



Universal Periodic Review, Sudan, May 2011

Submission by the Redress Trust and the Sudanese Human Rights Monitor, November 2010

Implementing international human rights obligations in domestic law

I. Introduction

This submission is made as part of the Project on Criminal Law Reform in Sudan (www.pclrs.org), carried out by the Redress Trust and the Sudanese Human Rights Monitor in collaboration with Sudanese civil society. The submission focuses on human rights concerns relating to Sudan's national laws. It highlights the need for legislative reforms to address persisting discrepancies between Sudan's international human rights obligations, particularly under the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR), and domestic laws. This includes an analysis of the Bill of Rights with a view to identifying critical aspects that should form part of the new constitution, which will have to be adopted following the end of the Comprehensive Peace Agreement (CPA) interim period in mid-2011.

II. Background

The parties to the CPA in 2005 agreed to adopt a bill of rights as part of the interim national constitution (INC) and to undertake legislative reforms to implement Sudan's international human rights obligations.¹ The National Constitutional Review Commission identified over 60 laws in need of harmonization with international human rights standards. In 2007, the UN Human Rights Committee found that "the rights protected by the Covenant have not been fully incorporated into domestic law."² Some steps have been taken to bring legislation in conformity with international standards, in particular the new Child Act of 2010. However, several areas that have given rise to human rights concerns have been the subject of no or inadequate reforms to date.

III. Bill of Rights (Interim National Constitution)

The Bill of Rights guarantees a number of rights contained in major human rights treaties. However, even though its article 27 (3) makes international treaties binding on Sudan an integral part of the Bill, the fundamental rights stipulated leave gaps in protection. Several rights, such as the right to liberty (article 29) and the right to a fair trial (article 34), do not extend the full guarantees as provided in the ICCPR (articles 9 and 14 respectively). This includes the right to be brought promptly before a judge and the right to an independent tribunal, the absence of which

¹ See in particular Chapter II, 1.6. and 2.4.3. of the CPA.

² Concluding observations of the UN Human Rights Committee: Sudan, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para.8.

has resulted in concerns about forced confessions and unfair trials.³ The definition of some rights, such as freedom from torture, is at variance with international treaties. In contrast to article 7 of the ICCPR, article 33 of the Bill of Rights omits cruel, inhuman or degrading punishment. Punishments such as flogging, and it is still frequently used in judicial practice.⁴ Rights such as freedom of expression (article 39) are subject to limitations to be determined by law that may be overly restrictive. An example is the law governing assemblies that has been used to forcibly break up public demonstrations before the recent elections.⁵ Emergency laws such as the Emergency and Safety Act of 1997 permit further limitations. The broad powers of authorities to restrict assemblies, associations and other rights have stifled civil society and the exercise of essential freedoms in Darfur where a state of emergency continues to apply.⁶

IV. STATUTORY LAW

1. Protection against violations

- National Security Law

A recent report by the UN High Commissioner for Human Rights summarized human rights concerns in respect of the role of the National Intelligence and Security Services, now National Security Services (NSS), as follows:

“In Khartoum and other parts of Northern Sudan, the National Intelligence and Security Services (NISS) systematically use arbitrary arrest and detention against political dissidents. According to allegations received by [UN] human rights officers, NISS detention can typically be accompanied by additional serious human rights violations such as incommunicado detention, ill-treatment, torture or detention in unofficial places of detention. The human rights concerns related to the NISS are longstanding and institutionalized problems that could be addressed through institutional reform.”⁷

A new National Security Act (NSA) was adopted in 2010.⁸ It largely failed to address the concerns that had been expressed in respect of the 1999 National Security Forces Law.⁹ The new Act effectively gives NSS members the same broad powers that are alleged to have frequently resulted in human rights violations as highlighted in the UN report above. Article 50 of the NSA retains 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. Article 51 of the Act grants the right to communicate with family members or a lawyer. However, the exercise of these safeguards is conditional upon not prejudicing the investigation. The NSS may therefore still hold detainees without contact to the outside world where it sees fit. This is contrary to international standards that provide access to a lawyer of one’s choice at the earliest stages of investigation, which constitutes an important safeguard against torture and unfair trials. Detainees do not have access to a judge or the right to file a habeas corpus petition within the period of 45 days or four and a half months respectively, depriving them of any judicial protection. These features contravene the right to liberty and equality under the ICCPR and the ACHPR.¹⁰ Contrary

³ See for example, Opinions adopted by the Working Group on Arbitrary Detentions, Opinion 208 (Sudan), UN Doc. A/HRC/13/30/Add.1, 2 March 2010, pp.166-181.

⁴ See on Sudan’s position, Information received from Sudan on the implementation of the concluding observations of the Human Rights Committee (CCPR/C/SDN/CO/3), UN Doc. CCPR/C/SDN/CO/3/Add.1, 18 December 2009, Recommendation No.10, para.14.

⁵ Report of the independent expert on the situation of human rights in the Sudan, Mohammed Chande Othman, UN Doc. A/HRC/15/CRP.1, 14 September 2010, para.22.

⁶ *Ibid.*, paras. 21 and 69.

⁷ 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, p.3.

⁸ Its text is available at www.pclrs.org/smartweb/english/bills-and-laws.

⁹ See REDRESS/SORD, *Security for All-Reforming Sudan’s National Security Services*, October 2009, www.pclrs.org/downloads/Resources/Resources/Security%20for%20all%20Final.pdf

¹⁰ Article 9 ICCPR and Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2001.

to a series of recommendations made by UN bodies¹¹ and the African Union High Level Panel on Darfur,¹² the NSA also retained immunities for NSS members for any civil or criminal proceedings (see on immunities, below at p.4, IV.2), thus perpetuating the existing culture of impunity.

- Sudan's Criminal Act: Offences against the state, apostasy and punishments

The Criminal Act of 1991 contains a number of broad and vaguely worded offences, such as "attempting to undermine the constitutional system" (article 50) and "waging war against the state". These offences facilitate arbitrary arrest and prosecutions because of the vague grounds for suspicion. They also violate specific rights, for example where used to prosecute journalists for exercising their freedom of expression.¹³ In addition, the crime of apostasy is "incompatible with article 18" of the ICCPR.¹⁴

The Child Act of 2010 has seemingly abolished the death penalty for children.¹⁵ However, the death penalty for adults still remains in force for numerous offences, including those that cannot be considered to be the most serious.¹⁶ Sudan's courts have imposed the death penalty in several instances where the defendants alleged that they had been tortured into making confessions. An example illustrating this practice is Opinion No.38/2008 of the Working Group on Arbitrary Detention, which concerned the trial of ten defendants accused of the murder of Mohamed Taha.¹⁷ This case, as well as convictions pursuant to trials under the anti-terrorism law,¹⁸ raise serious concerns over their compatibility with the right to life, which requires that the death penalty should only be imposed following a fair trial.¹⁹

Sudan's system of punishment is characterised by the large number of offences which carry the punishment of whipping. This form of punishment, which is considered cruel, inhuman and degrading under international law, is applied with casual frequency, often following summary trials.²⁰ The Human Rights Committee requested Sudan to abolish corporal punishment, which violates article 7 and 10 of the ICCPR (as well as article 5 of the ACHPR) but no steps have been taken towards this end.²¹

2. Accountability and remedies

The Armed Forces Act of 2007 and the amendment of the Criminal Act of 2009 recognise genocide, war crimes and crimes against humanity. However, the definitions used are not fully in line with internationally recognised ones. The practical effect of amendments may be limited due to non-retroactivity, amnesties and immunities,²² which may have the effect that those responsible for serious crimes in Darfur and elsewhere cannot be held accountable. Sudan's criminal law does not recognise an offence of torture in conformity with international standards.²³ The lack of effective protection against torture is compounded by inadequate custodial

¹¹ Human Rights Committee, above footnote 2, para.9 (e).

¹² 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, para.25 (c) and (d); pp. 56-63, paras.215-238; and pp.91, 92, para.336.

¹³ Report of the independent expert, above footnote 5, para.6.

¹⁴ Human Rights Committee, above footnote 2, para. 26.

¹⁵ However, the UN Committee on the Rights of the Child expressed serious concerns that "under article 36 of the Sudan Interim Constitution, the death penalty may be imposed on persons below the age of 18 in cases of retribution or *hudud*." See Concluding Observations: Sudan, UN Doc. C/ARC/C/SDN/CO/3-4, 1 October 2010, para.35.

¹⁶ Human Rights Committee, above footnote 2, para.19.

¹⁷ Opinion No.38/2008, above footnote 3.

¹⁸ See Report of the Special Rapporteur on the situation of human rights in the Sudan, Sima Samar, UN Doc. A/HRC/11/14, 14 June 2009, para.30.

¹⁹ See UNHRC, General Comment 6, para.7, see UN Doc. HRI/GEN/1/Rev.9 (Vol.I), 27 May 2008, p.176.

²⁰ This is based on interviews with Sudanese lawyers and anecdotal evidence. REDRESS is not aware of any publicly available information detailing the application of corporal punishments in Sudan.

²¹ Human Rights Committee, above footnote 2, para.10.

²² See REDRESS/KCHRED, Comments on the proposed amendment of the Sudanese Criminal Act, September 2008, www.pclrs.org/downloads/Miscellaneous/Penal_Code_Amendment_Position%20Paper%20_2_.pdf

²³ Human Rights Committee, above footnote 2, para.16.

safeguards (see above at p.3, IV.1) and ambiguous rules of evidence. This has led courts to sentence accused, including to capital punishment, on the basis of evidence that was alleged to have been obtained as a result of torture.²⁴ Conversely, perpetrators of torture may benefit from immunities and torture is subject to short statutes of limitation. This runs counter to the duty to investigate and prosecute such crimes under international human rights law and has contributed to a culture in which officials can commit torture with impunity.

The granting of immunities for officials in Sudanese laws is a long-standing concern. Effectively, authorities are given the right to police themselves and the resulting lack of accountability facilitates human rights violations. The UNHRC, the African Commission, various UN bodies, the AU High-Level Panel on Darfur and others have called on Sudan to abolish immunities.²⁵ 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 opted not to do so. The Sudanese Constitutional Court has justified immunities by emphasising their conditional nature and the possibility of judicial review.²⁶ However, in practice, immunities have frequently led to impunity, including for serious human rights violations, and legal remedies are neither clear nor effective.²⁷ By maintaining the current system, the state fails in its positive obligation to prevent, investigate and prosecute serious violations and in providing effective remedies to victims thereof.

3. Women's rights

Systemic and widespread discrimination and sexual violence against women and girls has resulted in a number of public reform campaigns. This had led to some limited changes, such as in the Child Act of 2010. However, major areas of concern, including discrimination in personal, family and employment laws, remain, which undermine equality and frustrate the full realisation of women's rights.

The laws on sexual violence fail to adequately protect women's right to physical and mental integrity. Article 149 of the Criminal Act defines rape with reference to adultery, which creates confusion over evidentiary requirements for a prosecution (adultery requires four male eye-witness of the act) and puts a woman at risk of facing prosecution for adultery where she cannot prove rape.²⁸ The definition of rape is narrow in scope and does not reflect legislative reforms and best practices elsewhere.²⁹ There is only one offence covering all other forms of sexual violence, which carries an inadequate maximum punishment of two years imprisonment. In addition, domestic rape, forms of sexual harassment and certain types of female genital cutting/mutilation are not criminal offences.³⁰ The Government of Sudan has discussed the reform of rape laws but effective steps have yet to be taken in this regard.³¹ Sudanese criminal law and Public Order Acts provide the authorities with broad powers to arrest, detain and punish anyone perceived to violate public order.³² As the recent case of the journalist Lubna Hussein, who was convicted for wearing trousers in public, demonstrates this legislation is discriminatory and is used disproportionately against women. This may, and does, result in

²⁴ Opinion No.38/2008, above footnote 3, pp.166-181.

²⁵ See e.g. Human Rights Committee, above footnote 2, para.9 (e) and AUPD report, above footnote 12, pp. xix, para.25 (c) and (d); 56-63, paras.215-238; and pp. 91, 92, para.336.

²⁶ *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.

²⁷ Human Rights Committee, above footnote 2, para.9 and OHCHR, Report, above footnote 7.

²⁸ *Ibid.*, para.14 (b).

²⁹ REDRESS/KCHRED, *Time for Change: Reforming Sudan's Legislation on Rape and Sexual Violence*, November 2008, pp.28, 29, www.pclrs.org/downloads/Miscellaneous/Position%20Paper%20Rape.pdf.

³⁰ *Ibid.*, pp.55-58.

³¹ Information received from Sudan, above footnote 4, para.24.

³² Article 152 of the Criminal Act of 1991 and the Khartoum Public Order Act of 1998, available at www.pclrs.org/Khartoum_Public_Order_Act_1998.pdf.

arbitrary arrest and detention because there is no clear definition of such terms as “indecent dress” and in punishment contrary to international standards, here whipping.³³

V. Process of law reform

The process of law reform in Sudan is hampered by a series of factors, such as the lack of capacity, transparency and consultation in the law-making process. This is coupled with restrictions on the exercise of freedom of assembly, association and expression that have limited the scope for broader public debates about human rights and the law. This was evident during the recent election campaigns where demonstrations advocating for a reform of the National Security Act were forcibly dissolved.³⁴ There is a need to strengthen institutions tasked with considering legislative reforms and to guarantee the rights that allow the public freely to express its views on how Sudanese law can best protect human rights.³⁵

RECOMMENDATIONS

REDRESS and SHRM urge the Government of Sudan to commit itself to:

- undertake a comprehensive review of the law making and reform process with a view to ensuring that international human rights standards are fully reflected and to making the process more transparent and participatory;
- in the course of the consideration of the future constitution necessitated by the end of the CPA interim period in 2011, promote public debate and consultation with civil society and experts with a view to identifying areas and mechanisms for the effective protection of human rights. In the new constitution, maintain elements conducive to human rights protection, such as article 27 (3) of the Bill of Rights, and include fundamental rights that are in conformity with international human rights standards binding on Sudan;
- implement expeditiously the recommendations of the independent expert on the situation of human rights in the Sudan: “Continue the process of review of national laws to conform with the CPA, the [INC] and international human rights standards; priority should be given to withdrawing enforcement powers, including of arrest and detention for the NSS in line with the information gathering and advisory role envisioned for the NSS in the CPA and the INC.”³⁶
- undertake a comprehensive review of the Criminal Act, including its system of punishments, and bring its provisions in conformity with international human rights standards binding on Sudan;
- introduce legislative changes that provide for effective accountability for serious human rights violations. This includes in particular changes in the legal framework pertaining to torture and other cruel, inhuman and degrading treatment and punishment as well as the abolition of immunities for public officials and statutes of limitation in relation thereto;
- undertake a comprehensive review of legislation pertaining to women’s rights and make the necessary legislative changes to provide effective protection against sexual violence and prevent discrimination. This should include changing the definition of rape, criminalising marital rape, and making all forms of sexual violence a criminal offence. It also comprises changes to public order laws to protect women from discrimination, harassment and disproportionate punishments.

³³ 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.

³⁴ See above footnote 5.

³⁵ REDRESS/SORD, *Implementing the Comprehensive Peace Agreement and the National Interim Constitution? An empirical assessment of the law reform process in Sudan: Challenges and prospects*, December 2009, www.pclrs.org/downloads/Miscellaneous/Implementing%20the%20Comprehensive%20Peace%20Agreement.pdf.

³⁶ Report of the independent expert, above footnote 5, p.8.