹ Committee on the Right of the Child, Concluding Observations: Colombia, UN Doc. CRC/C/COL/CO/3, 8 June 2006, para. 44.

¹⁰ Extrajudicial, summary or arbitrary executions, Report by the Special Rapporteur, Philip Alston, UN Doc. E/CN.4/2006/53, 8 March 2006, para.37.

¹¹ The Dakar Declaration is the result of a seminar on the right to fair trial organised by the African Commission on Human and Peoples’ Rights in collaboration with the African Society of International and Comparative Law and Interights from 9-11 September 1999 in Dakar, Senegal. The Declaration is available at www.chr.up.ac.za/hr_docs/african/docs/achpr/achpr2.doc.

¹² Ibid.

¹³ Section 155 (2) of the Criminal Procedure Act.

of the International Covenant on Civil and Political Rights (ICCPR), applicable by virtue of article 27 (3) of the Bill of Rights, which requires that such hearings must be by a “competent, independent and impartial tribunal established by law.” According to the UN Human Rights Committee responsible for the monitoring of the implementation of the ICCPR:

“The requirement of independence refers, in particular, to ... the actual independence of the judiciary from political interference by the executive branch and legislature...A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.”¹⁴

Police courts are an integral part of the police service forces and thus belong to the executive branch. The executive is able to control or direct the police courts by deciding on the appointment and dismissal of judges (who are officers and remain subject to executive control) and by having the power to stop criminal proceedings at any time before the verdict. The police courts therefore lack actual independence. Police officers subject to criminal trials are denied their right to a fair hearing because there is no right to have their cases heard by an ordinary criminal court at any stage of proceedings.¹⁵ The African Commission on Human and Peoples’ Rights derived at the same conclusion in a similar case, namely *Law Office of Ghazi Suleiman v. Sudan*, where it ruled that military courts who were largely composed of active servicemen lacked impartiality.¹⁶

It is for these reasons that the system of police courts envisaged in Chapter 9 of the Police Forces Bill should be fully revised so as to bring it in conformity with the National Interim Constitution and the rights guaranteed in the Bill of Rights and international human rights treaties binding on Sudan. To this end, police tribunals should only be vested with the power to hear disciplinary cases against members of the police forces. Jurisdiction over criminal cases against police officers should rest solely with ordinary criminal courts.

¹⁴ General Comment No.32, *Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para.19 and *Oló Bahamonde v. Equatorial Guinea*, Comm. No. 468/1991, UN Doc. CCPR/C/49/D/468/1991, 10 November 1993, para. 9.4.

¹⁵ A case against a police officer may be heard by an ordinary criminal court but only if referred by the Minister or someone delegated by him pursuant to section 46 (2) of the Bill, which means that it is entirely discretionary.

¹⁶ See *Law Office of Ghazi Suleiman v. Sudan*, African Commission on Human and Peoples’ Rights, Comm. Nos. 222/98 and 229/99 (2003), paras.64 et seq. See also *Media Rights Agenda v. Nigeria*, African Commission on Human and Peoples’ Rights, Comm. No. 224/98 (2000).

4. Recommendations

In light of the aforementioned considerations, it is recommended that the Bill be amended as follows:

- Criminal trials against police officers should be heard exclusively by independent ordinary criminal courts in order to ensure the rule of law, the right to an effective remedy of victims and the right to a fair trial of the defendant
- The jurisdiction of police courts or such tribunals should be confined to hearing disciplinary cases against police officers
- Victims of criminal offences alleged to have been committed by the Police should be given the right to act as party of the proceedings. This includes the right to bring private prosecutions, to submit evidence and cross-examine witnesses, to lodge appeals and to claim compensation
- The power of the Director General to stop criminal proceedings against police officers at any time before the verdict should be removed
- An Independent Police Complaints Authority should be established to enhance police oversight.