Assessing the compatibility of the right to a fair trial under Sudanese law with international human rights law

By

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Declaration

I declare that this thesis titled **Assessing the compatibility of the right to a fair trial under Sudanese law with international human rights law,** which I hereby submit for the degree *Doctor Legum* (LLD), at the University of Pretoria, is my work and has not been previously submitted by me for a degree at this or any other tertiary institution.

Amir Kamaleldin Ahmed Abdalla

Signature……..

Dedication

This thesis is dedicated to my mum, dad, wife, daughters and sons

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Abbreviations and Acronyms

ACHPR	African Charter on Human and Peoples' Rights
ACJPS	African Centre for Justice and Peace Studies
African Commission	African Commission on Human and Peoples' Rights
AHRLR	African Human Rights Law Report
AMCHR	American Convention on Human Rights
AI	Amnesty International
AU	African Union
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CC	Constitutional Court
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CLRS	Criminal Law Reform in Sudan
CPA	Criminal Procedure Act
CRC	Convention on the Rights of the Child
Doc	Document
ECHR	European Convention of Human Rights
ECOWAS	Economic Community of West African States
ed(s)	editor(s)
European Court	European Court of Human Rights
GA	General Assembly
GC	General Comment
HC	High Court
HRC	UN Human Rights Committee
HRLJ	Human Rights Law Journal
HRQ	Human Rights Quarterly

ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IE	Independent Expert
INC	Interim National Constitution of Sudan, 2005
KCHRED	Khartoum Centre for Human Rights and Environmental Development
NGOs	Non-Governmental Organisations
NO	Number
OHCHR	UN Office of the High Commissioner for Human Rights
Para	Paragraph
POC	Public Order Court
Rome Statute	the Rome Statute of the International Criminal Court
SACLR	South African Constitutional Law Report
SCCLR	Sudan Constitutional Court Law Report
SDFG	Sudan Democracy First Group
SHRM	Sudanese Human Rights Monitor
SHRO	Sudan Human Rights Organisation
SIHA	Strategic Initiative for Women in the Horn of Africa
SLJR	Sudan law Journal and Report
SORD	Sudanese Organisation for Research and Development
SR	Special Rapporteur
UDHR	Universal Declaration of Human Rights
U of K	University of Khartoum
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNDP	United Nations Development Programme
UNESCO	UN Educational, Scientific and Cultural Organisation

UNICEF	UN Children's Fund
USA	United States of America
Vol	Volume

Summary

This thesis investigates the compatibility of a crucial aspect of Sudanese criminal justice, namely, the compatibility of the right to a fair trial with two main sources of this right: international human rights law and *Shari'a* law. The right to a fair trial is a cornerstone for any society and serves to observe the rule of law and other rights of citizens. The study illustrates that the right to a fair trial could play a significant role in the protection of human rights in Sudan.

The main aim of this study is to establish ways in which the right to a fair trial can be strengthened in Sudan. The thesis has examined the work emanating from the international level by reviewing decisions, providing general comments and analysing other jurisprudence emanating from bodies such as the African Commission on Human and Peoples' Rights and the Human Rights Committee. The decisions, general comments and other jurisprudence from these bodies are juxtaposed against Sudan's laws to establish the extent to which the right to a fair trial is upheld at the domestic level in Sudan.

The study critically examines the sources of the right to a fair trial in Sudan. The main sources of right to a fair trial in Sudan are the Constitution, the Criminal Procedure Act, the Penal Code, *Shari'a* law and international human rights law. It seeks to answer the question whether Sudanese fair trial rights are compatible with international standards.

The study establishes that one of the sources of law that govern the right to a fair trial in Sudan is *Shari'a* law. The main principle in Islam is that nothing is unlawful, unless it is expressly forbidden by law. However, the *Shari'a* law in Sudan has not been properly implemented as is illustrated through the rigid and traditional implementation of some of its provisions. The selective and rigid implementation of provisions of *Shari'a* law has resulted in a conflict with the accepted international standards of fair trial rights. What

the study establishes is that a more progressive interpretation of *Shari'a* law can potentially solve the contradictions with international human rights law that currently exist.

The study identifies a number of factors that have affected the development of the right to a fair trial in Sudan. Among these factors are the lack of political will, poverty, the lack of awareness about rights, laws that are contrary to the right to a fair trial, laws that inadequately protect victims and witnesses, impunity, corruption, the lack of resources both human and financial, abuse of power, existence of military and special courts, institutional constraints, discrimination against women, and the refusal or resistance of the executive branch of government to implement decisions of the courts.

This study concludes that some pre-trial, trial and post-trial rights and standards in Sudan are not in conformity with international and regional standards. The study concludes by making a number of recommendations aimed at institutional and legal reform.

List of keywords

Right to a fair trial – International human rights law – *Shari'a* law – Compatibility – Interim National Constitution – Sudanese Criminal Procedure Act – Sudanese Criminal Act –Pre-trial rights – Trial-rights – Post-trial rights – Criminal justice – Criminal procedure – Corporal punishment – Arbitrary arrest – Legal representation – Special courts – Impunity – Legal aid – Presumption of innocence – Compel guilt – Equality before the law – Independence of the judiciary – Right to appeal – Death penalty – Reparation – Fair and public hearing – Violations – Law reform – Institutional reform.

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Chapter One

Introduction

1. Introductory remarks

Investigating fair trial standard in Sudan necessarily raises the core questions: what does the concept of a fair trial mean, and what are the constituent parts of a fair trial? A fair trial is important to protect human rights; however, quite obviously 'the protection of human rights begins but does not end with fair trial rights.'[1] The right to a fair trial is seen as a crucial right in all states respecting the rule of law. The right to a fair trial is a basic human right and one of the cornerstones of the international human rights system. It is also a keystone of a society based on the rule of law.[2] Where a fair trial cannot be guaranteed, the other rights of individuals also lose much of their value.[3]

The right to a fair trial is a norm of international human rights law. It is designed to protect individuals from the illegal and arbitrary deprivation of their basic rights and freedoms. The concept of a fair trial is based on the basic principles of natural justice. However, the form and practice of the principles of natural justice may differ from system to system, depending on the basis of prevailing conditions of the society concerned.[4]

Most fair trial rights have been recognised as non-derogable and are not subject to an exception even during periods of emergency. The non-derogable nature of the right to a

[1] R Clayton & H Tomlinson *Fair trial rights* (2001) 2.
[2] E Brens 'Conflict with human rights and rights to a fair trial' (2005) 27 *Human Rights Quarterly* 289.
[3] As above.
[4] N Tiwari 'Fair trial vis-à-vis criminal justice administration: A critical study of Indian criminal justice system' (2010) 2 *Journal of Law and Conflict Resolution* 66.

fair trial is essential in order to guarantee other non-derogable human rights.[5] If human rights are to be effectively protected, the recognition of the right to a fair trial as non-derogable must become universally and concretely accepted in both law and practice.

In the light of the above, the pivotal right to a fair trial is enshrined in the Universal Declaration of Human Rights (UDHR) and codified in the International Covenant on Civil and Political Rights (ICCPR).[6] Throughout the period of more than 47 years that has elapsed since this codification, a considerable international jurisprudence has developed that elucidates and interprets the legal principles relating to the right to a fair trial.[7]

[5] See D Weissbrodt *The right to a fair trial under the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights: Background, development and interpretations* (2001) 100–107.

[6] See Weissbrodt (n 5 above) 111.

[7] For example, Standard Minimum Rules for the Treatment of Prisoners, adopted 30 August 1955 by the First UN Congress on the Prevention of Crime and Treatment of Offenders UN Doc. A/CONF/611, Annex 1, ESC. res. 663 C, 24 UN. ESCOR Supp. (No. 1) at 11, UN Doc. E/3048 (1957), amended ESC. res. 2076, 62 UN ESCOR Supp. (No. 1) at 35, UN Doc. E/5988 (1977; Code of Conduct for Law Enforcement Officials, GA. res. 34/169, Annex, 34 UN. GAOR Supp. (No. 46) at 186, UN. Doc. A/34/46 (1979); Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty, ESC. res. 1984/50, Annex, 1984 UN. ESCOR Supp. (No. 1) at 33, UN. Doc. E/1984/84 (1984); Basic Principles on the Independence of the Judiciary, Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, UN Doc. A/CONF.121/22/rev. 1 at 59 (1985); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA. res. 40/34, Annex, 40 UN GAOR Supp. (No. 53) at 214, UN. Doc. A/40/53 (1985); Body of Principles for the Protection of all Persons Under any Form of Detention or Imprisonment, GA. res.43/173, Annex, 43 UN. CAOR Supp. (No 49) at 298, UN Doc. A/43/49 (1988); Principles on the Effective Prevention and Investigation of Extra-Legally, Arbitrary and Summary Executions, ESC. res. 1989/65, Annex, 1989 UN ESCOR Supp. (No.1) at 52, UN Doc. E/ 1989/89 (1989); Guidelines on the Role of Prosecutors, Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, UN. Doc. A/CONF. 144/28/rev. 1 at 189 (1990); UN Standards Minimum Rules for Non-Custodial Measures (The Tokyo Rules) GA res. 45/110, Annex 45 UN GAOR Supp. (No. 49A) at 197. UN Doc. A/45/49 (1990); Basic Principles on the Role of Lawyers, Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, UN. Doc A/CONF.144/28/rev.1. at 118 (1990); Basic Principles for the Treatment of Prisoners, GA. res.45/111, Annex, 45 UN. GAOR Supp. (No.49A) at 200, UN. Doc. A/45/49 (1990); Model Treaty on the Transfer of Proceedings in Criminal Matters, UNGA resolution 45/118 of 14 December 1990; Declaration on the Protection of All Persons from Enforced Disappearance, GA. res.47/133, 47 UN. GAOR Supp. (No. 49) at 207, UN. Doc. A/47/49 (1992); Draft UN Body of Principles on the Right to a Fair Trial and Remedy 1994.

The ICCPR[8] significantly contributed towards codifying international human rights law, comprising fair trial standards.[9] Articles 2, 6 and 9 encompass key provisions relating to the right to a fair trial, but article 14 articulates the most prominent provision in this regard[10] with particular reference to concepts contained in articles 10 and 11 of the UDHR.[11]

On a regional level the substance of article 14 of the ICCPR is contained in article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[12] article 8 of the American Convention on Human Rights (AMCHR),[13] and article 7 of the African Charter on Human and Peoples' Rights (ACHPR) (African Charter).[14] The African Commission on Human and Peoples' Rights (African Commission) has passed many resolutions and declarations regarding fair trial issues.[15] In addition, the right to a fair trial is enshrined in humanitarian law and aspects of it are codified in the four Geneva Conventions and two additional Protocols.[16]

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[8] Adopted by the General Assembly of the United Nations, Resolution 2200 (XXI) of December 1966, Entry into force: 23 May 1976. Goran, M & Gudmunder, A *The Raoul Wallenberg Compilation of human rights instruments* (1997) 43--60.

[9] Weissbrodt (n 5 above) 111.

[10] Art 14 of the ICCPR guarantees many fair trial rights in all stages including, the right to equality before the law, right to fair and public hearing by competent, independent and impartial tribunal established by law, right to be presumed innocent, right to be informed promptly and in a language which he or she understands, right to adequate time and facilities to prepare defence, right to trial without undue delay, right to present in the trial, right to a lawyer of his own choosing, right to legal aid, right to an interpreter, right to examine witness, right not to be compelled to testify against himself or to confess guilt and right to appeal.

[11] Adopted by the General Assembly of the United Nations, Resolution 217 (111) of 10 December 1948. Goran & Gudmunder (n 8 above) 27--32.

[12] Adopted by the Council of Europe on 4 November 1950, Rome, entered into force: 3 December 1953. Goran & Gudmundern (n 8 above) 81--96.

[13] Adopted by the Organisation of American States on 22 November 1969, San Jose, Costa Rica, entered into force: 18 July 1978. Goran & Gudmunder (n 8 above) 155--177.

[14] Adopted by the Organisation of African Unity at the 18th Conference of Heads of State and Government on 27 June 1981, Nairobi, Kenya, entered into force: 21 October 1986. Goran & Gudmunder (n 8 above) 191-204.

[15] Resolution on the Right to Recourse and Fair Trial 1992 (9 ACHPR/ Res. 4(XI) 92 African Commission meeting at its 11th ordinary session in Tunis, Tunisia held from 2 to 9 March 1992 www.achpr.org (accessed 29 September 2010), Resolution on Prison in Africa 1995 (9 ACHPR/Res.19 (XVII) 95). African Commission meeting at its 17th ordinary session held from 13 to 22 March 1995, Lome, Togo www.achpr.org (accessed 29 September 2010), Resolution on the Role of Lawyers and Judges in the Integration of the Charter (ACHPR/ Res. 22(XIX) 96 African Commission meetings at its 19th ordinary session held from 26 March to 4 of April 1996 Ouagadougou, Burkina Faso www.achpr.org (accessed 29 September 2010), Resolution on the Respect and the Strengthening on the Independence of the

Under the African human rights system, the African Charter is the main instrument dealing with human rights in Africa. Specifically, on the right to a fair trial, the African Charter provides two main safeguards on the right to a fair trial in articles 7 and 26, the latter dealing with the independence of the judiciary. Article 7 guarantees the right to a fair trial in the following terms:

> Every individual shall have the right to have his cause heard. This comprises a) the right to appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; b) the right to be presumed innocent and proved guilty by a competent court or tribunal; c) the right to defence, including the right to be defence by counsel of his choice; d) the right to be tried within a reasonable time by an impartial court or tribunal. 2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed, punishment is personal and can be imposed only on the offender.

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa[17] were formally adopted in the Dakar Declaration, with recommendations on matters relating to the right to a fair trial in Africa. The Declaration called on bar associations to institute a programme of on-going education for its affiliates on matters

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Judiciary 1996 (ACHPR/ Res.21 (XIX) 96) African Commission meeting at its 19th ordinary session held from 26 March to 4 of April 1996 Ouagadougou, Burkina Faso www.achpr.org (accessed 29 September 2010), Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 26th session held in Kigali, Rwanda, 1-15 November 1999 www.achpr.org (accessed 29 September 2010), Dakar Declaration and Recommendation, seminar on the right to a fair trial from 9 to 11 September 1999, Dakar, Senegal, Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman, Degrading Treatment and Punishment in Africa (2002) (ACHPR/Res.61 (XXX11) 02 African Commission meeting at its 32nd ordinary session held in Banjul, the Gambia held from 17 to 23 October 2002 www.achpr.org (accessed 29 September 2010), Resolution on the Adoption of the Ouagadougou Declaration and Plan of Action on the Acceleration of Prison and Penal Reform in Africa (2002) African Commission on Human and Peoples' Rights (ACHPR/Res. 64(XXXIV) 03 African Commission meeting at its 34th ordinary session held in Banjul, the Gambia held from 6 to 20 November 2003 www.achpr.org (accessed 29 September 2010).

[16] The right to a fair trial is provided for in all all four Geneva Conventions of 12 August 1949 and in Additional Protocols 1 and 2, First Geneva Convention, art 49; Second Geneva Convention, art 50; Third Geneva Convention, arts 102–108; Fourth Geneva Convention, arts 5 and 66–75; Additional Protocol I, art 75(4) (adopted by consensus); Additional Protocol II, art 6(2) (adopted by consensus).

[17] Adopted on 26th ordinary session of the African Commission on Human and Peoples' Rights 1 to 15 November 1999 Kigali, Rwanda.

that advance fair trial rights and seek suitable technical assistance and resources for its realisation. The realisation of this right is reliant on the existence of certain conditions and is hampered by certain practices. There are many factors that could advance a fair trial, including the rule of law, democracy, independence and impartiality of the judiciary, independence of lawyers, bar associations and other human rights defenders. The factors that could hamper a fair trial include military courts and special courts, traditional courts, impunity and ineffectiveness remedies, and abuse of power.[18]

Under the Muslim states, the main human rights instrument is the Universal Islamic Declaration of Human Rights[19] which provides standards of a fair trial.[20] This is in addition to the Arab Charter on Human Rights[21] which also provides for standards of a fair trial.[22]

The European Convention on Human Rights provides a further safeguard relevant to the issue of a fair trial. Article 13 provides for the right to an effective remedy for alleged violations of the Convention. In effect, where there is no effective remedy available under the domestic law, this in itself can amount to a violation under the Convention. A

[18] See N Udombana 'The African Commission on Human and Peoples Rights and the development of fair trial norms in Africa' (2006) 6 *African Human Rights Law Journal* 309.

[19] Universal Islamic Declaration of Human Rights, adopted at the 19th Islamic Conference of Foreign Ministers, Cairo, August 5, 1990 http://www.refworld.org/docid/3ae6b3822c.html (accessed 30 January 2010).

[20] Art 5 provides as follows: 'a) No person shall be adjudged guilty of an offence and made liable to punishment except after proof of his guilt before an independent judicial tribunal. b) No person shall be adjudged guilty except after a fair trial and after reasonable opportunity for defence has been provided to him. c) Punishment shall be awarded in accordance with the Law, in proportion to the seriousness of the offence and due consideration of the circumstances under which it was committed. d) No act shall be considered a crime unless it is stipulated as such in the clear wording of the law. e) Every individual is responsible for his actions. Responsibility for a crime cannot be vicariously extended to other members of his family or group, who are not otherwise directly or indirectly involved in the commission of a crime in question'.

[21] Adopted by the Council of the League of Arab States on 22 May 2004, and entered into force 15 March 2008. Sudan ratified the Arab Charter on Human Rights on 21 May 2013.

[22] Art 13 provides as follows: '1. Everybody has the right to a fair trial in which sufficient guarantees are ensured, conducted by a competent, independent and impartial tribunal established by law, in judging the grounds of criminal charges brought against him or in determining his rights and obligations. State parties shall ensure financial aid to those without the necessary means to pay for legal assistance to enable them to defend their rights. 2. The hearing shall be public other than (except) in exceptional cases where the interests of justice so require in a democratic society which respects freedom and human rights'.

State party must provide for the possibility of a remedy for alleged breaches of the Convention.

There are a number of notions related to the fair trial which are not clearly defined in the text of human rights treaties.[23] In the determination of any criminal charge every individual is entitled to a fair and public hearing without undue delay by a competent, independent and impartial court established by law. Sentence shall be pronounced publicly. The media and public might be precluded from whole or part of the court proceedings in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or protection of private lifes of the parties so demand, or to the scope accurately essential in the view of the court, in the special conditions where publicity would disadvantage the interests of justice.[24]

The right to a fair trial is a feature of the due process of law standard, expressing the notion of fair play and significant fairness.[25] As a legal theory, fair trial creates guidelines between the parties and implements structures that are capable of safeguarding judicial independence of partiality.[26]

The right to a fair trial seeks to safeguard persons from illegitimate and arbitrary restriction or deficiency of other elementary rights and freedom, particularly the right to life and liberty of the individual. The right to a fair trial encompasses fulfilment of certain

[23] The supervisory mechanisms have gradually defined these concepts, especially the European Court of Human Rights where, during the last few years, some 40% of the case-law (700-800 cases per year) has dealt with fair trial issues. In *Kraska v Switzerland* (Application No. 13942/88, 13942/88, Judgment of 19 April 1993 in order to assure that the trial is 'fair', the Court required a tribunal, to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessments of whether they were relevant to its decision. The requirements for a hearing to be 'fair' in a civil case are not necessarily identical to the requirements in criminal cases. An evaluation of fairness is necessarily subjective rather than objective, although some threshold considerations of a more objective nature appear in art 6(2) & 6(3) http://www.humanrights.is/the-human-rightsproject/humanrightscasesandmaterials/comparativeanalysis/therighttodueprocess/rights/ (accessed 30 September 2009). See also, S Joseph *et al The International Covenant on Civil and Political Rights: Cases, material and commentary* (2004) 388--461.

[24] See art 6(1) of the ECHR and the Draft Body of Principles on the Right to a Fair Trial and Remedy, art 1.

[25] Udombana (n 18 above) 299.

[26] Udombana (n 18 above) 300.

objective yardsticks, which includes the right to equal treatment and the right to legal representation in the interests of justice. It is the duty of courts and tribunals to conform to international criteria in order to assure a fair trial to all parties.[27]

The right to fair trial means is that anyone suspected or accused of committing a crime must be allowed to defend him or herself and should have the right to be presumed innocent. A person accused of committing a crime does not mean he or she is guilty of having committed the crime. The police and prosecutors must prove that a person who has allegedly committed the crime is guilty and advise the accused of the right to a lawyer. This is important in order to defend and prevent any risk of abuse of power. All trials should be public and fair because it is 'better that ten guilty persons escape than that one innocent suffers.'[28] Justice is an essential part of human rights and is a required condition for democracy.[29] Other United Nations (UN) organs have adopted norm setting instruments relating at least partially to the right to a fair trial.[30]

A fair trial is a trial that is conducted fairly and with procedural consistency by a neutral judge and in which the defendant derives his or her rights under the constitution or another statute. Amongst the factors used to conclude whether the defendant received a fair trial are: the efficiency of counsel; the chance to present evidence and witnesses; the chance to rebut the opposition's evidence and cross-examine the opposition's witnesses; and the non-bias by the judge or presiding officer. A fair trial is a trial conducted according to international and regional human rights standards.

A fair trial is a trial that demands a fair hearing, which requires respect for the principle of equality between parties to the proceedings, whether or not such proceedings are

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[27] Udombana (n 18 above) 301.

[28] REDRESS (Non-govermental human rights organisation based in London) & Khartoum Centre for Human Rights and Enviromental Development (KCHRED) *Criminal law and your rights* 8 March 2008 2.

[29] Resolution on the Respect and Strengthening on the Independence of the Judiciary 19th ordinary session of the African Commission on Human and Peoples' Rights 1996.

[30] For example, Basic Principles on the Independence of the Judiciary, Basic Principles on the Role of Lawyers, Basic Principles for the Treatment of Prisoners, Code of Conduct for Law Enforcement Officials, Guidelines on the Role of Prosecutors, and the UN Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules).

civil, criminal, administrative or military. All persons should be treated equally before and by the courts. The right of everyone to a fair trial is recognised without any discrimination at all in the Draft Body of Principles on the Right to a Fair Trial and Remedy.[31]

In Sudanese law, there is no definition of a fair trial, but the Interim National Constitution of 2005 (INC) guarantees the right to a fair trial in article 34 and legislation in the form of rules and provisions govern fair trial rights. The Constitutional Court in Sudan in the case of *Mohamed Yahia Adam*[32] has held that a fair trial is a trial conducted according to the legal procedure, where a litigant is given the opportunity to present his or her case with all his or her evidence, pleas, arguments and submissions. He or she must be represented by counsel if he or she so pleases.[33] A trial enables the court to apply the substantive law to the facts placed before it, and interpret the law accordingly. In other cases, the Sudanese Constitutional Court defined a fair trial as a trial in which all the procedural and substantive rules have been implemented properly.[34]

The Supreme Court in Zimbabwe has held that a broad interpretation of the right to a fair trial 'embraces not only the impartiality of the court, but also the absolute impartiality of the prosecutor whose function forms an indispensable part of the judicial process and whose conduct reflects the impartiality of the court.'[35] The prosecutor must devote himself to the accomplishment of fairness and follow that goal impartially.[36]

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[31] Art 2.
[32] *Sudan: Mohamed Yahia Adam v Sudan Government* (1999-2003) SCCLR 675-691.
[33] *Mohamed Yahia Adam* case (n 32 above) 676.
[34] For example, *Mohamed Awad Hamza v Abdelsalam Izelawad & Government of Sudan* Case No. 8/2001 SCCJR (1999-2003) 519--528.
[35] In case of *Symyth v Ushewokunze* Supreme Court of Zimbabwe (1998) 4 LRC 120. See N Jayawickrama *The judicial application of human rights law national, regional and international jurisprudence* (2002) 502.
[36] Jayawickrama (n 35 above) 502.

A fair trial is defined as a trial by an impartial and independent court, conducted in order to afford each party the due process rights prescribed by the appropriate law, in a criminal trial, and in which the defendant's constitutional rights have been respected.[37]

As far as Sudanese law is concerned, the right to a fair trial is enshrined in the INC, including article 34 (right to a fair trial);[38] article 31 (right to equality before the law); article 33 (prohibition of torture); article 35 (right to adjudication); and article 36 (restrictions on the death penalty). The subject of a fair trial is also dealt with in ordinary Sudanese legislation such as the Criminal Procedure Act of 1991 (CPA).

Sudan ratified the ICCPR[39] and the ACHPR[40] in 1986. The Bill of Rights contained in the INC of 2005 states that all the rights and freedoms enshrined in international human rights treaties and ratified by the Sudanese government are also embodied in the Sudanese Bill of Rights.[41]

Unfortunately, compared to international human rights standards, many subsidiary rights have been left unrecognised in Sudanese law. The Sudanese government made amendments to the Criminal Procedure Act in 2002, by way of a Provisional Ordinance. The President of the Republic issued the Provisional Ordinance in conflict with the Constitution of 1998 article 90(2).[42] There are many statutes that conflict with the

[37] www.yourdictionary.com/law/fair-trial (accessed on 12 March 2009).
[38] Art 34 provides as follows: '1. An accused is presumed to be innocent until his/her guilt is proved according to the law. 2. Every person who is arrested shall be informed at the time of arrest of the reasons for his/her arrest and shall be promptly informed of any charges against him/her. 3. In civil and criminal proceedings 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. 4. No person shall be charged with any act or omission which did not constitute an offence at the time of its commission. 5. Any person shall be entitled to be tried in his/her presence, in any criminal charge without undue delay; the law shall regulate a trial in *absentia*. 6. Any accused person has the right to defend himself/herself in person or through a lawyer of his/her own choice and to have legal aid assigned to him/her by the state where he/she is unable to defend himself/herself in serious offences'.
[39] Law No. 15/1986 sups to Sudan Gazette no. 1388.
[40] Law No. 45/1986 sups to Sudan Gazette no. 1395.
[41] Art 27(3) of the INC.
[42] Art 90(2) of the Constitution of 1998 provides: 'The President of the Republic cannot issue a temporary decree in matters effecting fundamental rights and liberties, state-federal relations, public elections, criminal laws or fiscal laws'.

international human rights law. There are also problematic gaps and deficits between enacted legislation and its application by law enforcement institutions. For example, the protection of due process is the foundation stone of substantive protection against state power. However, this protection is undermined when the accused persons are top officials as highlighted in the Darfur region by the international community regarding the charges of genocide, crimes against humanity and war crimes.[43] The judiciary and the Constitutional Court, which according to the Constitution is the guardian of rights and freedoms, do not properly protect these rights in practice.

In Sudan, Islamic law is also a source of law.[44] According to the *Qur'an* the human being, is the most exalted of all creatures and is therefore, especially valuable irrespective of his or her religion. It pronounces that 'killing an innocent human being is like killing all humankind.'[45] It is important to mention that the main sources from which one must derive the Islamic legal framework is found in the *Qur'an*, the *Sunnah,* the *Ijma*, and the *Qiyahs*.[46]

Most of the values that reinforce the contemporary concept of human rights are upheld by *Shari'a* law.[47] The key concepts relating to the inviolable preservation of human dignity are articulated in the *Qur'an*: 'We have honoured the Sons of Adam, given them for sustenance things good and pure, and conferred on them special favours, above a

[43] International community; UN Security Council, International Criminal Court and international NGOs criticised the independence of judiciary in Sudan.
[44] Art 5(1) of the INC. After the referendum the South of Sudan has decided succession, Islamic law is now a source of law in whole Sudan.
[45] Surat Al-Maaida verse 32.
[46] All of which are collectively known as the *Shari'a*, as the Islamic legal system is based on these texts. While Muslims accept the Holy *Qur'an* as the revealed word of Allah, the *Sunnah* refers to the utterances, traditions or known practices of the prophet Mohammed, as recorded by the Prophet's closest family members and companions in volumes known as *Hadith*. The *Ijma* (consensus) refers to legal rules agreed upon through the consensus of learned Islamic scholars within the Muslim community, where no injunction can be found either in the Holy *Qur'an* or the *Sunnah*. The *Qiyahs* (analogy) refer to the analogies, inferences and deductions drawn from time to time by Islamic jurists in resolving issues not covered by any of the other sources. The above-mentioned sources shed some light on why Islam as a religion is often described as 'a way of life'; it is because it has laws governing every aspect of life. See Oba A 'Islamic law as customary law: the changing perspective in Nigeria' (2002) 51 *International Comparative Law Quarterly* 817--819.
[47] A Khalil 'Guarantees for protection of human rights in the national and international law' unpublished LLM thesis, University of Khartoum October 2004 31.

great part of our creation.' Islamic law shares the commitment of Western civilisation to human rights. There are also claims that Islam preceded the west in recognising these rights, because *Shari'a* law since 14 centuries ago imposes obligation on judges to dispense justice and deal impartially with all disputes.[48]

Justice in Islam reflects a spirit of absolute equality in the treatment before the law for Muslims and non-Muslims, because justice is a right irrespective of nationality and religious conviction.[49] Islamic law has embodied the principle of legality for more than 14 centuries.[50] The tradition established requires that judges duly pass sentence according to the crimes and punishments laid down in *Shari'a* law. Arbitrary arrest is strictly prohibited,[51] and torture is similarly forbidden.[52] Prophet Mohamed told Ali Ibn Abi Talib when he was appointed as governor to Yemen: 'Do not make any sentence until you hear both parties.'[53] The right to appeal in Islam is also guaranteed.[54] Fairness in Islamic justice is prioritised beyond all other legal principles.

The influence of Islamic law in Sudan's criminal legislation started in 1983 during Numiri's regime[55] through provisional ordinances.[56] The first criticism regarding this influence is that Islamic amendments to the Penal Code and Criminal Procedure Act occurred by way of provisional ordinances. The regime included Islamic provisions of

[48] Surat An-Nisaa verse 58, Surat Al-Maaida verses 42 and 48 and Surat Al-Nahl verse 90.
[49] Surat Al-Maaida verse 8 and Surat Al-An'aam verse 152.
[50] See Surat Al-Maaida verses 44, 45, 47 and 49 and Surat An-Nisaa verse 105.
[51] Surat Al-Ahzaab verse 58, Surat Al-An'aam verse 164 and Surat Al-Muddathir verse 38.
[52] Surat Al-Ahzaab verse 58.
[53] Ibn Magah *Sunn Ibn Magah* Beirut: Dar Elmariffa 1997.
[54] The leading case regarding the right to appeal, is the case of the Hole '*Hufra*'. A group people were gathered around a big hole in Yemen to observe a lion, while watching, one of the attendants lost balance on the edge of the hole. He held on to another person to gain support, the second person held on to another; subsequently four people fell in the hole and were all killed by the lion. The victims' families engaged in a dispute about the apportionment of responsibilities, and they went to Ali Ibn Abi Talib, the forth Caliph, who afforded 25% *Diya* (compensation) to the first one, 50% *Diya* to the second, 75% *Diya* to the third and 100% *Diya* to the fourth. Some of the families accepted this judgment while the other refused to accept it. Ali Ibn Abi Talib referred the case to Prophet Mohamed, who approved of his decision. Quoting from M Elhamamiti 'The substantive guarantees for human rights in the trial stage: A comparative study between *Shari'a* and law' (Arabic) unpublished PhD thesis, Omdurman Islamic University 2005 63.
[55] Gaffer Numiri ruled Sudan from 25 May 1969 until 6 April 1985.
[56] Penal Code of 1983, Criminal Procedure Act of 1983, and other laws have been issued by Provisional Ordinances.

specific crimes in the Penal Code, but the other provisions of the Code remain almost the same as the previous Penal Code of 1974 which has been influenced by common law. With regards to the Criminal Procedure Act, the Numiri's regime added some of the Islamic law principles under section 3 which stated the principles, with other few amendments regarding the executions of Islamic punishments. The major amendment in 1983 to the Criminal Procedure Act is the role of the prosecutor and the functions of representatives of the Attorney General in criminal processes.[57] Since 1991, the Criminal Act, which has been enforced up to now, has remained almost the same with very few amendments.

2. Background to research questions

Although the Sudanese system is designed to promote a fair trial, it has some weaknesses.

Firstly, there is a conflict between the INC and international standards. Some fair trial rights, like the right not to be subjected to arbitrary arrest or detention, the right to appeal, the right to be brought promptly before a judge, the right to an independent tribunal and the right to examine witnesses are missing from the current Constitution. In addition, the right not to be subjected to cruel, inhuman and degrading punishment has been omitted from article 33 of the INC and includes only the right not to be subject to cruel, inhuman or degrading treatment.

Secondly, the legislative standards at the national level in Sudan do not measure up to international standards. For example, some legislation allows for cruel, inhuman and degrading punishment, impunity to government officials, special courts and long periods of detention of up to four and a half months without trial. The Criminal Act of 1991, the Criminal Procedure Act of 1991, the Evidence Act of 1994, the Emergency and Public Safety Act of 1997, the Anti-Terrorism Act of 2001, the Civil Procedure Amendment Act

[57] In the Penal Code of 1974, the functions of the prosecutor and the functions of representatives of the Attorney-General in criminal procedure practiced by Magistrates.

of 2004, the Armed Forces Act of the 2007, the Police Act of 2008, and the National Security Act of 2009 contain provisions which violate international human rights law.

In addition, the status of international law within a municipal legal system is uncertain.[58] The uncertain nature of international human rights treaties to which Sudan has ratified is affecting the administration of justice. The incorporation of international human rights treaties into national law in Sudan shows an inconsistent practice by courts.[59] The jurisprudence of the courts has also been marked by its limited reference to binding international standards or relevant comparative experience.[60]

Moreover, there are gaps between national legislation and practice. For example: there are guarantees in Sudanese law concerning the independence of courts and that courts should be competent and impartial, but there is much criticism made regarding this issue in Darfur cases.[61] Further, the Sudanese law guarantees the need to expedite an arrestee's appearance before the judge through a prosecutor or police authority, quick release of the arrestee if the bond or bail is fully met in the case of an arrest with warrant, the arrestee's dignity must be protected, the arrestee has a right to contact a legal adviser or lawyer as well as to meet with the judge. However, these associations

[58] See report of the Special Rapporteur, Gaspar Biro, submitted in accordance with the Commission on Human Rights Resolution 1993/60, UN Document E/CN.4/1994/48 1 February, 1994, stated that: 'No treaty, agreement, or convention with any other country or countries, or any decision made in any international convention, association, or other body has effect in the Sudan unless it is ratified affirmed by Parliament'. Report of the Special Rapporteur, Gaspar Biro, submitted on 1 February, 1994, quoted in S Hussein 'Sudan in the shadows of civil war and politicization of Islam' in An-Na'im A(ed) *Human rights under African constitutions* (2003) 366.

[59] As a common law country, Sudan used to follow a dualist approach and according to the INC, art 27(3) suggests that Sudan legal system is monist.

[60] See, for example, *Farouk Mohamed Ibrahim Alnour v Government of Sudan & Legislative Body* CC18/2007 (2011) SCCLR 365.

[61] International community; UN Security Council, International Criminal Court and international NGOs criticised the independence of judiciary in Sudan. President Al-Basheer has been indicted with others and warrants of arrest have been issued against them from the International Criminal Court. See, for example, 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* issued by the Office of the High Commissioner for Human Rights on 28 November 2008 39, Concluding observations of the HRC: Sudan UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, African Centre for Justice and Peace Studies (ACJPS) *The judiciary in Sudan: It's role in the protection of human rights during the Comprehensive Peace Agreement interim period (2005--2011)* April 2012, and REDRESS & Sudanese Human Rights Monitor (SHRM) *Arrested development: Sudan's Constitutional Court, access to justice and the effective protection of human rights* August 2012.

and guarantees are not sufficient for the due process of justice. The Emergency and Public Safety Act, the Anti-Terrorism Act, the Police Act and the Armed Forces Act created special criminal courts that include preliminary and appeal courts. The Sudanese penal institutions are overcrowded with a high rate of untried prisoners who have been detained under investigation by prosecutors or are awaiting judicial orders of commitment. The existence of a huge number of these prisoners constitutes a crucial dilemma in prisons as they crowd up in the narrow lockups or incarceration sections.[62]

Judges in Sudan are adequately trained in law, but not necessarily in human rights law and consequently they cannot discharge their functions fairly regarding fair trial issues from a human rights perspective.[63] Few trained jurists are, therefore, capable of handling issues especially pertaining to international human rights law.

Factors like poverty could also affect fair trial rights. For example, the inability by victims to obtain funding to pay for trials,[64] and the limited availability of resources has made inroads on legal aid provision towards the exercising of fair trial rights in Sudan.[65]

3. Research questions

The thesis investigates and analyses the right to a fair trial in Sudan by addressing the following main question:

Are the fair trial rights in Sudan compatible with international human rights law? If not, to what extent are they not compliant?

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[62] M Mahmoud *Sudan law and international human rights norms*: *Comparative research* (2002) 461.
[63] All law schools in Sudan do not have independent human rights subject; the schools put it in the public international law subject. Faculty of Law at the University of Khartoum has amended its curriculum in 2010 and adopted a human rights subject and implemented it from 2011.
[64] See *Attorney General v Mopa* (2002) AHRLR 91.
[65] Legal Aid office belongs to the Ministry of Justice. According to CPA 1991 legal aid should be provided to the accused person charged with a serious crime. The funds that allocated to the legal aid are not enough; most of the lawyers that are registered to assist the legal aid office are beginner advocates and do not have enough experience to defend such serious crimes. Moreover, the indigenous people and women who committed crimes such as, making alcohol, selling or buying, adultery, and theft, go to trial without legal aid.

In order to respond to the main question, the study will raise the following sub-questions:

- What are the fair trial rights in Sudan? What is the source and content of fair trial rights under Sudanese law? How should international standards be incorporated in the Sudan legal system?
- To what extent is *Shari'a* law as a source of law in Sudan compatible with international human rights law?
- Are the mechanisms for implementing fair trial rights in Sudan independent of the executive as stipulated in article 26 of the African Charter, article 14(1) of the ICCPR and article 9 of the UDHR which ensure independent courts?
- To what extent are the pre-trial rights in Sudan in line with international standards?
- To what extent do the trial rights in Sudan line up with international standards?
- To what extent are the post-trial rights in Sudan compatible with international standards?

It is necessary to enumerate the fair trial rights in Sudan and its sources, contents and mechanisms. The main sources of fair trial rights are the Constitution,[66] legislation,[67] *Shari'a* law and international human rights law.[68] The implementation of international law in municipal courts will be elaborated. The issue of the reception of international human rights standards into the national level will be discussed. The mechanisms for implementing and ensuring the right to a fair trial in Sudan are the courts, the Attorney General's representatives (attorneys) as prosecutors, the police, and the Constitutional Court.

[66] INC, Sudan Constitution of 1998, Transitional Constitution of 1985, Permanent Constitution 1973, Transitional Constitution of 1964 and Transitional Constitution of 1956.
[67] The Security Act of 2009, the Police Act of 2008, the Armed Forces Act of 2007, the Anti-Terrorism Act of 2001, Evidence Act of 1994, Criminal Procedure Act of 1991, Criminal Act of 1991, Judiciary Act of 1986 and Attorney General Act of 1983.
[68] Art 27(3) of the INC obliges authorities to apply international human rights law ratified by Sudan.

The study will explore some fair trial rights in Sudanese laws, including the right to be safeguarded against coercive confessions and admissions, the right to be presumed innocent, the right to retain the services of legal counsel, the right to equality before the law, the right against arbitrary detention, the right to *habeas corpus* and to be brought promptly before a judicial authority, the right to bail, the right to be informed of the charge to meet, the right to have adequate time and facilities to prepare a defence, the right to a public trial, the right to a fair hearing, the right to examine witnesses, the right to a competent, independent and impartial court, the right to a trial in an ordinary court, the right of access to a court, the right to legal aid, the right to be tried in his or her presence, the right to have access to the services of an interpreter, the right to reparation, the right not to be subjected to cruel, inhuman or degrading punishment and the right of appeal. An analysis will be conducted regarding all fair trial rights and standards as recognised in international human rights law.

The study will also focus on the fair trial rights in Islamic law as the main source of Sudanese law, by answering the questions: What are the fair trial rights standards set out in Islamic jurisprudence? Is a trial under *Shari'a* law inherently unfair or not? If it is fair, is Sudanese law compatible with these *Shari'a* principles of fair trial rights? Under Islamic law, the topic of a fair trial focuses on the procedural nature of a trial and is protected with the methods,[69] rather than by sources of *Shari'a* law.[70] *Shari'a* law mainly covers the substantive features of *Shari'a* law whereas the procedural features fall within the jurisdictions of *fiqh* as articulated by the experts. Although the *Qur'an* and *Sunnah* may stipulate the crime, set penalties, and command essential fairness, they do not frequently provide particulars of procedures relating to apprehension, confinement, inquiry, prosecution, trial, and judicial appraisal. The *Shari'a* basically underlines substantive justice, leaving the particulars of the procedure of its fulfilment for the

[69] The methods are: *Ijma* (juristic consensus), *Qiyas* (legal analogy), *Istihsan* (juristic preference), *istilah* or *Maslahah* (welfare), *Urf* (custom), *Darurah* (necessity), through which the formal sources could be extended to cover new developments of life. These methods, which are usually considered as secondary or subsidiary sources of Islamic law, were products of human reasoning, an addition of the recognition of human reasoning in the Islamic legal process from the earliest period of Islam.
[70] M Baderin *International human rights and Islamic law* (2003) 98.

national authority to determine in line with the best interests of society. From the sources, methods and practices of Prophet Mohamed and Islamic history, there have been many fair trial rights adopted.[71]

The fair trial rights in international human rights law will be compared with the fair trial rights in Sudan.[72] The study will examine incompatibilities between them and point out the weaknesses of the Sudanese system in terms of fair trial rights. Further, the question will be raised whether there is tension between international human rights law and *Shari'a* law regarding fair trial rights. In Islamic law, there are some issues that are controversial and that do not comply with the international standards such the testimony of women before the court and the testimony of non-Muslims before the courts.

The study raises the question which system could be applied in Sudan, in the event of a conflict between *Shari'a* law and international human rights law. The study further raises the question as to whether there is a legislative or judicial guideline clarifying the status of international human rights law when it conflicts with *Shari'a* law.

The effectiveness of functionaries dealing with fair trial issues in Sudan is compromised by a lack of training in such matters, lack of appropriate skills, a scarcity of the resources required to bring the accused to trial, and ignorance among members of the Sudanese public (especially in rural areas) concerning their fair trial rights, which makes it very hard to assist them in exercising such rights. Poverty affects the right to a fair trial in various ways.[73] Overall, the lack of political will and the political factor[74] plays a main role for non-compliance with the international human rights law. The declaration of the

[71] As above.
[72] Sudan ratified the ICCPR & ACHPR in 1986.
[73] For example, a lack of resources affects the right of the accused to appear promptly before a court. It also affects access to caregivers, detainees' human conditions and the right to assistance by an interpreter. Poor people cannot defend themselves if their indigent status prevents them from facing access to proper legal aid.
[74] Three military regimes have ruled the country more than 47 years since its independence.

state of emergency from time to time, civil war in the south of Sudan,[75] South Kordofan and Blue Nile, in addition to Darfur dispute and the allegations of the massive human rights violation and lack of impartial and competent courts in Sudan.

The improvement of fair trial rights in Sudan in order to comply with international human rights law and Islamic law regarding the right to a fair trial depend on the following factors: the provision of extensive training for judges in human rights issues and jurisprudence, Attorney General representatives (attorneys), police and private legal practitioners in exercising fair trial rights from a human rights perspective; the development of a stable legal aid system, and to nullify the laws and provisions in conflict with international norms and *Shari'a* law. Further, a tangible democratic environment should be accessible to all.

4. The objective of the study

The main objectives of the study are: the development of knowledge on the Sudanese legal system; to critique current legal and institutional arrangements in Sudan with regards to a fair trial; and to propose amendments to the law and institutions in Sudan in order to guarantee the right to a fair trial.

This study is an attempt to contribute towards ensuring that the right to a fair trial is upheld in Sudan and on par with international standards. The study is designed to offer an academic analysis of fair trial rights as a tool of securing justice and protecting human rights.

The study looks critically at the provisions of the Constitution, the Criminal Procedure Act, Criminal Law, Evidence Act as well as decisions and judgments handed down by Sudanese courts, practices followed by attorneys and police during the pre-trial stage,

[75] Civil war in South Sudan started in 1955, and it has been settled by signing the Comprehensive Peace Agreement in 2005, although the impact of the long civil war remains.

the roles of courts and finally the challenges encountered by attorneys, police, courts and lawyers in seeking to secure the right to a fair trial.

The study will shed light on the accused person's rights to a fair trial as well as the victim's rights to a fair trial when government officials stand accused, such as in the Darfur cases brought before the special courts of Sudan.

Comparing Sudanese law to the international norms of criminal justice and *Shari'a* law is extremely important in order to bring national legislation in line with international standards. An attempt will be made to provide examples of laws and practices that undermine the rule of law, and to take stock of mechanisms that can improve the system of criminal proceedings in Sudan in order to guarantee compliance with international human rights standards and norms.

The study will provide recommendations to strengthen and lend more substance to the right to a fair trial in Sudan.

5. Literature review

The right to a fair trial is an area of human rights law that has been widely explored by various authors, but very little has been written about the subject in the Sudanese context. The purpose of the present study is to address this deficiency.

Extensive literature is available on the relationship between the right to a fair trial and other human rights,[76] but most of the available literature does not examine the situation

[76] See for example, R Clayton & H Tomlinson *Fair trial rights* (2001), D Howard *Human rights law directions* (2007), Jacobs & White *The European Convention on Human Rights* (2006), J Sarkin *et al Resolving the tension between crime and human rights* (2001), S Joseph *The ICCPR: Cases, materials and commentary* (2004), K Reid *A practitioner's guide to the European Convention on Human Rights* (2004), M Bassiouni & Z Motala *The protection of human rights in African criminal proceedings* (1995), N Steytler *Constitutional criminal procedure: A commentary on the Constitution of the Republic of South Africa* (1998), S Trechsel *Human rights in criminal proceedings* Academy of European Law (2001) S Stavros *The guarantees for accused persons under article 6 of the ECHR: An analysis of the applications of the Convention and a comparison with other instruments* (1992).

in Sudan. Rather, human rights are discussed in general, and only passing reference are made to fair trial issues in Sudan. The African context scholarly writers comment on the human rights in Africa including the right to a fair trial.[77] However, in any case no attention is paid to the specific issue of strengthening the right to a fair trial. It is, therefore, anticipated that this study will fill this gap and introduce an extensive body of experience and provide content from the practitioners on the ground.

Non-governmental organisations dealing with human rights produced reports on the human rights situation in Sudan, including the right to a fair trial. The pertinent reports refer, for instance, to the following: Amnesty International Organisation (AIO) reports on the human rights situation in Sudan; AIO's Fair trial manual, reports of Human Rights Watch on the human rights situation in Sudan; REDRESS and African Centre of Justice and Peace Studies (ACJPS) reports and papers, and reports of Internal Non-Governmental Organizations (NGOs) regarding the administration of criminal justice in Sudan.[78] The reports and papers of these international and national human rights organisations contributed significantly, particularly with respect to the recent cases of human rights violations regarding fair trial rights.

General comments adopted by the UN Human Rights Committee (HRC) elaborate the international standards of the right to a fair trial. The concluding observations on the periodic reports of Sudan from the HRC and the African Commission assist in the evaluation of the right in Sudan in addition to the concluding observations on Sudan periodic report to the UN treaty bodies, the periodic reports of the UN High

[77] E Anakumah *African Commission on Human and Peoples' Rights: Practice and procedure* (1996), N Udombana 'The African Commission on Human and Peoples Rights and the development of fair trial norms in Africa' (2006) 6 *African Human Rights Law Journal Volume* 2, F Viljoen 'Introduction to the African Commission and the regional human rights system' in C Heyns (ed) *Human rights in Africa* (2004), C Heyns 'Civil and political rights in the African Charter' in M Evans & R Murry *The African Charter on Human and Peoples' Rights: The system in practice 1986–2000* (2002) and L Chenwi *Towards the abolition of the death penalty in Africa: A human rights perspective* (2007).

[78] For example, Sudanese Human Rights Monitor (SHRM), Sudan Democracy First Group (SDFG), Khartoum Centre for Human Rights and Environmental Development (KCHRED), Sudan Human Rights Organisation (SHRO) and Sudanese Organisation for Research and Development (SORD).

Commissioner of Human Rights, Special Rapporteur reports and the Independent Expert's reports on the situation of human rights in Sudan.

An-Na'im[79] highlights the universality and cultural relativism of human rights. He also writes on the criminal law system in Sudan, but without dealing substantively or extensively with fair trial issues. It is prudent to mention that the right to a fair trial is a non-derogable right, and the standards of this right should be universal and not subject to any cultural relativism.

Khalil[80] discusses the protection of human rights in national and international law, clarifying human rights in the Sudanese context, including the right to a fair trial. However, the coverage is somewhat superficial.

Mahmoud[81] discusses Sudanese criminal law, police law and prison law in general. However, his coverage of the jurisprudence of the courts of Sudan regarding the right to a fair trial is inadequate and does not compare Sudanese law to international human rights law.

Elbushra[82] sheds light on criminal justice and the crime problem in Sudan. However, he does not cover the procedural laws on fair trial.

Issa, Hamid, Yousif, Alnour and Mohamed deal with the Sudanese criminal procedure statutes but do not provide extensive coverage of procedural laws on fair trial in Sudan from a human rights perspective.[83]

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[79] See An-Na'im *Islam and the secular state: Negotiating the future of Shari'a* (2008); A An-Na'im *African constitutionalism and the contingent role of Islam* (2006); A An-Na'im *Toward an Islamic reformation: Civil liberties, human rights and international law* (1990). A An-Na'im *Sudanese criminal law: General principles of criminal responsibility* (Arabic) (1985).

[80] A Khalil 'Guarantees for protection of human rights in the national and international law' unpublished LLM thesis, University of Khartoum October 2004.

[81] M Mahmoud *Sudan law and international human rights norms*: *Comparative research* (2002).

[82] M Elbushra *Criminal justice and crime problem in Sudan* (1998).

Other Scholarly writers who have written on the some aspects of fair trial rights are notably, Medani,[84] Adib,[85] Babikir,[86] Hussain,[87] Abdelhaleem,[88] and Lutz.[89]

Literature sources used to support arguments on the interpretation of fair trial standards include Weissbrodt,[90] who deals with the right to a fair trial against the UDHR and ICCPR with specific reference to development and interpretation of the HRC. Jayamckrama[91] comments on the judicial application of human rights law, with specific reference to national, regional and international jurisprudence.

Literary sources used to support arguments on the interpretation of fair trial standards from an Islamic law perspective include Baderin,[92] who discusses the international human rights standard and Islamic law. He draws a comparison between international human rights and Islamic law and identifies possible mechanisms in Islamic law for the promotion and protection of human rights. He discusses all human rights including

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[83] A Issa *Criminal Procedure Act 1991* (2000), M Hamid *International Criminal Court: A comparative study with criminal judicial system in Sudan* (2006), Y Yousif *Sudan: Criminal Act 1991* (2002), A Alnour *Sudan: Islamic criminal procedure* (1992) and M Awad *Criminal Procedure Act* part 1 (1989).

[84] A Medani 'A legacy of institutionalized repression: Criminal law and justice in Sudan' in L Oette (ed) *Criminal law reform and transitional justice: Human rights perspectives for Sudan* (2011), A Medani *Criminal law and justice in Sudan* February 2010 and *The Draft Social Control Act 2011 for Khartoum State: Flogging into submission for the public order* November (2011).

[85] N Adib 'At the state's mercy: Arrest, detention and trials under Sudanese law' in L Oette (ed) *Criminal law reform and transitional justice: Human rights perspectives for Sudan* (2011).

[86] M Babikir *Criminal justice and human rights: an agenda for effective protection in Sudan's new constitution* (2012) www.redress.org (accessed 9 Sep 2013).

[87] S Hussein 'Sudan: in the shadow of civil war and politicization of Islam' in An-Na'im A (ed) *Human rights under African constitutions* (2003).

[88] A Abdel Halim 'Gendered justice: Women and the application of penal laws in the Sudan' in L Oette (ed) *Criminal law reform and transitional justice: Human rights perspectives for Sudan* 2011.

[89] L Oette 'Law reforms in times of peace processes and transitional justice: The Sudanese dimension' in L Oette (ed) *Criminal law reform and transitional justice: Human rights perspectives for Sudan* (2011).

[90] D Weissbradt *The right to a fair trial under the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights: Background, development and interpretations* (2001).

[91] N Jayamckrama *The judicial application of human rights law national, regional and international jurisprudence* (2002).

[92] M Baderin *International human rights and Islamic law* Oxford University Press, Oxford (2003), 'Identifying possible mechanisms within Islamic law for the promotion and protection of human rights in Muslims states' (2004) 22/3 *Netherlands Quarterly of Human Rights* 329--346, 'A macroscopic analysis of the practice of Muslim state parties to international human rights treaties: Conflict or congruence?' (2001) 1 *Human Rights law Review,* No.2, 265--303, and 'Establishing areas of common ground between Islamic law and international human rights' (2001) 5 *International Journal of Human Rights,* No.2 72--113.

those in ICCPR and ICSECR and Islamic law. His book and articles are very useful for this study regarding the fair trial rights in Sudan from a comparative perspective.

Authors have written extensively on Islam and human rights.[93] The *Qur'an* pronounces on the subject of fair trial and justice. The *Qur'an*[94] will serve as important reference source for the study, as well as a speech by Prophet Mohamed[95] on fairness and justice is used as a reference source for the purposes of this study.

However, an exclusive study has not as yet been undertaken on the status of upholding the right to a fair trial in Sudan from a human rights perspective. The gaps identified in literature review include that very little has been written on the right to a fair trial in Sudan and the status of human rights instruments and their relevance in Sudan is yet to be fully investigated

6. Research methodology

The study will cover the theoretical and practical aspects of the right to a fair trial in Sudan, to which end it will draw on the UN Charter, the ICCPR, the African Charter on Human and Peoples' Rights, the Sudanese INC, Sudanese Criminal Procedure Act of 1991, and Sudanese Criminal Act of 1991. Reference will also be made to global and regional human rights instruments. The African Commission on Human and Peoples' Rights jurisprudence, resolutions and declarations regarding fair trial[96] will also be

[93] M Al-Awa *Punishment in Islamic law (1982)*, A Mawdudi *Human rights in Islam* (1980), M Saeed *The accused person and his rights in Islamic law: Compensation of accused person* (1983), M Osman *Human rights between Shari'a law and Western legal of view* (1987), A Mayer *Islam and human rights, tradition and politics* (1999), R Afshari 'An essay on Islamic cultural relativism in the discourse of human rights' (1994) 16 *Human Rights Quarterly,* Al-Turabi, H *Issues of freedom and unity* (Arabic) (1987), F Halliday 'Relativism and universality in human rights: The case of the Islamic middle east' in D Beetham (ed) *Politics and human rights* (1995) 154--155 and E Mortimer *Islam and human rights: Index* on censorship October (1983) No.12.

[94] Out of its approximately 6666 verses, which cover both the spiritual and temporal aspects of life, Muslim jurists estimate that 500 verses are containing legal elements.

[95] The *Sunnah* of the prophet is of three types: first is the *Sunnah*, which prescribes some of what God has revealed in the *Qur'an*; next is the *Sunnah*, which explains the general principles of the *Qur'an* and clarifies the will of God; and last is the *Sunnah*, where the Messenger of God ruled rules on matters be not found in the *Qur'an*.

[96] Resolution on the Right to a Fair Trial and Legal Assistance in Africa, Resolution on the Right to Recourse and Fair Trial, Dakar Declaration and Recommendation on the Right to a Fair Trial in Africa,

referred to. Reference will also be made to the fair trial standards set in Islamic jurisprudence and an analysis of human rights in criminal proceedings would have to include domestic case law.

Reference will also be made to the practice of other international, regional and national institutions. In addition, selected books, journal articles and internet materials will also be used.

The practical aspects of the study will include the practice and jurisprudence of the Sudanese courts, prosecutors and police records.

In order to establish the extent of practical problems associated with the implementation of the right to a fair trial, a number of trials will be covered, and discussions will be held with practitioners, judges, judicial officers, attorneys, police, academia and NGOs in Sudan.[97] An analysis will also be made of the records of the Sudanese Ministry of Justice, the Ministry of Internal Affairs and the judiciary.

The study will also have a comparative element, comparing Sudan with other national systems in Africa, particularly South Africa. A comparative analysis will be made between international human rights law and Islamic law and the implementations in Sudan.

7. Scope of the study

In terms of delimiting this study, it does not address the right to a fair trial in civil proceedings and the employment arena proceedings. It addresses the right to a fair trial in criminal proceedings and compares that with the international standards and Islamic

Resolution on the Respect for and Strengthening of the Independence of the Judiciary and Resolution on the Need to Strengthen the Rule of Law.

[97] See annexure 1.

law. It is also discussing the relevant laws[98] and looks at whether all of these are compatible with the international human rights law or not.

The study examines the sources of the right to a fair trial in Sudan. The study emphasises the pre-trial stage; the study discusses the right to be presumed innocent, the right not to be compelled against oneself or confess guilt and the detainee's rights including; the right against arbitrary arrest or detention; the right to *habeas corpus*; the right to be detained in a place recognised by law; the right to humane treatment; the right to bail; the right to legal services; the right to be informed promptly and the right to compensation. The trial stage discusses the right of access to the court, the right to equality before the law and the courts, the right to a competent, impartial and independent court, the right to legal aid, the right to a fair and public hearing, the right to legal representation and the right to adduce and challenge evidence. In addition, the study explores the matter of the special courts in Sudan. The post-trial stage focuses on the right to appeal, the punishments including; the death penalty, stoning, whipping and amputation and the right to reparation. The study explores those rights with reference to Sudanese, Islamic and international human rights law.

8. Limitation of the study

With regard to limitations there are many factors that could detract from the ultimate value of this work including the following: lack of resources to do comprehensive field research; lack of access to public information sought from courts and government officials such as the police; and difficulties relating to translation into English from relevant source materials, of which the bulk is in Arabic.

9. Structure and overview of chapters

[98] For example, the Judgment Basic Act 1983, the Evidence Act 1994, the Emergency and Public Safety Act 1997, the Anti-Terrorism Act 2001, the Armed forces Act of 2007, the Police Act 2008, and the National Security Act 2009.

This study consists of six chapters. A brief overview of the chapters, starting from chapter one, is provided below.

Chapter one serves as an introduction to the study, explores; the definitions of fair trial rights in international, regional and national level; the international standards of the right to a fair trial; setting the background of the research questions; the research questions, the objective of the study; the literature review; the methodology to be used; and the overview of the chapters.

Chapter two introduces the concept of a fair trial in Sudan, sheds light on fair trial rights in Sudan, presents and determines its sources in Sudan: the Constitution, legislation, *Shari'a* law, custom, international human rights law mainly the ICCPR and Convention on the Rights of the Child (CRC) and ACHPR; and identifies and discusses the mechanisms of protection of the right in Sudan the Constitutional Courts, Human Rights Commission and normal courts and the status of international law in the national level. In addition, the chapter will discuss the impact of the international and regional human rights instruments Sudan has not ratified like the Convention on the Elimination of All Forms of Discrimination against Women, the Protocol to the African Commission on Women's Rights in Africa (2003), the Protocol to the African Charter Establishing the African Court on Human and Peoples' Rights (1998) to the human rights system in Sudan especially fair trial rights. The chapter discusses the areas of conflict between Islamic law and international human rights law as a source of Sudanese law.

Chapter three evaluates the pre-trial rights, focuses on the pre-trial rights mainly the right to be presumed innocent including its contents and implications, the burden and standard of proof. The right not to be compelled to testify against oneself or confess guilt, the detainee's rights including statutes affecting detainees' rights, the study examines the Emergency and Protection of Public Safety Act of 1997, the Khartoum Public Order Act of the 1998, the Anti-Terrorism Act of 2001, the Armed Forces Act of the 2007, the Police Act of 2008 and the Security Act of 2009, the specific detainees' rights discussed are the right against arbitrary arrest or detention, the right to *habeas*

corpus, the right to be detained in a place recognised by law, the right to humane treatment, the right to bail, the right to legal services, the right to be informed promptly of the reason of arrest or detention and the right to compensation. This chapter compares Sudanese law, Islamic law, international and regional standards. The chapter covers the theoretical and practical aspects of these rights.

Chapter four deals with trial rights, the main rights will be considered in this chapter are the right of access to a court, the right to equality before the law and courts, the right to access to a competent, impartial and independent court, the right to legal aid, the rights to fair and public hearing, the right to legal representation and the right to adduce and challenge evidence. In addition, the study explores the special courts in Sudan. The chapter focuses on the compatibility of global and regional standards and Sudanese law and Islamic law from theoretical and practical views.

Chapter five discusses the post-trial rights, the rights will be covered are the right to appeal and right to reparation. In addition, the chapter covers the death penalty, whipping, stoning, amputation and cross-amputation in Sudanese law and conducts comparative study with the international human rights law and *Shari'a* law.

Chapter six contains conclusion and recommendations of the study. It presents findings of the study and addresses the questions raised by the study. The recommendations are directed different government organs, the judiciary, the police and the Attorney General office. In addition, the chapter will identify avenues for further research.

Chapter Two

Sources of the right to a fair trial in Sudan

This chapter discusses the sources of the right to a fair trial right in Sudan, mainly derived from the various Sudanese Constitutions, pieces of legislation, *Shari'a* law and international human rights law. It also explores the Sudanese Bill of Rights and compares it with the international standards. It considers the role of the Constitutional Court as the guardian of rights and freedoms. In addition, it examines Sudanese statutes from a human rights perspective. The chapter seeks to answer the question whether Sudanese sources of fair trial rights are compatible with the international standards of the right to a fair trial. Furthermore, the chapter focuses on the implementation of international law at the domestic level and aims to answer the question of how international law would be implemented at the national level.

1. Constitutions

1.1 Previous Constitutions

The constitutional history of Sudan since independence[1] can be divided into two phases: first, the transitional phase, which saw the adoption of three transitional Constitutions;[2] and the permanent phase, which has seen the adoption of two permanent Constitutions.[3] In addition, there have been several Constitutional Decrees.

[1] Sudan gained its independence on 1 January 1956.
[2] Namely: Sudan Transitional Constitution of 1956, Sudan Transitional Constitution of 1964 and Sudan Transitional Constitution of 1985. These three Transitional Constitutions were democratically written, and the political parties, trade unions, academic scholars, lawyers and many civil society groups participated in the preparation of the drafts.
[3] Namely: The Permanent Constitution of 1973 and the Constitution of 1998. These two Constitutions have been written during two military regimes.

Regarding the first phase, Sudan adopted a Transitional Constitution in 1956. In this Constitution, rights which were guaranteed included the right to a fair trial, equality, access to courts, and the right not to be arrested, detained, imprisoned or deprived of the use or ownership of property, except by due process of law.[4] In addition, the 1956 Constitution expressly guaranteed the right of access to courts and the independence of the judiciary.[5] With only a total of six rights guaranteed in the Bill of Rights, there were many fair trial rights that the 1956 Constitution failed fully to guarantee.[6] This 1956 Constitution was in effect until 17 November 1958 when the first military *coup* caused the suspension of the Constitution and the executive, legislative and judiciary powers were transferred to the Military Council in terms of the first Constitutional Ordinance that was issued.

The second Transitional Constitution was the 1964 Transitional Constitution, which reiterated the fundamental rights recognised by its precursor.[7] The 1964 Constitution underwent a number of amendments, the first being in 1965.[8] A further amendment followed in 1966, in essence adding provisions relating to the hierarchy of the judiciary. The role of the judiciary as a guardian of the Constitution stirred controversy in 1965 and 1966. In late 1965, for example, the Constitutional Assembly amended article 5 of the 1964 Transitional Constitution to exclude members of the Communist Party from

[4] Arts 4, 6 & 9.
[5] Arts 8 & 9.
[6] For example, the following rights were not guaranteed: the right to appeal, the right to a fair and public hearing, the right to an interpreter, and the right to a lawyer. The 1956 Constitution guaranteed the following rights: art 4 (the right to equality), art 5 (the freedom of religious, expression and association), art 6 (the right against arrest and confiscation), art 7 (the rule of law), art 8 (the enjoyment of constitutional rights) and art 9 (the independence of the judiciary).
[7] S Hussein 'Sudan in the shadows of civil war and politicization of Islam' in An-Na'im A (ed) *Human rights under African constitutions* (2003) 346-347. The rights which have been enshrined are art 4 (the right to freedom and equality), art 5 (the freedom of religious, expression and association), art 6 (the right against arrest and confiscation), art 7 (the rule of law), art 8 (the enjoyment of constitutional rights) and art 9 (the independence of the judiciary).
[8] The amendment reads as follows: 'the following proviso shall be added at the end of sub-article (2) of article 5: provided that no person shall perform or seek to perform any act in furtherance of communism, whether local or international, or perform or seek to perform any act to overthrow the government'. The following new sub-article shall be added after sub-article 2 of 5: '(3) every association whose aim or means constitutes a contravention of the proviso to sub-art 2 shall be deemed to be an unlawful association and the constituent assembly may enact any legislation which it shall deem to be necessary for the implementation of the provisions of that proviso'.

Parliament.[9] This amendment was challenged by affiliates of the Communist Party who had been elected as members of Parliament.[10] In this case, the High Court concluded that the adjustment was unconstitutional as the 1964 Transitional Constitution was the crucial law and consequently had supremacy over all other laws as provided in article 3 of the Constitution.[11] Although the High Court held that the amendment was unconstitutional, the executive failed to abide by the court's decision. It was obvious that the government did not in practice respect the rights guaranteed in the 1964 Transitional Constitution. The right to a fair trial should protect the other individual's rights and when there is an infringement, there should be a remedy. However, the government ignored the High Court decision, causing the promise of a fair trial to become ineffective.[12]

The Permanent Constitution of 1973[13] provided for several rights and freedoms including fair trial rights.[14] Theoretically, the 1973 Constitution was comprehensive and included most of the international standards pertaining to fair trial rights, but in practice not all of them were enforced due to the nature of the dictatorship of the military regime. Hussein, one of the Sudanese scholars commented that 'the provisions of many rights

[9] Art 5 was the provision that had guaranteed freedom of expression, opinion, and association.
[10] *Joseph Garang & Others v Supreme Commission & Others* (1968) SLJR 1.
[11] Hussein (n 7 above) 367.
[12] The Prime Minister refused compliance with the Court's judgment, describing it as not binding and merely 'declaratory'. See A Medni 'The constitutional Bill of Rights in the Sudan: Towards substantive guarantees and effective realization of rights' in REDRESS, Faculty of Law, University of Khartoum & SHRM *The constitutional protection of human rights in Sudan: Challenges and future perspectives* (January 2014) 8.
[13] Guaranteed several rights of citizenship and dealt explicitly with the issues of religion (art 16). There was no counterpart to art 16 of the 1973 Constitution in the Transitional Constitution of 1985. The 1973 Constitution guaranteed numerous social and economic rights, including the right to development (arts 18 & 21), the right to education (arts 20 & 53), the freedom from hunger and thirst (art 21), the right to social security (art 24), the right to free health care (art 54), the right to work and equal employment opportunity (arts 36 & 56), the protection of childhood, motherhood, and working mothers (arts 26, 27 & 55), the cultural and artistic development (art 25), and the eradication of illiteracy (art 29).
[14] Such as art 63 'legal representation; the right to freely choose a lawyer', art 64 'the right of an accused to a prompt and fair trial', art 65 'the right of the victim to compensation', art 67 'the right to be released on bail', art 68 'the right to legal aid at its own expense if a person accused of a serious crime in unable to afford legal fees', art 69 the right to be presumed innocent', art 70 'the freedom from retroactive incrimination or punishment', and art 71 'the freedom from double jeopardy, except in cases provided for under the law'.

in the 1973 Constitution should not blind the observer to the myriad of repressive laws that existed alongside the Constitution throughout the reign of the regime.'[15]

In 1985, a third Transitional Constitution was adopted, containing a Bill of Rights that introduced a clearly defined set of civil rights including the right of litigation and recourse to a court of competent jurisdiction.[16] It further stipulated that state action shall be subject to judicial review, and provided for the presumption of innocence, the right of the accused in a criminal case to a prompt and fair trial, and the right to defend oneself, including the right to appoint counsel. Likewise, the accused was guaranteed protection from inducements, oppression, torture, cruel or degrading punishment or application of retroactive laws.[17] The 1985 Constitution guaranteed people the right to apply to the Supreme Court for the protection or implementation of any of the rights established by the Constitution.[18] The 1985 Constitution also reiterated that the Supreme Court was the guardian of the Constitution and guaranteed the jurisdiction of the Supreme Court to issue decrees and judgments, and the interpretation of the Constitution and laws. The Supreme Court could also review constitutional matters and constitutionality of laws, and the protection of the fundamental rights and freedoms as guaranteed by the Constitution. However, article 40 of the 1985 Transitional Constitution placed some limits on fundamental rights and freedoms. Accordingly, all the rights set out in the Constitution could be restricted by legislation protecting public security, morality, health, or the security of the national economy. With the exception of the right to litigation, all the rights could be suspended through a declaration of a state of emergency.[19] On 2 April 1987, a new article was added to the Transitional Constitution obliging the state to attain the objects enunciated by the original National Charter of 1964.[20]

[15] Hussein (n 7 above) 357.
[16] Arts 17 to 32.
[17] Art 27.
[18] Art 32.
[19] Art 134.
[20] Hussein (n 7 above) 349.

In 1998, another permanent Constitution was promulgated and contained a Bill of Rights that included the right to litigation, subject to procedures and rules of law.[21] Other rights recognised in the 1998 Constitution included the right of the accused to be presumed innocent, the right to be afforded a prompt and fair trial, the right to a defence, the right to a choice of counsel, and the right not to be tried for acts that were not defined as crimes at the time that they were committed.[22] The 1998 Constitution provided for judicial independence.[23] The 1998 Constitution recognises social and economic rights only as principles and policies to guide the state, rather than as justiciable constitutional rights.[24] The 1998 Constitution further reserved the death penalty as punishment to be applied to only the most serious crimes and placed additional limitations on when it could be applied.[25]

Although some rights have been theoretically guaranteed in this Constitution, the exercise of these rights is in question. For example, the Constitutional Court has decided[26] that the declaration of emergency made by the President[27] be constitutional, even though it was not submitted to the Parliament within 15 days, in violation of the 1998 Constitution.[28] The reason, in the words of the Constitutional Court is 'it was

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[21] Art 31.
[22] Art 32.
[23] Art 99 provides 'The judiciary in the Republic of Sudan shall be vested in an independent body called the Judicial Authority. The Judicial Authority shall undertake the administration of justice through the adjudication of disputes and the giving of judgments in accordance with the Constitution and law' and art 101 provides '1. Judges are independent in the performance of their duties and have full judicial authority in their jurisdiction. They may not be influenced in their functioning directly or indirectly. 2. A judge is guided by the rule of the Constitution and law and it shall be his duty to protect these principles by distributing justice without fear or favour. 3. The state shall abide by and implement decisions of the Judicial Authorities'.
[24] Art 19.
[25] The Constitution for instance provided that no one under 18 years of age could be sentenced to death. In terms of art 33 of the 1998 Constitution, no one over 70 years could be sentenced to death or executed if sentenced earlier and having attained the age of 70 prior to execution. Exception of *hudud* and *qissas* as stressed by the Constitution mean that *Shari'a* punishments shall be applied and carried out irrespective of age. Pregnant and suckling mothers would not be immune to the death sentence but according to the Constitution may only be executed after two years of lactation. The exceptions mentioned above were incompatible with the international standard of fair trial rights and reflected one of the areas of conflict between *Shari'a* law and international standards of human rights.
[26] *Ibrahim Yousif Habani & Others v The President of the Republic* cc/Constitutional Case/1/2000 SCCJR (1999--2003) 174--200.
[27] On 12 November 1999.
[28] Art 131(2).

impossible to submit a declaration of emergency to the Parliament because the President had dissolved the assembly prior to the declaration of emergency.'[29] However, the Court also stated that in principle, 'the declaration of emergency is a matter that the courts do not intervene with.'[30] This decision reflects the influence of the executive authority upon the judiciary and its effect on the independence of the judiciary. Further, it sheds some light on one of the principles of a fair trial namely that the court should be competent, impartial and independent. The right to a fair trial should not only be enshrined in the Constitution, but should also be exercised, practiced and enjoyed by individuals. The Constitutional Court should protect and guarantee the right to a fair trial enshrined in the Constitution.

1.2 Current Constitution

Subsequent to the Comprehensive Peace Agreement of 2005, the Interim National Constitution of 2005 (INC) was adopted and contained relevant provisions dealing with fair trial rights.

According to article 3 of the INC, the Constitution is the supreme law in Sudan. Article 27(4) of the INC provides 'legislation shall regulate the rights and freedoms enshrined in this Bill and shall not detract or derogate from any of these rights.' Further, article 48 states that 'no derogation from the rights and freedoms enshrined in this Bill shall be made.' Similar to the Constitution of the Republic of the South African, 1996 the INC in article 3 states, that the INC is the supreme law of the land and the laws should comply with it. In this regard, the South African Constitution of 1996 states that in section 2 'this Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled.' However, there are also significant differences. The first difference is that the Sudanese INC is interim in nature while South Africa had progressed from the era of an Interim Constitution in 1993 to the Constitution of 1996. Secondly, the appropriate implementation of the South African

[29] N 26 above, 187.
[30] N 26 above, 188.

Constitution's Bill of Rights depends on the democratic values, dignity, equality and freedoms.[31] However, democracy, human rights and freedoms are in question in Sudanese practice. Thirdly, the South African Bill of Rights applies to all laws and binds the legislature, the executive, the judiciary and all organs of state.[32] In Sudan, the President dissolved the Parliament (National Counsel) in 2000, and the Constitutional Court approved the dissolution even though the Constitution of 1998 stated clearly the protection of the constitutional rights in article 34.[33] The 1998 Constitution did not mention expressly the supremacy of the constitution but article 4 of the 1998 Constitution provides as follows:

> God, the creator of all people, is supreme over the State and sovereignty is delegated to the people of Sudan by succession, to be practiced as worship to God, performing his trust, developing the homeland, and spreading justice, freedom and *shura* in accordance with the Constitution and laws.

Therefore, the INC is better than the 1998 Constitution in this regard.

The fair trial rights in the INC included rights dealing with personal liberty whereby the INC provides that '[e]very person has the right to liberty and security of person; no person shall be subjected to arrest, detention, deprivation or restriction of his/her liberty except for reasons and in accordance with procedures prescribe by law.'[34] This provision, however, falls short of the rights against arbitrary arrest, as stipulated in the ICCPR.[35] Equality before the law is also protected, and the INC provides that '[a]ll persons are equal before the law and are entitled without discrimination, as to race, colour, sex, language, religious creed, political opinion, or ethnic origin, to the equal

[31] See sec 7(1) of the Constitution of the South Africa, 1996.
[32] Sec 7(2).
[33] Which provides as follows: 'Every injured or harmed person who has exhausted all his executive and administrative remedies has the right to appeal to the Constitutional Court to protect the sacred liberties and rights contained in this Part. The Constitutional Court in an exercise of its authority may annul any law or order that is not in accordance with the Constitution and order compensation for damages'.
[34] Art 29.
[35] Art 9(1) of the ICCPR.

protection of the law.'[36] However, the article does not mention all the grounds of discrimination as enshrined in the ICCPR which include opinion, national or social origin, property, birth or other status.[37] Another provision in the INC is that dealing with freedom from torture which states that '[n]o person shall be subjected to torture or to cruel, inhuman or degrading treatment.'[38] It is clear from this provision that the article does not prohibit punishment that is cruel, inhuman and degrading because it does not explicitly mention 'punishment'.

Other fair trial rights provided in the INC under article 34 include:

- The accused is presumed to be innocent until his or her guilt is proved according to the law.
- Every person who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest and shall be promptly informed of any charges against him or her.
- In all criminal proceedings, 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.
- No person shall be charged with any act or omission which did not constitute an offence at the time of its commission.
- Any person shall be entitled to be tried in his or her presence in any criminal charge without undue delay; the law shall regulate a trial in *absentia*.
- Any accused person has the right to defend himself or herself in person or through a lawyer of his or her own choice and to have legal aid assigned to him or her by the State where he or she is unable to defend himself or herself in serious offences.

When compared to article 14 of the ICCPR, it appears that the INC does not fully guarantee the fair trial rights. For example, the right to appeal, the right to be brought

[36] Art 31.
[37] Art 2(1) of the ICCPR.
[38] Art 33.

promptly before a judge, the right to an independent tribunal and the right to examine witnesses are omitted from the INC.

Article 35 of INC that deals with the right to litigation provides: '[t]he right to litigation shall be guaranteed for all persons; no person shall be denied the right to resort to justice.' However, there are impediments that curtail the right to litigation or the right to access courts in Sudan. For example, immunity guaranteed to police, security officers, army officers and other government officials in legislation undermines the right to litigation and the right to access courts.[39]

Article 36 of the INC dealing with the restriction on the death penalty provides as follows:

> (1) No death penalty shall be imposed, save as retribution, *hudud* or punishment for extremely serious offences in accordance with the law. (2) The death penalty shall not be imposed on a person under the age of eighteen or a person who has attained the age of seventy except in cases of retribution or *hudud*. (3) No death penalty shall be executed upon pregnant or lactating women, save after two years of lactation.

It is clear as shown in the above article, that the Bill of Rights does not prohibit the death penalty, which can be executed in cases of *qisas* (retribution), *hudud* or punishment for extremely serious crimes. Article 6(5) of the ICCPR elucidates that the State party should safeguard that the death penalty will not be imposed to individuals aged below 18 years.[40] International principles limit the execution of the death penalty on persons in certain groups, including persons who were below the age of 18 years at the time the crime was committed, persons over the age of 70 years, pregnant women and new mothers, the mentally damaged and the mentally ill. Persons who were below the age of 18 at the time the offence was committed may not be penalised to death,

[39] Example of impunity provisions, sec 52 of the National Security Forces Act of 2010, sec 45 of the Police Act of 2008, and sec 34 of the Armed Forces Act of 2007.
[40] Concluding observations of the HRC: *Sudan* CCPR/SDN/CO/3/CRP.1, para 20.

irrespective of their age at the time of trial or handing down of the judgment.[41] The UN Economic and Social Council has suggested that countries should introduce 'a maximum age beyond which a person may not be sentenced to death or executed.'[42]

The CRC Committee is seriously concerned that under article 36 of the Sudan INC, the death penalty may be executed on individuals below the age of 18 years old in cases of *qisas* or *hudud*. The CRC Committee is also concerned at latest reports that the death penalty remains to be carried out on children. The CRC Committee reminds Sudan that the imposition of the death penalty to children is a serious violation of articles 6 of ICCPR and 37(a) of CRC.[43] It reiterates that the CRC does not tolerate the death penalty to be executed for offences committed by persons below 18 years of age and permits no derogation or departure from that article.

There are also some applicable articles in the INC relevant to the right to a fair trial, including independence of the judiciary,[44] and the independence and impartiality of judges.[45] Although the President appoints judges according to recommendations from the National Judicial Service commission,[46] a judge cannot be fired without a

[41] See art 6(5) of the ICCPR, art 37(a) of the CRC, para 3 of the Death Penalty Safeguards, rule 17(2) of The Beijing Rules, art 4(5) of the AMCHR. Art 6(4) of Additional Protocols I and II to the Geneva Conventions of 1949 prohibit the death penalty being pronounced on people aged less than 18 years at the time the crime was committed.
[42] ECOSOC Resolution 1989/64 adopted on 24 May 1989, UN Doc. E/1989/INF/7, 127 at 128.
[43] Concluding observations of the Committee on the Rights of the Child: *Sudan* UN Doc. CRC/C/SDN/CO/3-4, 1 October 2010, para 35.
[44] Art 123 provides as follows: (1) The National judicial authority in the Republic of the Sudan shall be vested in the National Judiciary. (2) The National Judiciary shall be independent of the Legislature and the Executive, with the necessary financial and administrative independence. (3) The National Judiciary shall have judicial competence to adjudicate on disputes and render judgments in accordance with the law. (4) The Chief Justice of the Republic of the Sudan, who is the head of the National Judiciary and the President of the National Supreme Court, shall be answerable to the President of the Republic for the administration of the National Judiciary. (5) All organs and institutions of the State shall execute the judgments and orders of the courts.
[45] Art 128 provides as follows: (1) All Justices and Judges are independent in the performance of their duties and have full judicial competence with respect to their functions; and they shall not be influenced in their judgments. (2) Justices and Judges shall uphold the Constitution and the rule of law and shall administer justice diligently, impartially and without fear or favour. (3) Tenure of office of Justices and Judges shall not be affected by their judgments.
[46] Art 130(1).

recommendation from the National Judicial Service commission.[47] In Sudan, the President is the head of the executive, and his appointment of judges is incompatible with the principles of separation of powers, because in those countries where the judges are appointed by the head of state, the head of state permanently has no executive powers.[48] Under the African Charter, article 26 provides that the state parties should guarantee the independence of the courts. In Sudan, the interference of the executive authority and some pieces of legislation affect the independence of the judiciary. Although the INC established the National Judicial Service Commission as an independent body,[49] the reality is that the National Judicial Service Commission has been criticised for failing to exercise it independence and enhance the independence of the judiciary in Sudan.[50]

Article 122(d) of the INC stipulates that a Constitutional Court is responsible for deciding cases of constitutional rights violations. Accessibility to an effective constitutional remedy before Sudan's Constitutional Court is hampered by several key factors, namely narrow *locus standi*, fees, qualification of lawyers and inaccessibility as it is located in the capital.[51] The Constitutional Court has not adequately protected the rights enshrined in the Bill of Rights. An example of the Constitutional Court failing to uphold human rights occurred when it granted the Minister of Justice the power to stay any criminal suit at any time before a final judgment is rendered.[52] In addition, the Constitutional

[47] Art 131(2).
[48] A Khalil 'Guarantees for protection of human rights in national and international law' unpublished LLM thesis, University of Khartoum (2004) 69.
[49] Art 129 of INC which provides: '(1) The President of the Republic, after consultation within the Presidency, shall establish a commission to be known as the National Judicial Service Commission to undertake the overall management of the National Judiciary; its composition and functions shall be prescribed by law in accordance with the provisions of the Comprehensive Peace Agreement. (2) The Chief Justice of the Republic of the Sudan, as the head of the National Judiciary, shall chair the National Judicial Service Commission'.
[50] Criticised by many NGOs such as REDRESS, SHRM & ACJPS.
[51] For example, regarding the right of access to the Constitutional Court is the high cost which is the equivalent of $1,000. This bars prospective litigants from bringing cases to court.
[52] Constitutional Court decision, powers of the Minister of Justice during pre-trial proceedings. On the13 June 2010, the Constitutional Court issued a decision in response to a petition by the Minister of Justice in 2009 about the nature of decisions issued by the Minister regarding the proceedings of criminal suits in the pre-trial stage.

Court failed to rule on the constitutionality of numerous provisions in various statutes.[53] In the *Ibrahim Yousif Habani* case,[54] the Constitutional Court's decision reflects the influence of the executive authority upon the judiciary and its effect on the independence of the judiciary. This case sheds some light on one of the principles of a fair trial, namely that the court should be competent, impartial and independent. This right requires 'justice must not only be done, but must be seen to be done.'[55] The notion of independence of the judiciary means that the judiciary must be independent of the other state authorities, namely: the executive and legislative. The Constitutional Court has failed to act as a constitutional guardian of rights and remedies provided for in the INC and legislation has proved largely ineffective.[56] In practice, there is virtually a complete lack of cases that have resulted in compensation or other forms of reparation being given to victims of torture and other serious human rights abuses.[57] In another case that showed the shortcomings of the Constitutional Court, the Court dismissed a petition challenging the legality of the detention of persons detained.[58] The Constitutional Court found that the detention complied with the National Security Forces Act, while failing to review the constitutionality of the National Security Forces Act itself.[59] The Constitutional Court has heard a series of cases in which applicants argued that they have been sentenced to death following an unfair trial, but has repeatedly dismissed the applicants' allegations that evidence used in these trials had been obtained by means of torture.[60]

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[53] See secs 152, 175 & 177 of the CPA, the Anti-Terrorism Act of 2001 & its Rules and Regulations and the immunities in the Security Act 2009.
[54] *Ibrahim Yousif Habani & Others* (n 26 above) 174-200.
[55] See European Court of Human Rights *Delcourt Case* 17 January 1970, 11 Ser. A 17, para 3. Quoted in Amnesty International *Fair trial manual* Amnesty International Publications (1998) 88.
[56] See REDRESS, CLRS & SHRM *Arrested development: Sudan's Constitutional Court, access to justice and the effective protection of human rights* (2012) 24.
[57] As above.
[58] *Farouk Mohamed Ibrahim v Sudan Government & Legislative Authority* CC18/2007 (2011) SCCLR 365.
[59] See 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* information is gathered from the Office of the High Commissioner for Human Rights was issued on 28 November 2008 39--41.
[60] See *Paul John Kaw & Others v Ministry of Justice & Next of kin of Elreashed Mudawee* Case No. MD/QD/51/2008, Constitutional Court Judgment of 13 October 2009, confirming the death sentence of six men accused of murder. *Isahq Al-Sanusi & Others v Successors of Deceased Mohamed Taha Mohamed*

However, in the *Nagmeldin Gasmelseed v Government of Sudan and the relatives of Abdelrahman Ali*,[61] the Constitutional Court made a progressive decision dealing with human rights protection and implementation of international standards. The case dealt with the violation of the right to life. The applicant had been sentenced to death for a homicide committed when he was 15 years old. The applicant lodged a complaint before the Constitutional Court challenging the constitutionality of the decision rendered by the Supreme Court, contending that the latter Court had applied the Child Act of 2004 incorrectly. The Child Act excludes children below the age of 18 years from being sentenced to death, except in *hudud* and *quisas* which are *Shari'a* punishments. In this case, the Constitutional Court found that the provisions of the Criminal Act upon which the Supreme Court grounded its decision infringed the CRC and the INC as the CRC is part and parcel of the INC by virtue of article 27(3).[62] Subsequently, it held that the verdict of the Supreme Court was unconstitutional as it infringed upon the right to life. The Constitutional Court interpreted the Child Act of 2004 which does not provide for imposing the death penalty on children below the age of 18 years, and held that the Criminal Act of 1991 is incompatible with the Child Act of 2004. The Criminal Act allows for the imposition of the death penalty on those under 18, in the case of *hudud* and *quisas*. The Court interpreted the Child Act of 2004 as a 'specific law' that should prevail over the Criminal Act of 1991 as a 'general law.' The Court referred widely to global and regional human rights law and determined that article 27(3) made human rights treaties part and parcel of the national law that should dominate over national law. However, the Constitutional Court failed to declare the unconstitutionality of section 27(2) of the Criminal Act of 1991[63] which allow the imposition of the death penalty on children below the age of 18 years.

Ahmed Case No MD/QD/121/2008, Constitutional Court Order of 23 March 2009 confirming the death sentence of nine men convicted for the murder of the journalist Mohamed Taha.

[61] *Nagmeldin Gasmelseed v Government of Sudan & the relatives of Abdelrahman Ali* MD/GD/18/2005 (2011) SCCLR 399--424.

[62] Which provides that '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'.

[63] Sec 27(2) of the Criminal Act of 1991 which provides as follows: '(2) With the exception of *Hudud* and retribution (*qisas*) offences, the death sentence shall not be passed against any person, who has not attained the age of eighteen, or who exceeds seventy years of age'.

The INC provides in article 157 for the formation of a special Commission for non-Muslim rights at the National Capital with the elementary duty of safeguarding that the non-Muslims' rights are protected in line with the INC and that the non-Muslims are not affected by the application of the *Shari'a*.[64] The commission should safeguard and protect non-Muslim from the application of *Shari'a* law. However, in practice the role of the commission has been criticized regarding the case of Mariam Yahia the lady tried of converted to Christianity.[65]

The INC also provides for the establishment of a human rights commission.[66] However, although the important role of the Human Rights Commission is commendable, it was only founded after 6 years of the INC being enforced.[67] Therefore, its role is not yet effective in the areas of the promotion and protection of human rights.

2. Legislation

2.1 Criminal Procedure Act

Sudan needs rules, principles, mechanisms and state structures to prevent, detect, cope with and control criminal behaviour. Criminal procedure rules play a pivotal role in this regard.[68] The current Criminal Procedure Act of 1991 (CPA) is also one of the main sources to fair trial rights. The main rights related to a fair trial are in section 4

[64] The Third Periodical Report of the Republic of the Sudan under Article 62 of the African Charter on Human and People's Rights May 2006 para 69.
[65] See pp 51 & 260 in front.
[66] Art 142 which states that '(1) The President of the Republic shall, after consultation within the Presidency, establish an independent Human Rights Commission consisting of fifteen independent, competent non-partisan and impartial members. Their appointment shall be representative. It shall be independent in decision making. (2) Representative of relevant government organs shall take part in the deliberations of the Commission in an advisory capacity. (3) The Human Rights Commission shall monitor the application of the rights and freedoms provided for in the Bill of Rights and shall receive complaints on violations thereof. (4) The Human Rights Commission may express opinion or present advice to State organs on any issue related to human rights. (5) The law shall specify the functions, powers, procedures, terms and conditions of service of the Commission'.
[67] Established in 2012.
[68] P Bekker *et al Criminal procedure handbook* (2006) 3.

(principles to be regarded),[69] sections 6 to 16 (criminal courts and the powers thereof),[70] sections 17 to 21 (the Prosecution Attorneys Bureau and powers thereof),[71] sections 22 to 28 (the General Crimes Police, the Judicial Police and the Prisons Police and powers thereof),[72] section 52 stated the inquiry by the people's administrator as to death,[73] sections 53 and 54 (functions and powers of an inquirer), sections 61 to 66 (summonses), and sections 67 to 83 (arrest).[74]

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[69] In the application of the provisions of this Act, due regard shall be had to the following principles: a) prevention of offences is a duty of all, b) no incrimination or sanction is made, save by an antecedent legislative provision, c) the accused is presumed innocent until his conviction is proved, and he is entitled to be subject to fair and prompt inquiry and trial, d) the life and property of the accused is inviolable, he shall neither be forced to incriminate himself, nor shall he be required to take the oath, save in otherwise than *hudud* offences to which a private right of a third party relates, e) prejudice to witnesses, in any way, is prohibited, f) due regard shall, as far as possible, be had to in the procedure of inquiry, summons, and exercise of the powers of arrest shall not be resorted to save where necessary, g) the Criminal Prosecution Attorneys Bureau is the guardian of victims who has no next of kin, h) a private injury, resulting from the offence shall be compensated, i) conciliation or pardon may be made in every offence involving a private right, to the extent of such right, subject to the provisions of *Hudud* offences, j) Arabic shall be used in all criminal procedure. Another language may be used upon necessity.

[70] Sec 6 types of criminal courts (the Supreme Court, Court of Appeal, General Criminal Court 'Province Court', First Criminal Court 'District Court', Second Criminal Court 'District Court', Third Criminal Court 'District Court', People's Criminal Court 'Town or Rural Court', and any Special Criminal Court, established by the Chief Justice, under the Judiciary Act of 1986, or any law), sec 7 provided for the powers of criminal courts and magistrates, sec 8 provided for power of supervision of magistrates in inquiry, sec 9 powers of the General Criminal Court, sec 10 powers of the First Criminal Court, sec 11 powers of the Second Criminal Court, sec 12 powers of the Third Criminal Court, sec 13 powers of People's Criminal Court, sec 14 powers of Special Criminal Courts, sec 15 temporary judicial powers, and section 16 powers of the court to inflict a number of sanctions.

[71] Sec 17(1) the Criminal Prosecution Bureau shall consist of: a) the Minister of Justice, b) the prosecution attorneys. (2) Each of the Under-Secretary of the Ministry of Justice, the Prosecutor-General and the Head of the Prosecution Attorneys Bureau, in the state, shall be an ex officio Prosecution Attorney, sec 18 (establishment and organisation of Prosecution Attorneys Bureau), sec 19 (powers of the Criminal Prosecution Bureau to supervise the criminal suit), sec 20 (powers of the Prosecution Attorneys Bureau granted), and sec 21 (Confirmation and appeal of decisions of the Prosecution Attorneys Bureau).

[72] Sec 22 'formation of the police forces', sec 23 'the Judicial Police', sec 24 'functions of the General Crimes Police', sec 25 'Powers of the General Crimes Police', sec 26 'power of the officer in charge and superior officer', sec 27 'powers of prisons police', and sec 28 'inspection of prisons'.

[73] Provide as follows: 'Where particulars or information are received, by the people's administrator (in 2009's amendment becomes an Administrator) as to finding the body of a human being or the commission of suicide by a person or his death in an accident, he shall immediately inform the officer in charge, and proceed to the place of the accident and conduct, in the presence of two or more witnesses, an inquiry, in accordance with the inquiry procedure in offences relating to death, and lay down a report on the inquiry procedure and the apparent cause of death, a description of wounds, fractures on the body, a statement of the condition, and the surroundings thereof, and mention any weapon, or instrument, which is apparently used to effect death and such other information, relating to the death as may have been discovered by him. He shall submit his report to the officer in charge and continue the inquiry until the same is assumed by the officer in charge'.

[74] Sec 67 'arrest by the Prosecution Attorney or Magistrate', sec 68 'other cases of arrest, arrest by policeman, people's administrator or any person', sec 69 'form and validity of arrest warrant', sec 70

Section 83 provides for the rights of arrested persons including the right to be treated in a manner that preserves the dignity of the human being. This includes that a person should not be hurt physically or mentally, and should be provided with appropriate medical care. The individual should not be subjected to being restrained more than what is necessary in order to prevent his or her escape. The individual should have the right to contact his or her legal representative. In addition, the detained person should have the right to meet the Prosecution Attorney or the Magistrate; be placed in the custody of the police who conducts the arrest or inquiry; and he or she shall not be transferred, or placed in any other place, save upon the approval of the Prosecution Attorneys Bureau. The family of the accused or a body to which the accused belongs must be informed of the arrest. The arrested person must have a reasonable amount of food, clothing and educational materials, at his or her own cost, subject to the conditions relating to security and public order. The accused is also required to abide by the rules of public morals and sound conduct, and any regulations concerning detention.

Although the section includes important safeguards for detainees, the prosecution authority can extend the period of arrest up to four days, which may increase the risk of torture in police cells. In addition, the section does not provide for the right to contact a lawyer at the beginning of the procedure. The CPA also contains numerous other provisions that deal with fair trial rights.[75]

'bodies to whom arrest warrant is directed', sec 71 'public bound to help in arrest', sec 72 'substance of the arrest warrant notified', sec 73 'use of force upon opposition of arrest', sec 74 'weapons with arrested persons seized', sec 75 'procedure after arrest', sec 76 'execution of arrest outside the limits of jurisdiction', sec 77 'Prosecution Attorney or Magistrate informed of cases of arrest', sec 78 'proclamation for absconding person published', sec 79 'detention for inquiry', sec 80 'detention for trial', sec 81 'daily inspection of custodies', and sec 82 'Arrest register'.

[75] Secs: 84 'police supervision', 85 'travel prohibited', 86 'power to issue search warrant', 87 'form of search warrant', 89 'personal search', 90 'entry for search', 91 'use of force for entry', 92 'search of suspected person', 93 'search of women', 94 'experts deputed to attend search', 95 'safeguards of conducting search', 105 'cases of release on bail', 106 'release in an offence punishable with death, retribution or amputation', 107 'release on deposit', 108 'release in other offences', 109 'release of public servant', 110 'conditions of bond', 111 'bail of minor mandatory', 112 'Discharge of surety', 113 'modification of the bond, bail or security', 114 'revocation of the order of release', 115 'procedure upon breach of bond, or bail', 116 'appeal of decisions and orders', 117 'duty to inform of offences and help', 118 'power to issue precautionary orders', 119 'period of bond, police supervision and detention', 120 'bond upon conviction', 121 'breach of bond', 122 'police supervision', 123 'appeal of orders', 124 'power

In terms of the legal method that had existed, the police took awareness of the first info report on the commission of an offence, continued with the interrogation, performed search and arrests, and after sign off of the requisite authorisation by the competent magistrate, determined the charge. They then summarised the case and finally submitted the case to the court for trial. With the establishment of the Public Prosecutor's Office, work formerly completed by the police has gradually moved to the prosecuting attorney. The prosecuting attorney would now issue warrants of arrest to be executed by the police, and can command search and arrest of an individual for up to 72 hours, a duty formerly exercised by the magistrates.[76] This prosecution system has been criticised by one of the Sudanese scholars who stated the following: '[o]ne criticism of the present prosecution system is that the prosecutor is part of the Ministry of Justice, which is comprised of officials of the executive, with the inherent risk of bias in favour of his or her employer, the government.'[77]

Even though there have been efforts to advance fair trial rights, there are a number of internationally recognised rights which the CPA has failed to recognise. These include:

- The main guarantees against arbitrary detention are not fully guaranteed such as the right of *habeas corpus*, the right to a lawyer chosen by the accused, the right to medical and humane treatment, the right to inform family members and the right of compensation for arbitrary arrest. These rights are guaranteed in the

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to dispersal of unlawful assembly', 125 'use of necessary force to disperse the assembly', 126 'intervention of military force', 127 'organizing processions and gatherings', 128 'closing public places', 129 'eviction and closure of shops', 130 'prevention of public nuisance', 131 'stepping aside by the magistrate from assuming trial', 132 'no trial after acquittal or conviction', 133 'public hearing', 134 'trial in *absentia*', 135 'the right of the accused to be defended by an advocate or pleader', 136 'assuming prosecution', 137 'right to translation to the language understood by the accused', 139 'progress of trial', 145 'procedure of charging', 153–-165 'procedure of taking evidence', 166--174 'judgment', 175--178 'summary trial', 179--188 'right to appeal', 189--200 'execution', and 201--213 'miscellaneous provisions'. There are three schedules annexed to the CPA 1991: the first schedule states the offences in which criminal suit may be compoundable, the second schedule states the offences in which arrest without warrant may be made, and the third schedule states the offences wherein the officer in charge may release the accused by bond or bail.

[76] A Medani 'A legacy of institutionalized repression: Criminal law and justice in Sudan' in L Oettee (ed) *Criminal law reform and transitional justice: Human rights perspectives for Sudan* (2011) 84. See also, pages 45, 46, 48 & 49 in front for further elucidation of the point.

[77] See Medani (n 76 above) 85.

ICCPR and ACHPR.[78] In Sudan, officials have the authority to detain people arbitrarily and sometimes without trial. The government uses the pretext of emergencies to justify such detentions.[79]

- The right to legal aid is not given in pre-trial stage and provided for only in very serious crimes. It is provided for all trial stages and in any case where the interest of justice so required according to the ICCPR.[80] Also, it is guaranteed by the African Commission's Principle and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.[81] States party to ICCPR is encouraged to deliver free legal assistance in other cases, for persons who do not have adequate resources to pay for it.[82] In case of *Rahmtalla Adam Madani,*[83] the Constitutional Court restricted the right to a lawyer or obtaining legal aid by a request from the accused person if he is insolvent or poor.
- The CPA allows for the existence of special courts.[84] The creation of extraordinary courts is also in direct conflict with the principle of equality before the law.[85] Often, the procedures in special courts offer fewer guarantees of a fair trial than the ordinary courts. Under the international human rights law, the HRC has stated that '[q]uite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice.'[86] Further, the special courts violate the right to equality before the court.[87] In addition, the CPA provides for specialised prosecutors who are perceived to be act unfairly towards an accused. The Special Prosecution

[78] Art 14 of the ICCPR & art 7 of the ACHPR.
[79] For example, the law does not adequately stipulate what constitutes 'suspicious circumstances' that act as a trigger mechanism for an arrest. Consequently, the police have powers to determine the reasons for arrest in a given case, and these powers increase the risk of abuse.
[80] Art 14(3)(d).
[81] Paras 8(a) & (c).
[82] HRC General Comment No 32: Right to equality before courts and tribunals and to a fair trial (Article 14 of the ICCPR) UN Doc. CCPR/C/GC/32, 23 August 2007, para 10.
[83] *Rahmtalla Adam Madani v Sudan Government & Others* Case No 1/2001 SCCLR (1991--2003) 290--293.
[84] Sec 6(h) of the CPA.
[85] See N Steytler *Constitutional criminal procedure: A commentary on the Constitution of the Republic of South Africa* (1998) 194.
[86] HRC General Comment 13: Administration of justice (Article 14 of the ICCPR) para 4.
[87] Guaranteed in arts 2(1), 2(3) & 26 of the ICCPR, and arts 2 & 3 of the ACHPR.

offices shed a light on the integrity and independence. Prosecutors shall, in accordance with the law, 'perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus, contributing to ensuring due process and the smooth functioning of the criminal justice system.'[88]

- Section 129 of the CPA[89] confers the Mayor in a municipality or the Governor in a state or municipality the power and jurisdiction of conducting investigations as well as issuing evacuation or closing up orders of places, if these places have been opened for purposes of committing adultery, or consumption of alcohol, and drugs. The investigations should be made by prosecution attorneys and these serious orders should be practised and issued by the judiciary and not by the executive authority. According to the Manual on Human Rights for Judges, Prosecutors and Lawyers, published by the Office of the High Commissioner for Human Rights, other branches of government have a duty 'to respect and observe the independence of the judiciary.'[90] This also violates the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.[91]
- Section 59 of the CPA[92] that regulates pardons gives the prosecution attorneys power to promise an accused person waiver from the execution of the punishment if he or she confessed and disclosed the evidence against their

[88] Art 12 of the UN Guidelines on the Role of Prosecutors. Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx (accessed 16 January 2014).

[89] Sec 129 of CPA provides as follows: 'The Governor, or Commissioner, whenever it has been proved to him, after conducting the necessary inquiry, that any house, or shop is operated to deal in liquor, narcotics, psychotropic, gambling or prostitution, may order an eviction and closure thereof, for a period, not exceeding one year'.

[90] Principle 1 of the Basic Principles on the Independence of the Judiciary. See also, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* 121, Office of the High Commissioner for Human Rights, Geneva, 2003, 154.

[91] Art 14(1) of the ICCPR.

[92] Provides as follows: 'The Superior of prosecution attorney, in order to obtain the testimony of a person committed with others an offence of *ta'zir* penalty, in which he has no major act may take a grounded decision, before the trial, to tender pardon to the accused concerned, on condition that the accused shall disclose the whole of such facts and circumstances, relating to such offence, and about any other person, who has relation thereto, as who has knowledge thereof'.

partners in crime. This provision contradicts the international standards and also contradicts *Shari'a* law, as this evidence is not acceptable in *Shari'a* law. This contradicts the right not to be compelled to testify against oneself or confess guilt that is guaranteed in the ICCPR[93] and the Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment (Body of Principles).[94]

- Section 58 of the CPA grants the Minister of Justice power to stay a criminal suit. The Minister of Justice is part of the executive authority, and he may abuse his power or be influenced by political considerations. The Attorney General should be an independent officer and not submit to the executive authority. In the performance of their duties, prosecutors are supposed to carry out 'their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination.'[95] International standards even require that the office of prosecutors should be independent of the judicial office.[96]
- The CPA confers upon administrators[97] powers, similar to those of the police that may endanger and affect the proper procedure for fair trial rights because some of the administrators may lack adequate training and knowledge of the procedures. The CPA provides administrators with the same powers as police even though they are not sufficiently trained in investigation procedures. Ideally, the power to restrict an accused's freedoms should only be vested in persons who are adequately trained. The administrator may not be aware of the accused rights as guaranteed under international law.
- The right of the accused to legal consultation is contained in section 135(2) of the CPA which states: 'The court may permit any person to plead before it, where it deems him qualified therefor.' Such a decision or permission by the court would

[93] Art 14(3)(g) of the ICCPR provides as follows: 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (g) not to be compelled to testify against himself or to confess guilt'.
[94] Principle 21.
[95] See art 13(a) of the UN Guidelines on the Role of Prosecutors (n 87 above) http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx (accessed 16 January 2014.).
[96] UN Guidelines on the Role of Prosecutors (n 88 above), art 10.
[97] Sec 5 of (CPA) defines the administrator 'means the person who assumes chairmanship in any native, people's or local administration, having the function of preserving security and order'.

obviously violate the right to defence. The right to legal service of his or her choice is guaranteed in international human rights law.[98] The African Commission in *Amnesty International and Others v Sudan*[99] held that providing a court the authority to veto the choice of counsel for a defendant is unacceptable of the right to freely choose one's counsel under the article 7(1)(C) of the ACHPR.[100]

- Considering the gravity that is placed on the swearing of an oath under Islamic law, *Shari'a* permits the prosecutor (if the evidence is not available) or the judge to take the accused person's testimony under oath. This procedure is based on the Islamic principle that 'evidence is required from the claimant and oath is conferred upon the defendant.'[101] However, such procedure should not prejudice the accused person's right to be presumed innocent in the event of not taking an oath. To presume someone is guilty because he or she did not take an oath violates the right to be presumed innocent, the right not to be compelled to testify against himself or herself or to confess guilt and the right to remain silent which guaranteed in international human rights law.[102]
- Section 133 of the CPA of 1991[103] requires the trial be conducted in public. The courts may prevent the public in general or any person in particular, from attending a court session if this is deemed necessary in light of the nature or order of the court. Consequently, the judge is allowed to ignore the principle of public sessions. The law did not specify the exceptions for court to be held in

[98] See art 14(3)(d) of the ICCPR & art 7(1)(c) of the ACHPR.
[99] Communications 48/90-50/91-52/91-89/93(2000) AHRLR 297 (ACHPR 1999).
[100] As above, paras 64--66.
[101] Sec 200 of 1983 of the CPA provides: ' ……accused person has a chance to submit all his/her defense and a court could request his or her oath if he or she refused a court may decide according to his or her refusal'. The Appeal Court in Kasala state decided that in case of evidence in *hudud* or *quisas* if the plaintiff requests an oath from the accused, the court may order the accused to oath as a substitute of evidence', in *Sudan Government v Mohamed Ali Elsanosi & Other* SLJR (1986) 221-224. In 1991 CPA sec 4(d) this principle will be applied only in non *hudud* offence.
[102] See art 14(2) &14(3)(g)of the ICCPR, and art 7(1)(b) of the ACHPR.
[103] Provides as follows: 'Trial shall be publicly conducted, and the public may attend the same, provided that the court may, at its discretion, order at any of the stages of trial, exclusion of the public generally, or any person attending who attends, or remains at the sitting, whenever the nature of trial procedure, or order require the same'.

camera as occurs in other countries[104] or what has been specified in ICCPR. The law provides a judge with broad powers that could result in the court using the exceptional powers as a general rule to exclude the public or particular individuals.

- The CPA guarantees an accused the right to attend sessions of the court, but also allows for trial in *absentia*. In allowing trial in *absentia,* section 134 of the CPA[105] states that accused person should attend all the sessions except in, crimes against the state such as treason, spying or attempting to overthrow the government. The law exempts the accused from attending court sessions if the accused pleads guilty in writing or if an authorised person attends the sessions for him or her. This provision that allows conduct of trials in *absentia* might be relied upon to try political opponents without affording them the right to defend themselves before the court.[106] The provision has not fully guaranteed this right as stipulated in article 14(3)(d) of the ICCPR.
- The prosecution authority in terms of the CPA of the 1991 is vested in the Ministry of Justice and not in an independent body.[107] In many legal systems public prosecution is undertaken by prosecutors working under the Director of Public Prosecutions (DPP), who is independent and not responsible to the Minister of Justice. Under such legal systems the Attorney General is an autonomous office, and not a subsidiary to the Minister of Justice.[108]

[104] For example, England and South Africa.
[105] Provides: '1. An accused shall be tried in his presence, and shall not be tried, in *absentia*, save in the following cases: a) his being accused of any of the offences against the state; b) the court deciding exempting him from appearance; on condition that he shall admit, in writing, that he is guilty, or an advocate, or agent appears, on his behalf; c) the court deeming that proceeding with the procedure, in the absence of the accused does not prejudice the defence case in any way. 2. In all the cases, provided for in sub-section (1), summons shall be served by way, provided for in this Act'.
[106] During the civil war and the armed conflict with the northern opposition, some trials in *absentia* have been occurred. The leaders of Revolutionary Front are now facing trial in *absentia* in Sudan.
[107] As indicated in page 43 of this thesis.
[108] Medani (n 76 above) 85.

The government made amendments to the Criminal Procedure Act in 2002, by way of a Provisional Ordinance. The President of the Republic issued the Provisional Ordinance in contradiction to the Constitution of 1998.[109]

The CPA of the 1991 was amended in 2009. Section 3(2) added the following: 'Any Sudanese that has been accused of infringing the international humanitarian law including crimes against humanity, genocide or war crimes, the criminal proceeding should be brought before Sudanese police, Sudanese prosecutors and Sudanese courts.' The amendment in section 3(3) prohibits any state organ or any person from assisting or submitting any support regarding a Sudanese to be tried abroad according to the international humanitarian law including crimes against humanity, genocide or war crimes.[110] Section 5 repealed 'people administrator' and used only 'administrator'. Pursuant to the amendment section 135(3), legal aid is obligatory upon request by a person who has been accused of a crime which is punishable by incarceration of seven years or more, the death penalty or if he or she is insolvent. The previous text had determined persons accused of crimes punishable with ten years incarceration could only access legal aid. The amendment has brought some improvements regarding the access to legal aid, but lags behind international standards.

2.2 Criminal Act

The Sudanese Criminal Act of 1991 has some provisions which affect the right to a fair trial in Sudan. For example, it contains punishments which can amount to cruel, inhuman and degrading punishment such as whipping, stoning, amputation and cross-amputation.[111] Corporal punishment is banned by international standards as it infringes

[109] Art 90(2) of the Constitution of 1998 provides as follows: 'The President of the Republic cannot issue a temporary decree in matters effecting fundamental rights and liberties, state-federal relations, public elections, criminal laws or fiscal laws'.

[110] As it stands, this clause undermines fair trial in international criminal justice applicable to Sudan.

[111] The punishment of whipping is found in about 20 sections of the Criminal Act of 1991, secs: 68 (rioting), 69 (breach of public peace), 78 (intoxication and nuisance), 80 (gambling), 81 (habitual dealing in alcohol),125 (insulting religious beliefs), 146 (adultery), 148 (sodomy), 149 (rape), 151 (gross indecency), 152 (indecent and immoral acts), 153 (materials and displays contrary to public morality), 154 (practicing prostitution), 155 (running places of prostitution), 156 (seduction), 157 (false accusations of

on the absolute prohibition against torture and cruel, inhuman and degrading treatment or punishment.[112] This includes the crime of apostasy which violates article 18 of the ICCPR.[113] The definition of torture is deficient. It does not criminalise acts of torture in line with internationally accepted standards and punishment for acts of torture is inadequate.[114] The definitions of genocide, war crimes and crimes against humanity were only included in the Criminal Act of 1991 in 2009 leaving a possibility that those crimes carried out before its enactment in places such as Darfur will not be prosecuted.[115] Section 149(1) provides: 'There shall be deemed to commit the offence of rape, whoever makes sexual intercourse, by way of adultery, or sodomy, with any person without his or her consent.' As a matter of evidence, adultery requires four male witnesses making it difficult to prove where a woman alleges rape, and that places a woman at risk of facing prosecution for false accusation if she did not prove rape.[116] Moreover, the Criminal Act of 1991 contains vaguely worded crimes such as what amounts to 'indecent' and 'immoral' acts or what constitutes attempting to undermine the constitutional regime and the crime of waging war against the state.[117]

In 2009, the Criminal Act was adjusted to shelter genocide, crimes against humanity and war crimes.[118] These amendments allow domestic courts to prosecute international crimes. However, many impediments may curtail prosecutions and prevent Sudanese courts from charging certain acts as international crimes, including that the definition of

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unchastity), 160 (insult and abuse), 173 (capital theft where *hudud* is remitted) and 174 (theft). The punishment of stoning in sec 146(1)(a). The punishment of amputation in sec 171(1), and the punishment of cross-amputation in sec 168(1)(b).

[112] See art 5 of the UDHR, art 7 of the ICCPR, art 3 of the ECHR, art 5(2) of the AMCHR, art 5 of the ACHPR and art 1 of the 1975 UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[113] Sec 126 of the Criminal Act 1991. In a very recent case (May 2014), *Meriam Yahia Ibrahim Ishag,* was sentenced to hang for apostasy. She was married to a Christian and eight months pregnant. She was also sentenced to 100 lashes for '*Zina*'. Under Sudan's interpretation of *Shari'a*, a Muslim woman cannot marry a non-Muslim man and any such relationship is regarded as adulterous. She was born to a Muslim father, and a Christian mother. The Criminal Act of 1991 in sec 26 prohibition against apostasy violates the INC, the ICCPR and ACHPR http://news.msn.com/world/sudan-judge-sentences-christian-woman-to-death-for-apostasy (accessed 2 June 2014). See also, in front p. 260 of this thesis.

[114] Sec 115(2) of the Criminal Act 1991.

[115] Secs 187, 188 & 186 of the Criminal Act of 1991.

[116] Sec 157.

[117] See sec 50, 51 & 152 of the Criminal Act of 1991.

[118] See secs 186, 187, 188 and 189.

these crimes are not in line with international law,[119] and not covering some war crimes.[120] Pursuant to the principle of retrospectivity, crimes committed before the amendment came into force cannot be prosecuted as international crimes. This is problematic because the definitions of some domestic crimes are soft and do not amount to the grave penalties that a war-related brutality should require. For example, the prohibition of torture associated with witness intimidation carries a sentence of three months of imprisonment.[121]

2.3 Evidence Act

The Evidence Act of 1994 deals with the set of rules and legal principles that govern proof of facts in legal proceedings. Some of these are basic rules[122] dealing with the rejection of admissible evidence[123] and evidence obtained by unlawful means.[124] The Act provides in section 10 as follows:

> Subject to provisions of admission and rejected evidence, evidence shall not be rejected merely because it has been obtained by unlawful means whenever the court is satisfied that it is independent and admissible. (2) The court may, if it thinks it reasonable for achieving justice, not convict on evidence referred to in sub-section (1) unless it is corroborated.

Section 12 of the Evidence Act, provides that:

> [e]rror in admitting or rejecting evidence shall not constitute a cause to order the retrial if it appears to the court to which an objection against the judgment is presented that the judgment is supported by sufficient evidence even after the withdrawal of the evidence wrongfully admitted, or that the evidence wrongfully rejected would not change the judgment if it were admitted.

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[119] Genocide under Sudanese law must be committed through murder and in the context of widespread and systematic attack.
[120] Such as sexual slavery that is criminalised under international law.
[121] See S Horvitz *Sudan: Interaction between international and national judicial responses to mass atrocities in Darfur* (2013) 20.
[122] Sec 5.
[123] Sec 9.
[124] Sec 10.

There is also a special provision on *hudud* offences, evidence of adultery[125] which provides as follows:

> The offence of adultery shall be proved by any of the following: (a) by express confession before the court, unless there is a retraction before the commencing of the execution of the judgment; (b) by the testimony of four adult men; (c) by pregnancy when the woman has no husband if there is no any doubt; (d) refusal of wife to give '*Lian*' oath, after husband taking '*Lian*' oath.

Further, section 63, which provides '[s]ubject to the provisions of section 62 all *hudud* offences shall be proved: (a) by confession even once before a court; (b) by the testimony of two men, or when necessary, by the testimony of a man and two women or by the testimony of four women.' Proof of drinking liquor could be by smell.[126] *Hudud* is not judged upon doubt,[127] the Act provides '(1) *Hudud* shall not be judged in cases of doubt. (2) Retraction of an admission shall be considered one of the doubts, and also the contradiction of witnesses' testimony, and the withdrawal of testimony given by a witness. (3) If the wife takes '*Lian*' oath, the '*hadd*' shall not be judged on the wife.'

It is obvious from these sections that the Evidence Act is incompatible with the international standards of fair trial, because the Act admits evidence obtained by unlawful means, and allows for discrimination against women in testimony by stipulating that it must be two women's testimony in place of one man testimony. The Sudanese law implements in this regard *Shari'a* law. However, the interpretation of the verse[128] in the *Qur'an* could not generally be imposed to all testamentary evidence, but should be restricted to business transaction.[129] Baderin justified its application for business transaction as follows:

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[125] Sec 62.
[126] Sec 64.
[127] Sec 65.
[128] *Surat Al-Baqara* verse 289 'o you who believe! When you contract a debt for a fixed period, write it down. And get two witnesses out of your own men, and if there are not two men available then a man and two women, so that if one of them errs, the other can remind her'.
[129] M Baderin *International human rights and Islamic law* (2003) 101.

> Such transactions being then seldom assumed by women, they ordinarily lacked experience in the intricacies involved and were more likely to err in the presentation of evidence in this respect. Therefore, the reason for requesting two women testimony in place of one man here was that if one of them errs the other can remind her.[130]

His argument in this regard is supported by other provisions or verses in the *Qur'an* which do not differentiate between women and men. In some verses, the word witness is used without gender differentiation and does not contradict fair trial standard in the judicial process.[131] Some Muslims countries such as Pakistan adopted a more progressive interpretation in order to admit a single female witness.[132] Sudanese law took the traditional interpretation which contradicts international standards of fair trial.[133] The Evidence Act needs legislative reform or there must be a more progressive interpretation which would comply with the international standards of fair trial rights.

2.4 Other laws

There are other legislative sources regarding judicial authority, which includes the Judiciary Act of 1986.[134] There are warrants according to that Act for example: a warrant for the establishment of criminal court for the trial of the crimes committed in Darfur.[135]

There are other laws that undermine the right to a fair trial. These include:
The National Security Forces Act of 2010, which provides for the power of security forces organ,[136] power of its members,[137] rights of detained, arrested or confined

[130] As above.
[131] Baderin (n 129 above) 102.
[132] *Ansar Burney v Federation of Pakistan* (1983) PLD (FSC) 73-75. Quoted in Baderin (n 128 above) 102.
[133] Art 14(1) of the ICCPR.
[134] As amended in 1994, 2001 and 2002.
[135] In accordance with sec 10(e) of the Judiciary Act 1986 read with sec 6(h) and 14 of the CPA, issued on 7 June 2005 under signature of the Chief Justice.
[136] Sec 25 which provides as follows: 'The Organ shall exercise the following powers in accordance with the provisions of the law: (a) requiring information, statements, documents or things from any person and peruse, keep or take such measures as may be essential or necessary with respect to the same; (b) summoning, interrogation and taking depositions of persons; (c) surveillance, inquiry and search; (d)

persons,[138] immunity of members of security forces and their collaborators.[139] It confers immunity upon officials and there is no immediate access to lawyers or judges Wide

seizure of property in accordance with the law; (e) custody and detention for individuals in accordance with section 50 of this Act'.

[137] Sec 50 which provides as follows: '(1) every member designated by the Director, by an order thereof, for the sake of executing the functions set out in this Act, shall have: (a) any of the powers provided for in section 25; (b) the power of search, after obtaining a written order, from the Director; (c) the powers of a policeman, provided for in the police force law and the Criminal Procedure Act; (d) exercise any legal powers necessary for the implementation of the Provisions of this Act; (e) arrest or detention of any person suspected for a period not exceeding thirty days and notify relatives of such person forthwith; (f) after expiry of the thirty days period mentioned above if there are reasons for remand of the person in custody, Organ authorities shall notify the competent prosecution attorney of such reasons to obtain his approval to renew arrest according to Criminal Procedure Act of the thirty days period mentioned above if there are reasons for remand of the person in custody, Organ authorities shall notify the competent prosecution attorney of such reasons to obtain his approval to renew arrest according to the Criminal Procedure Act; (g) if it transpires from the preliminary investigation that there is evidence against the suspect, the Organ shall deliver all the documents and the Accused to the Prosecution Bureau to complete the procedure. In case of non-existence of evidence, the Organ shall discharge the suspect forthwith; (h) in case of delivery of the accused according to paragraph (g) the Prosecution Bureau shall according to its powers in Criminal Procedure Act, take the procedure it thinks appropriate; (i) if the Prosecution Bureau does not complete the investigation according to Criminal Procedure Act, it may extend the period of arrest of the accused by an order from the court in accordance with the same Act. (2) For the purposes of this section, the Organ shall observe the provisions of article 33 of the Interim Constitution of the Republic of the Sudan 2005. (3) The Director shall issue the standing orders necessary for regulating exercise of the powers mentioned in sub-section (1) above. (4) Any member sustained injury during exercising of his duties in the Organ, may institute a suit against the Organ if such member has not been compensated by the Organ previously'.

[138] Sec 51 which provides as follows: '(1) A person shall be informed, upon his being detained, arrested or confined, of the grounds demanding the same. (2) A detained, arrested or confined person shall have the right to inform his family, or the body to which he belongs, of his detention and be allowed to communicate with his family, and his advocate where the same does not prejudice the progress of interrogation, inquiry and investigation of the case. (3) A detained, arrested or confined person shall be treated, in such way, as may preserve the dignity of the human being, and shall not be hurt physically or morally and regulations shall specify keeping and delivery of his belongings. (4) The arrested person shall have the right to obtain his cultural materials and clothes at his own expense subject to security circumstances and system of custodies.custody. (5) Arrested women shall be kept in the custody of women only and be treated humanely as women. (6) Finally an arrested person shall be allowed visit him according to the regulations organising the same. (7) An arrested person shall have the right to medical care. (8) The competent Prosecution Attorney shall continuously inspect custodies of detained persons to ensure the abidance by the safeguards of detention, and receive any complaint from a detained person in his this respect'.

[139] Sec 52 provides as follows: 'Members and collaborators shall have the following immunities: (1) It shall not be deemed an offence any act of any member done in good faith during or by reason of performing his job or performing any duty imposed on him, or act based on delegated or granted power by this Act or any other Act in force, regulations or order made thereunder; provided that such act is within the limits of the business or duties imposed according to the power delegated under this Act. (2) No member or collaborator shall be compelled to deliver any information about the conditions or activities of the Organ or such business as he may have obtained in the course of discharging his duty, save with a decision of the court. (3) With prejudice to the Provisions of this Act, and without affecting any right to compensation against the Organ, no civil or criminal proceedings shall be instituted against a member or collaborator for any act save upon approval of the Director, and the Director shall grant this approval whenever it transpires that the subject of responsibility is not connected with official work, provided that the trial of any

powers of arrest and detention have been conferred on security forces whereby detention can be extended up to four and half months.[140] The lengthy detention periods imposed are contrary to international standards. These standards have been promoted by African human rights institutions such as the African Commission which has held that long detention without trial violates the African Charter.[141]

The Police Act of 2008, grants immunity to police forces for acts done in the course of their work.[142] Furthermore, the Act provides for special courts that shall not be subject to judicial review. The granting of immunity and establishment of special courts can undermine fair trial rights.

The Armed Forces Act of 2007 grants immunity to officials and recently after the amendment of the Act in 2013, the Act now provides that civilians are subject to military courts for certain crimes. For example, these certain crimes include undermining the constitutional system and the publication of false news if such is considered to undermine state security. In addition, the immunities granted to soldiers and the legal defence of obeying orders under the Armed Forces Act is an obstacle to prosecuting international crimes in Sudan.[143]

The Civil Procedure Amendment Act of 2004 to the Civil Procedure Act 1983 was passed by means of provisional order, which amended section 243 to exempt the state from subjection to execution of civil judgment against organs by way of attachment and

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member or collaborator before a criminal court shall be secret, during service or after the termination of service as to such act in connection with his official work. (4) Subject to sec 46 of this Act, and without affecting any right to compensation against the Organ, no civil or criminal proceedings shall be instituted against the member on any act connected with his official work, save upon approval of the Director, and the Director shall grant this approval whenever it transpires that the subject of responsibility is not connected with the business of the Organ. (5) There shall be secret trial before an ordinary court of any member during service or after the termination thereof as to such act as may have been done thereby in connection with his official work, unless the court decides otherwise. (6) The collaborators shall enjoy the same immunities provided for in this section'. See also, chapter 3 of this thesis 85--86 and chapter 4 125--128.

[140] See secs 51 & 52.

[141] See art 16. See also, N Udombana 'The African Commission on Human and Peoples Rights and the development of fair trial norms in Africa' (2006) 6 *African Human Rights Law Journal* 2 303--304.

[142] Sudanese law already has provisions that protect police officers against false accusations and does not incriminate acts that were committed in pursuit of the lawful exercise of police duties, even including the use of deadly force.

[143] See Horvitz (n 121 above) 19.

sale of property and detention of persons to satisfy a judgement debt. The amendment violates the right to reparation against state organs.

The Anti-Terrorism Act of 2001 defines several unlawful acts within a very broad definition of what constitutes terrorism. However, the provisions of the Act, in relation to the prosecution and trial of terrorism, give rise to very serious concerns on the compatibility of the Act with principles of sanctity of the rule of law and protection of human rights as included in the INC.[144] It permits trial before special courts and its Regulations violate the right of appeal.

Under this Act, cases of alleged terrorism are not subject to trial before ordinary courts, but are subject to the exclusive jurisdiction of special courts established by the Chief Justice. The rules of procedure of these courts are established by the Chief Justice in consultation with the Minister of Justice. The Minister of Justice is a member of the executive whose participation in the establishment of trial courts is an obvious violation of the principles of the independence of the judiciary and separation of powers. The Act further enables the Chief Justice to establish a Special Court of Appeal, in obvious violation of the provisions of the CPA of 1991 under which there is an existing Court of Appeal.[145]

The Emergency and Public Safety Act of 1997 gives broad powers to arrest,[146] and empowers the President to establish special courts, to determine the jurisdiction of such courts and the investigation procedures to be followed by such courts.[147] There is no limitation on the president powers to determine the above. According to section 6(1), the

[144] A Medani *Criminal law and justice in Sudan* (2010) 18.
[145] ACJPS *The judiciary in Sudan: Its role in the protection of human rights during the Comprehensive Peace Agreement interim period (2005--2011)* 2012 15.
[146] Sec 5(h) 'arresting persons suspected of participating in crimes related to the Declaration'.
[147] Sec 6(2). 'The President of the Republic, or any person he delegates, may set, in consultation with the Chief Justice, Special Courts (trial and appellate) to try any accused under this act and he may specify the procedures of these courts'. Sec 6(3) 'The competent authorities may establish, after consultation with Ministry of Justice and the Minister for Interior Affairs, Special Prosecution Offices to investigate and inquire in accordance with the provisions of this Act'.

mandate of the special courts shall prevail in cases of inconsistency in terms of the due process stipulated by the Criminal Procedure Act.[148]

3. *Shari'a* law

Shari'a[149] law is one of the sources of law in Sudan. Article 18 of the Sudan Constitution of 1998 provided that:

> Those working for the state and those in public life should worship God in their daily lives, for Muslims this is through observing the Holy *Qur'an* and the ways of the Prophet, and all people shall preserve the principles of religion and reflect this in their planning, laws, policies, and official work or duties in the fields of politics, economics, and social and cultural activities; with the end of striving towards the societal aim of justice and righteousness, and towards achieving the salvation of the kingdom of God.

Article 5(1) of the INC states that '[n]ationally enacted legislation having effect only in respect of the Northern states of the Sudan shall have as its sources of legislation Islamic *Shari'a* and the consensus of the people.' Following the secession of South Sudan in July 2011, the northern states now alone constitute Sudan.

The Judicial Interpretation Act of 1983 said that a judge should interpret any provision in any legislation according to the spirit of *Shari'a* law and the presumption should always be that the legislature did not intend to undermine *Shari'a* principles.[150] Where there is no clear provision, the judge should rather apply *Qur'an* or *Sunna*,[151] and he or she should interpret it as if there is no text in the *Qur'an* or *Sunna* according to *Ijmaa,*[152] *Qiyas*,[153] and judicial precedents[154] if there is no contradiction with *Shari'a* law and

[148] Hussein (n 7 above) 355.
[149] Literally *Shari'a* means path to be followed or right path, and *Shari'a* law in this study, refers to Islamic law.
[150] The Judicial Interpretation Act of 1983, sec 2.
[151] Sec 3(a).
[152] Sec 3(b)(1).
[153] Sec 3(b)(2).
[154] Sec 3(b)(5).

custom.[155] Following the amendment of this Act, criminal suits have been excluded from the implementation of section 3 of the Judicial Interpretation Act.

The main source of fair trial rights in *Shari'a* are the *Qur'an*,[156] the *Sunna*,[157] the *Ijma* and the *Qiyahs*.[158] According to the Islamic tenets, Islam is a way of life because 'it has laws governing every aspect of life.'[159] It has been argued that Islamic law provides the basis for diverse matters pertaining to 'justice, the sanctity of life, personal safety, freedom, mercy, compassion, and respect for all human beings as rooted in the obligations owed by believers to Allah.'[160] According to the *Qur'an*, human rights including the right to a fair trial are the most exalted of all creatures and are, therefore, especially valuable irrespective of the individuals' religion.[161]

Despite the fact that *Shari'a* law is the source of fair trial rights, there are some areas of *Shari'a* law that do not satisfy international standards of fair trial rights. For example,

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[155] Sec 3(b)(6).

[156] The *Qur'an* is the principal source and is believed by Muslims to be the exact words of God revealed to the Prophet Mohamed over a period of approximately 23 years. Surat Ash-Shura verse 192 that says; 'Verily this is a Revelation from the Lord of the Worlds' and Surat Al-Jathiyah verse 2 that says: 'The revelation of the Book is from God, the Exalted in Power, Full of Wisdom'. Surat Al-Baqarah verse 2 which says: 'this is the book; in it is guidance sure, without the doubt, to those who fear God'. Out of its approximately 6666 verses, which cover both the spiritual and temporal aspects of life, Muslim jurists estimate 350 to 500 verses as containing legal elements.

[157] The role of *Sunna* as a source of law is supported in the *Qur'an* itself e.g., Surat Al-Aimran verse 31 and Surat Al-Ahzab verse 21. An illustrative evidence of the *Qur'an* and *Sunna* being sources of Islamic law from the time of the prophet Mohamed is the well-known tradition in which the prophet was reported to have asked one of his companions named Mu'adh Ibn Jabal when he deployed the latter as a judge to Yemen, as to what would be his source of law in deciding cases. Mu'adh replied 'I will judge with what is in the Book of God (*Qur'an*)'.The Prophet then asked: 'And if you do not find a clue in the Book of God'? Mu'adh answered: 'Then with the *Sunna* of the messenger of God'. The Prophet asked again 'If you do not find a clue in that'? Mu'adh replied 'I will exercise my own legal reasoning'. The Prophet was reported as being perfectly satisfied with these answers by Mu'adh, which signified an approval by the Prophet.

[158] The *Ijma* (consensus) refers to legal rules agreed upon through the consensus of learned Islamic scholars within the Muslim community, where no injunction can be found either the *Qur'an* or the *Sunna*. The *Qiyahs* (analogy) refer to the analogies, inferences and deductions drawn from time to time by Islamic jurists in resolving issues not covered by any of the other sources. D Olowu 'Children's rights, international human rights and the promise of Islamic legal theory' (2008) 2 *Law Democracy and Development* 62--85.

[159] A Oba 'Islamic law as customary law: The changing perspective in Nigeria' (2002) 51 *International Comparative Law Quarterly* 817--819.

[160] PG Lauren *The evolution of international human rights: Visions seen* (2003) 8.

[161] Surat Al- Maaida verse 38.

firstly, non-Muslim witnesses do not enjoy equal status with Muslims.[162] Secondly, Islam makes distinctions in status between men and women as explicitly laid down in the *Qur'an*,[163] for example, a man as witness in court is equivalent to two women witnesses.[164] Thirdly, regarding the penal code, the *Qur'an* approves certain types of punishment which in terms of modern human rights doctrine are considered as inhuman, degrading and cruel punishment. For example, the principle 'an eye for an eye'[165] is approved in the *Qur'an* and sometimes punishment is excessive, for instance, in cases of murder a guilty person should also face the death penalty. The same principles apply to those convicted of theft,[166] whereas amputation of hands is acceptable.[167] In the case of adultery if those involved are married, they both face death by stoning.

In response to these challenges and shortcomings posed by Islamic law, modern scholars of Islamic law have given positive interpretations of the provisions of Islamic sources that to some extent are compatible with international human rights law. Concerning the right to a fair trial, they argue that there is a duty on the state to enforce justice under Islamic law. This is acknowledged by the juristic dictum that, 'God regulates through the authority of State that which is not regulated through the Qur'an',[168] and also, *Shari'a* law which has stated the obligation on judges to do justice and display neutrality in all disputes.[169] Justice in Islam reflects the spirit of absolute equality and its implementation whether for Muslims and non-Muslims[170] should be

[162] There is a principle that Muslim witness testimony has greater weight than non-Muslim testimony.
[163] According to Surat Al-Bakara verse 282.
[164] See this chapter pp 52--53.
[165] Surat Al-Bakara verse 179.
[166] As stated in verse 38 of Surat Al-Maaida.
[167] If a thief had acted out of desperation on account of poverty or urgent need, he or she would be acquitted. Considering the strictness of criteria required for the precise determination of a crime, it should not come as a surprise to observe that, during the Ottoman Empire, amputation was applied only in a few exceptional cases.
[168] See for example, A Zaydan *Al-fard wa al-Dawlah fi al-Shari'ah al-Islamiyyah* (Arabic), IIFSO, Kuwait, 1970 12. This maxim is ascribed to Uthman, the third Caliph of the early Islamic State in Madena.
[169] Surat Al-Nissa verse 58, Surat Al-Maaida verse 42, Surat Al-Nahl 90, Surat Al-Maaida verse 48.
[170] The story of Omer Ibn Al-Khatab with Ammr Ibn Elaas, and Aubai Ibn Kaab (Christian). See A Elkubaisi 'The accused person guarantees on pre-trial and trial stage: A comparative study' LLD Thesis Faculty of Law University of Cairo 1980.

applied equally because justice is a right irrespective of the nationality and religious belief of those involved.[171] The scholars shed light on the fact that Islamic law guaranteed some fair trial rights centuries ago for example, Islamic law for more than fourteen centuries has provided for the principle of legality.[172] Other rights that are recognised include the right against arbitrary arrest,[173] and the right against torture.[174] The rule of natural justice (*audi alteram partem*) was also recognised when Prophet Mohamed told Ali Ibn Abi Talib when he was appointing him as governor to Yemen 'do not make any sentence until you hear from both parties.'[175] The right to appeal was also recognised in Islam is generally and was recognised in the *Hufra* Case.[176] Regarding the independence and impartiality of judges in Islam holds the view that the laws implemented by the judge are not made by the executive authority of a state, but emanate from God.[177] The right to be presumed innocent is also recognised in Islamic law.[178] Islamic law does not recognise special courts.[179]

The question of whether or not the right to a fair trial can be efficiently protected within the application of Islamic law remains crucial.[180] In Sudan, after independence, the implementation of *Shari'a* law started with the Numiri's dictatorship regime in 1983. One of the main criticisms of that regime is that they made those laws to repress it opponents.[181] Many Sudanese scholars and political party leaders criticised the implementation of Islamic law, but did not criticise Islamic law itself.

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[171] Surat Al-Maaida verse 8 and Surat Al-Anam verse 152.
[172] See Surat Al-Maaida verses 44, 45, 47, 49 Surat Al-Nissa verse 105.
[173] Surat Al-Ahzab verse 58. Surat Al-Anam 164 Surat Al-Mudathir 38.
[174] Surat Al-Ahzab verse 58.
[175] Ibn Magah *Sunn Ibn Magah* Beirut: Dar Elmariffa 1997.
[176] See details of this case in footnote 54 chapter 1.
[177] Surat SAAD verse 26. Surat Al-Maaida verse 48 Surat Al-Nissa verse 105 Surat Al-Maaida verse 42 Surrat Al-Nahl 90 Surrat Al-maaida verse 8 Surrat Al-Nissa verse 58. Surrat Al-Ahzab verses 36 & 72.
[178] Surrat Al-Nissa 36.
[179] Surat Al-Nissa verse 65 Surrat Al-Hugrat verse 13. Prophet Mohamed made it clear that equality before the law is one of the basic ingredients of fair adjudication. It is relevant to evoke the case of the *Makhzumiyya*. For the details of this case see chapter 4 of this thesis 147--148.
[180] Baderin (n 129 above) 3.
[181] One of the opposition leaders (Mahmoud M. Taha leader of Republican Brothers), convicted in 1984 of apostasy and punishment was the death penalty, though at that time there was no provision in the Penal Code incriminated the apostasy.

The application of Islamic law in the Sudan was accompanied by a series of mistakes, including the experience of the emergency court (Prompt justice courts), which came into force in April 1984, this type of courts were not guaranteeing in most of his trials fair trial rights. Before the Prompt Justice Courts and after the application of Islamic sharia law the Chief Justice at that time was converted about 150 sentenced to death for the ratification and send them to the president has returned them to different courts to review. This procedure did not happen during the Prompt justice courts period, which lasted until April 1985 and was canceled after the popular uprising that ousted President Nimeiri regime.[182]

It is unfair to judge Islamic law (*Shari'a*) by the political systems which prevailed in various periods of Islamic history, because most of them did not implement Islamic law properly, and they misused its principle by implementing the rigid interpretation of some provisions or used it as a tool to suppress their opponents. Islamic law ought to be judged by the general principles which are derived from its source. Contemporary Islamic practices cannot be said to conform in many aspects with the true principles of Islam. Further, it is incorrect to misuse Islam by seeking to justify certain political systems in the face of obvious conflicts between those systems and Islamic law.[183] Furthermore, '[t]he Islamic heritage offers many philosophical concepts, humanistic values, and moral principles that could be adopted in constructing fair trial principles. Such values and principles abound even in the pre-modern Islamic intellectual heritage.'[184]

There is nothing under Islamic law that prohibits Muslim states from fulfilling their obligation to provide effective domestic remedies in case of the violation of the rights of individuals as guaranteed under the international human rights law including the right to a fair trial. The main principle in Islam is that anything is allowed if there is no provision to prohibit it, and therefore, fair trial rights should be recognised.

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[182] Interview with former Chief Justice Daffallah Haj Yousuf, Khartoum 20 November 2014.
[183] See International Commission of Jurists *Human rights in Islam* Report of a seminar held in Kuwait in December 1980 (1982).
[184] A Mayer *Islam and human rights, tradition and politics* (1999) 43.

4. Custom

Custom is one of the sources in Sudan. The Constitution of 1998 in art 65 provides that **'**The Islamic *Shari'a* and the national consent through voting, the Constitution and custom are the source of law and no law shall be enacted contrary to these sources, or without taking into account the nation's public opinion, the efforts of the nation's scientists, intellectuals and leaders'. However, the INC considered custom as 'a source of moral strength and inspiration for the Sudanese People.'[185] Moreover art 5(1) of the INC provides that 'Nationally enacted legislation having effect only in respect of the Northern states of the Sudan shall have as its sources of legislation Islamic *Shari'a* and the consensus of the people'. The article did not mention the custom as a source of law. The consensus of the people determined through the vote as interpreted in art 65 of the 1998 Constitution. A broad interpretation of the consensus of the people could contain customs as custom is simply the practices and usages of distinctive communities.[186] A general definition of custom:

> *'Custom is a rule of conduct obligatory to those within its scope, established by long usage. A valid custom has the force of law. Custom to the society is what law is to the State. A valid custom must be of immemorial antiquity, certain, reasonable, obligatory and not repugnant to statute law, though it may derogate from the common law.'*[187]

Custom refers to the form of traditions, habits, common conventions and guidelines that over extended practice and prevalent reception straight and govern traditional African people.[188]

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185 Art 4(b) of the INC provides as follows: 'religions, beliefs, traditions and customs are the source of moral strength and inspiration for the Sudanese people.'

186 David J Bederman *Custom as a source of law* Cambridge 2010 5.

187 John Burke *Osborn's Concise Law Dictionary* Sweet & Maxwell Ltd 1976 108.

188 See the definition in K Deng *Access to Traditional Justice Systems & the Rights of Women and Children in South Sudan.* Workshop on the Legal Protection of Children, organised by the South Sudan Law Society 2000 Rumbek, South Sudan. Dias specifies certain conditions have to be achieved for a custom to be recognised by a court. These are: 'the custom must be of immemorial antiquity. The onus of its antiquity being on the person who asserts the application of the custom. The proof becomes easier,

Historically, in Sudan, the judiciary interpreted the common law principle of country 'Justice, Equality and Good Conscience' in the light of local culture and customs.[189] The Sudanese jurisprudence, ample of the debate over the description of customary has associated more to its scope than meaning. Dissimilarity occurred between the judiciary of the colonial period. The former encouraged a restraining sense.[190] The second favoured a broader meaning to embrace the statutory laws with other communities' customs resident in Sudan.[191]

Notwithstanding the disagreement over the interpretation, 'customary law remains a fundamental aspect of African and Sudanese society'.[192]

Customary laws addressed in the Civil Justice Ordinance 1929 and the Chiefs' Courts Ordinance 1931. The second law was officially accepted Chief's lawful power to workout customary power in their traditional clannish parts.[193] The People's Local Courts Act 1977 annulled the previous law but substituted it by a nearly alike order.[194] The jurisdiction of customary courts is specified and defined by the Chief Justice. Consistently, limitations is located upon the jurisdiction of every court, which regulate

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however if its origin cannot be remembered. The burden of rebutting it lies upon the party against whom the custom is being applied, it must have been enjoyed as of right, it must be certain and precise, it must have been enjoyed continuously and it must be reasonable.' RWM Dias *Jurisprudence* Butterworths, London 1964 142.

189 A Medani (n 144 above) 1.

190 In the case of Bamboulis v Bamboulis, the Chief Justice CJ Lindsay held that *'Custom in refers to local custom originating by usage in the Sudan, and is not applicable to the imported rule of law of foreign origin'.* Per Lindsay CJ. [Sudan High Court and Court of Appeal. Quoted in A Jok *el al Study of Customary Law in Contemporary Southern Sudan* World Vision International and The South Sudan Secretariat of Legal and Constitutional Affairs March 2004 6.

191 See the Khartoum High Court in *Maurice Goldenburg v Rachel Goldenburg et al, George Rizkalla Sayis and Edward Michel Sikias* [HC. CS-441, 1958] per Babikir Awadalla J, the argument centred around a case which held that 'custom' for a Jewish couple living in Sudan was defined as the Islamic customs and codes of the community in which they lived rather than the customs shaped by their Jewish religion. Quoted in A Jok *el al* (n 190 above) 7.

192 Engle Merry *From Law and Colonialism to Law and Globalization* Law and Social Inquiry Spring 2003 569--573.

193 Sec 7 provided that: *The Chiefs' Court shall administer the Native Law and Customs prevailing in the area over which Court exercises its jurisdiction provided that such Native Law and Custom is not contrary to justice, morality or order.*

194 A Jok *et al* (n 190 above) 16

such matters as the amount of payments/prizes, the sorts of suits that can be heard and the place within which the court could work out its authorities. [195]

One of the most prominent characteristics of Sudanese customary law is the lack of division amid criminal and civil law. Customary laws combine their treatment of civil and criminal laws. The motivation for this attitude has pronounced as a stable need to reinstate societal stability through recompense of harms.[196] The crucial goal of customary law is reconciliation between the aggrieved and offender and conflict resolution in civil and criminal law.[197] The norm of reconciliation intended at harmony over conciliation and compensation for damages dedicated.[198] This approach conformed to the African methods. African conflict resolution has labeled as insertion a best on strengthening associations on the foundation of justice, real integrity and impartial performance, rather than the severe legitimacy frequently connected with Western fairness.[199]

However, sometimes it is ambiguous where an individual could bring his or her case to ordinary court or tribal elders. There are some significant issues, such as murder cases; we found sometimes tribal leaders issue their rulings without reference to the court especially in Darfur.[200]

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[195] A Jok *et al* (n 190 above) 22
[196] A Jok *et al* (n 190 above) 16.
[197] As above.
[198] John Wuol Makec, identified the doctrines that character customary law practice and development. They are all different from Western jurisprudence. The doctrines include 'the most serious of cases and heinous of crimes, all efforts are made to settle disputes outside of Court, all procedures are made as simple as possible, the overall aim being to minimize parties' logistic problems, expenses and collateral losses and to ensure expeditious handling of cases, customary law procedure follows an inquisitorial system with Chiefs or Judges actively engaging the parties during the decision-making process. This differs radically from English-style adversarial systems, where the Judge acts in an observer role.' See A Jok *et al* (n 190 above) 17
[199] N Udombana 'An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?' (2003) 23 *Brooklyn Journal of International Law* 818.
[200] Prof Michelo Hansungule (The Supervisor) was told by one of the fourteen tribal elders who met him at El-Fasher that the tribal leader had just fined 2 million United States dollars against a man who became excited during a wedding ceremony and fired gun shorts which resulted in the deaths of six people. When Prof M. Hansungule asked retired Chief Justice Dafalla whether this case was properly handled to be taken to the tribal elders, the former Chief Justice said that it needed to be brought to ordinary courts for

The fundamental principle of customary law is conciliation, a vigorous tool in dispute resolution. In the prompt post-dispute era, ancient conflict will reemerge, and new conflicts are expected. Dispute resolution over customary law will be crucial to a non-violent and unbiased society. [201]

Some of the criticism directed at Sudanese customary law are poor treatment of women and children.[202] One of the problems that the customary law in Sudan is not found in written form. The unwritten form may lead to conflict between the customary law and the Criminal Law and its procedure.[203] In addition, the customary law is currently confronted from several ways, mostly by legislative law, *Shari'a* law, and International human rights law. Procedures to be followed according to custom does not comply with the fair trial rights enshrined in international human rights law and the INC.

5. International human rights law

Sudan ratified the ICCPR and the ACHPR in 1986. Fair trial rights provided for in article 7 of the ACHPR are not as exhaustive as those in article 14 of the ICCPR.[204] In

determination as to whether it was trial before tribal elders because there could be revenge. But Al-Fasher Prosecutor Ali Karam Alla Mursi thought tribal elders had jurisdiction.

[201] A Jok *et al* (n 190 above) 6..

[202] Especially in South Sudan, see Aleu Akechak Jok *et al* (n 190 above) 27. The position of women and children under most customary law systems is the basis of much contentious debate. 'Within southern Sudanese society the role and status of women is seen as a reflection of a culture that places a premium on the cohesion and strength of the family as a basis of society. The male is the undisputed head of the family and marriage as means of strengthening the bonds between families and clans within tribes. The role of women in this social pattern is that of cementing family ties through 'bride-wealth' and of producing children. To the outside spectator, particularly one whose culture is based upon the rights of the individual, the status of women in this role is that of property. Notwithstanding the fact that these cultural practices have evolved over countless generations and survived twenty years of war, some in the international arena view their effects upon the status and role of women to be repugnant and clamour for change.' A Jok *et al* (n 190 above) 7--8.

[203] For example, 'the majority of southern Sudanese customary law systems show plainly a conflict between international human rights laws and rights granted to women and children in customary law. The pressure to harmonize customary law with international law will continue to grow and must sooner or later be addressed. A strategy for resolving this issue should be developed by lawmakers, community leaders and the judiciary.' A Jok *et al* (n 190 above) 6.

[204] L Chenwi *Towards the abolition of the death penalty in Africa: A human rights perspective* (2007) 102.

addition, Sudan has ratified the Convention on the Rights of the Child (CRC),[205] and the African Charter on the Rights and the Welfare of the Child,[206] which guarantees the right to a fair trial of the child. Recently Sudan has also ratified the Convention on the Rights of Persons with Disabilities, which guarantees the right to a fair trial of the disable person.[207]

Nevertheless, the ratification alone is not enough and at the same time will not prove the actual practice of the government, but it can be considered as a first step towards realising human rights. Notwithstanding, the ratification of international treaties governing fair trial by Sudan, the impact of these laws is insignificant as domestic laws remain largely incompatible with international standards. The influence of these international instruments on administration of justice in Sudan is disputed and problematic. One reason is that the appropriate approach at domesticating international law in Sudan is uncertain. For instance, it is not clear whether Sudan is a monist or dualist state. The lack of clarity of the status is also evidenced in the jurisprudence of Sudan on this issue. Another example of this is the plethora of domestic laws in existence which questions the applicability of international standard on fair trial in Sudan.

However, there are many international human rights instruments that Sudan has not yet ratified, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[208] which guarantees the right to a fair trial for women, and

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[205] Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entered into force 2 September 1990. Sudan ratified CRC on 3 August 1990. Sudan also ratified the Optional Protocol on the Convention of the Rights of the Child on the Involvement of Children in Armed Conflict on 26 July 2005.

[206] OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999. Sudan ratified in 1990.

[207] On 24 April 2009.

[208] Adopted by UN Assembly General on 18 December 1979 and entered into force on 3 September 1981. Sudan did not ratify the CEDAW because it guarantees equality of women and men which according to the government not consist with *Shari'a* law some officials saying CEDAW has no reservation clause which is not correct. Several Arab Muslim countries, including Algeria, Bahrain, Egypt, Jordan, Kuwait, Lebanon, Libya, Mauritania, Oman, Qatar, Saudi Arabia, Iraq, Tunisia, United Arab Emirates (U.A.E.), Yemen, Djibouti and Syria have become parties to the Convention, although some have reservations about it. The Vienna Convention on the Law of Treaties 1969 prohibits reservation which are incompatible with the object and purpose of a particular treaty. CEDAW reiterates the Vienna

the Convention against Torture or Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) and its Optional Protocol[209] which prohibits cruel, inhuman and degrading treatment and punishments.[210] In addition, Sudan not ratified the First Optional Protocol to the International Covenant of the Civil and Political rights,[211] which establishes an individual complaints mechanism for the ICCPR and the Second Optional Protocol to the International Covenant of the Civil and Political rights, which prohibits the death penalty.

Under the African human rights system, Sudan has not yet ratified the Protocol establishing the African Court on Human and Peoples' Rights (1998)[212] and the Protocol on Women's Rights in Africa (2003). In addition, Sudan has not yet ratified the African Union Convention on Preventing and Combating Corruption (corruption is one factor that curtails many fair trial rights), and African Union Charter on Democracy, Elections and Good Governance (which strengthening and promoting universal values, principles of democracy, and good governance, all these factors are advancing the right to a fair trial). The African human rights system recognises the right to a fair trial and the right has occupied a central part of the African Commission's resolutions.[213] Although these resolutions are not compulsory on states, they are principles emanating from an international body that comply with prospects of anticipated behavior.[214] As a member of the African Union, it is important for Sudan to comply with the African human rights system by ratifying all important African human rights instruments so that its position is aligned with the position of the continental organisation which it joined voluntarily.

Convention and prohibits reservations which are incompatible with its own object and purpose. However, the prohibition of such reservations there is no explicit mechanism beyond the mechanism of objections by other states parties, in Vienna Convention or CEDAW by which a reservation can be adjudged incompatible with the convention, and the convention itself dosen not spell out the consequences of an incompatible reservation or an objection to such reservation.

[209] CAT adopted by UNGA resolution 39/46 on 10 December 1984 and entered into force on 26 June 1987. CAT Optional Protocol Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199 entered into force on 22 June 2006.

[210] Sudan has signed but not yet ratified the CAT.

[211] It was adopted by the UN General Assembly resolution 2200A (XXI) on 16 December 1966, entered into force on 23 March 1976.

[212] Signed on 9 July 1998 and not ratified yet.

[213] Udombana (n 141 above) 306.

[214] As above.

5. 1 Factors aiding incompatibility with international human rights law

Many factors contribute to the fact that international human right standards have not been incorporated in the national legal system although article 27(3) of the Bill of Rights of the INC stipulates that all the rights in international human rights treaties ratified by the Sudan shall be integral parts of the Bill of Rights. Some of these factors are religion, lack of political will and the unsettled status of domestication of international human rights law.

5.1.1 Religion

Shari'a law as a source of law contains many provisions that contradict the international standards of the right to a fair trial. For example, a man as witness in court is equivalent to two women witnesses and punishments such as stoning, amputation and whipping and apostasy is considered as a crime punished by death penalty.

Sudanese law took the traditional interpretation which contradicts international standards of fair trial.[215] According to the international standards, the States Parties have a commitment to safeguard the equal right of men and women to the enjoyment of all civil and political rights set out in the ICCPR.[216] Further, the discrimination against women means any distinction, exclusion or restriction made on the basis of sex.[217] Women shall have equality with men before the law.[218] Furthermore, the ICCPR and ACHPR are guaranteed the right to freedom of religion; therefore, apostasy is in violation the international standards.

It is unclear in cases of conflict between international human rights law and *Shari'a* law, which one of the sources of law according to the INC should prevail. The legislature has

[215] Art 14(1) of the ICCPR.
[216] Art 3 of the ICCPR.
[217] Art 1 of the CEDAW.
[218] Art 15(1) of the CEDAW.

not clarified the status of international human rights law when it contradicts the *Shari'a* law. The Chief Justice has not issued any guidelines or policies providing directions on the implementation of international human rights on a domestic level when contradicting *Shari'a* law.[219]

5.1.2 Lack of political will

The political factor plays a main role for non-compliance with the international human rights law. For example, Sudan's political experience since independence does not demonstrate political stability.[220] Three military regimes have ruled the country for more than 47 years since the independence in 1956.[221] Medani states as follows:

> Since independence of the country, successive Sudanese political regimes, whether parliamentary democracies or military regimes, have not, with varying degrees, succeeded in building a culture of human rights or fundamental freedoms, either as a culture among their citizens, or in their endeavours to seek and maintain political power. Such a generalization should indeed be qualified by the difference between the attitudes of the two regimes.[222]

In addition, political instability has been influenced by the long civil war in South Sudan[223], continuing armed conflict after secession of South Sudan in three areas,[224] declarations of a state of emergency from time to time,[225] Darfur disputes and the allegations of the massive human rights violation and lack of impartial and competent courts in Sudan. Further, the government's lack of political will to combat impunity that pervades crime prosecutions in domestic courts.

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[219] See M Babikir 'Why constitutional Bills of Rights fail to protect civil and political rights in Sudan: Substantive gaps, conflicting rights, and 'arrested' reception of international human rights law' in REDRESS, Faculty of Law, University of Khartoum & SHRM *The constitutional protection of human rights in Sudan: Challenges and future perspectives* (January 2014) 27.
[220] Medani (n 12 above) 7.
[221] The democratic regimes have only ruled for ten years since independence.
[222] Medani (n 12 above) 12.
[223] Civil war in South Sudan started in 1955, and it has been settled by signing a comprehensive peace agreement in 2005, although the impact of the long civil war remain.
[224] South Kordofan, Blue Nile & Abyie.
[225] Astate of emergency still exists in some parts of Sudan, especially the neighbouring states of South Sudan and the Darfur states.

5.1.3 Unsettled status of domestication approach

In states where the monist theory is followed, there is no division of international and domestic law, as together they are part of a united system. In the instance of conflict, international law takes superiority.[226] In the dualist tradition, the two systems are said to be separate, and therefore, international law has no influence on the domestic law, except it is incorporated through national legislation.[227] The monist theory generally is followed in civil law states. However, it is obvious that, to pronounce that international legal rules prevail over all relevant national legislation at all times is improper in several of these states and 'would be to overlook the real in the face of ideal.'[228] While it is correct that it would be an effective guarantee for the protection of human rights to provide for the supremacy of international human rights treaties over domestic laws, this is not realised in practice.[229]

As regards to the systems of monism and dualism, Higgins states that 'of course, whichever view you take, there is still the problem of which system prevails when there is a clash between the two'; and that '[i]n the real world the answer often depends upon the tribunal answering it (whether it is a tribunal of international or domestic law) and upon the question asked; in her view different courts do address that problem differently.'[230]

In Sudan, pursuant to the Constitution of 1998 which determined the functions of the National Legislative Assembly,[231] one of the functions of the National Assembly is to pass bills ratifying international conventions and agreements. This suggests that Sudan is a dualist country which means that the signing of a treaty is considered as suggesting a bill which is required to be ratified by the Parliament in order to become an obligatory

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[226] Khalil (n 48 above) 86.
[227] As above.
[228] Khalil (n 48 above) 87.
[229] See Khalil (n 48 above) 88.
[230] See R Higgins *Problems and process: International law and how we use it* Oxford: Clarendon Press (1994) 205. Quoted in UNOHCHR *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* Geneva: Publications of the Office of the High Commissioner for Human Rights (2003) 20.
[231] Art 73.

law. Consequently, the ratification of international treaties on human rights law pursuant to such approach cannot run as an active safeguard for the protection of the rights as there will be no restriction on the authority of the legislature to pass laws with the consequence of decreasing or even destroying the rights protected by treaties. They must enact legislation which gives effect to the rights protected by these treaties.[232]

However, according to article 27(3) of the INC which suggests that Sudan's legal system is monist[233] by stating that 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 the Bill of Rights. According to article 27(3) of the INC, the fair trial rights provided by the ICCPR and the ACHPR became part of Sudan's Bill of Rights.[234] Hence, article 27(3) of the Constitution provides the minimum standard and framework for protection and promotion of human rights in Sudan.[235] According to the supremacy of the Constitution, as guaranteed in article 3 of the INC, all other forms or laws or regulations that violate fair trial rights should be repealed. However, the Constitutional Court's Justice Abdalla,[236] interpreted article 27(3) of the INC as not binding, arguing that the whole Bill of Rights is not part of the Constitution because article 27(1) defined the Bill of Rights as a 'covenant' among the Sudanese people and between them and their governments at every level, while the Constitution is defined a 'set of legal rules' and, therefore, the Bill of Rights is not the Constitution.[237] He further argued that an interpretation of article 27(4) of the INC is the basis of dualist theory in the INC, because the article addressed that the 'legislation' shall regulate the rights and freedoms enshrined in the Bill of Rights. According to his view, the ratified treaties and conventions should be incorporated by 'legislation' in order to find application in Sudan.

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[232] Khalil (n 48 above) 88.
[233] Babikir (n 219 above) 27.
[234] Sudan ratified the ICCPR in 1986 (law no. 15/1986 sup to Sudan Gazette no. 1388) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1986 (Law no.30/1986. Sup to Sudan Gazette no. 1390).
[235] General guidelines for the preparation of information under the universal periodic report, Human Rights Council decision no. 6/102
[236] Now the President of the Constitutional Court.
[237] See *Alhaj Yousif A. Makki v Izzeldin Ahmed M. Alhassan & Sudan Government* Constitutional Case No. 6/2006 (2011) CCLJR 245--246.

This would preclude any contradiction between treaties and the Constitution or treaties and the domestic law. Therefore, the judge applies the provisions of the international treaties only if issued in the form of 'legislation.'[238] Another Constitutional Court's justice Zidan expressed that in case of conflict between international law and Islamic law, Islamic law prevails because international law is a 'general law' and Islamic law is a 'specific law.' According to his view, Islamic law is the foundation of the INC in accordance to article 5(1) of the INC.[239] Also, according to his view, international human rights law does not apply automatically in domestic courts if it contradicts Islamic law.

However, their position is in contrast to article 48 of the INC which states that the Constitutional Court should uphold, protect and apply the Bill of Rights. One of the Sudanese scholars criticised this decision as follows:

> In practice, however, the Constitutional Court, due to political influence, deliberately ignored article 48 to conclude that it is not under any obligation to uphold, protect and apply the Bill of Rights. The Court is of the view that the Bill of Rights is merely a covenant among the Sudanese people and between them and their governments at every level, and a commitment to respect and promote human rights and fundamental freedoms enshrined in the Constitution.[240]

The incorporation of international human rights treaties into national law in Sudan shows a contradictory application by courts.[241] In the constitutional case of *Alhaj Yousif A. Makki*,[242] the case dealt with the violation of article 27(3) of the INC and article 11 of the ICCPR. The applicant was imprisoned for debt pursuant to sections 244 and 232 of the Civil Procedure Act of 1983.[243] The applicant lodged a complaint before the Constitutional Court challenging the constitutionality of sections of 244 and 232 of the

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[238] As above pages 245, 246 & 251.
[239] See *Alhaj Yousif A. Makki* (n 237 above) 266--267.
[240] A Ahmed 'Economic, social and cultural rights under the constitutional Bill of Rights in the Sudan' in REDRESS, Faculty of Law, University of Khartoum & SHRM *The constitutional protection of human rights in Sudan: Challenges and future perspectives* (January 2014) 33.
[241] As a common law country, Sudan used to follow a dualist approach and according to the INC, art 27(3) which suggests that Sudan legal system is monist.
[242] *Alhaj Yousif A. Makki* (n 237 above) 228--269. The decision issued on 18 May 2008.
[243] Sec 244 of the Civil Procedure Act of 1983, which states that debtor arrested and imprisoned until the fulfillment of debt, and sec 232(c) states that confinement as one of the ways to carry out civil judgment.

Civil Procedure Act of 1983, contending that the imprisonment of the debtor (appellant) until the fulfillment of debt is an obvious violation of article 11 of the ICCPR,[244] because the ICCPR is part of the INC by virtue of article 27(3). The applicant requested the Constitutional Court to declare sections 244 and 232 of the Civil Procedure Act of 1983 unconstitutional.[245] However, the Constitutional Court dismissed the application on the ground that the confinement of the applicant occurred pursuant to commission of a criminal offence, and that is not subject to the provision of article 11 of the ICCPR.[246] Closer scrutiny of the Constitutional Court decision found that the narrow interpretation is inconsistent with the philosophy or the reason on which the prohibition contained in article 11 of the ICCPR on any obligations that came from financial receivables relate to individuals and not their persons, which inevitably leads to rid all physical coercion to meet rights.

The lack of clarity of the status is also evidenced in the jurisprudence of Sudan. The jurisprudence of the courts has also been marked by its limited reference to binding international standards or relevant comparative experience.[247] However, treaties are relied upon by the courts as binding laws in at least some cases of socio-economic and children rights. An example of socio-economic rights can be found in the case of *Accountants and Auditors Society v Sudan Government.*[248] In this case, the Constitutional Court held that any law contrary to article 28 of the Constitution and article 6 of the ICESCR that deals with the same right would be unconstitutional.

As an example of children rights, the Constitutional Court, in case of *Gasmelseed*,[249] found that the Supreme Court violated the CRC and the INC as the CRC is part of the INC by virtue of article 27(3). Accordingly, it found that the decision of the Supreme Court was unconstitutional because it violated the right to life. The Court referred

[244] Which indicates the inadmissibility of the imprisonment of the debtor to fulfill a contractual obligation.
[245] *Alhaj Yousif A. Makki* (n 237 above) 230.
[246] *Alhaj Yousif A. Makki* (n 237 above) 243.
[247] See, for example, *Farouk Mohamed Ibrahim Alnour* (n 58 above) 365.
[248] 1999--2003 SCCLR 137.
[249] *Nagmeldin Gasmelseed* (n 61 above) 399--424. The decision issued on 2 December 2008.

broadly to international human rights law and determined that article 27(3) made human rights treaties an intrinsic part of the national law that should prevail over national law.

The unclear nature of international human rights treaties to which Sudan is a party to is affecting the administration of justice. According to the position of the Courts on the matter, the UN Office of High Commissioner of Human Rights (OHCHR) reports that the ICCPR and its articles relevant to the right to a fair trial are not fulfilled properly in Sudan.[250]

The proper interpretation is that the Bill of Rights is a fundamental part of the INC. With reference to article 27(3) of the INC, courts should apply any reasonable interpretation that is compliant with international law over any alternative interpretation that is varying with international law.[251] Section 39 of the constitution of the South Africa, 1996 requires that '[w]hen interpreting the Bill of Rights a court or tribunal must (a) promote the values that underlie an open and democratic society based on human dignity, equality and freedom (b) consider international law and (c) may consider foreign law.' Also, the South African Constitution in section 35 safeguards the right to a fair trial and in section 37 the right to a fair trial is an aspect of a non derogable right. The South African Constitution contains a limitation clause[252] that allows for limitations to be exercised as long as such limitations are reasonable and justifiable in an open and democratic society and should take into account factors such as the nature of the right, importance, purpose, and the extent of the limitation.[253] In the case of Sudan, there is no limitation

[250] See, Eleventh periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan 23 January 2009, Tenth periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan 28 November 2008 and Ninth periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan 28 March 2008.
[251] L Oette 'Law reforms in times of peace processes and transitional justice: The Sudanese dimension' in L Oette (ed) *Criminal law reform and transitional justice: Human rights perspectives for Sudan* (2011) 23. See also, sec 233 of the Constitution of the South Africa, 1996.
[252] Sec 36.
[253] Bekker *et al* (n 68 above) 3.

clause in the INC. The fair trial rights in Sudan according to the INC shall not be derogated.[254]

However, article 27(3) of the INC has not efficiently converted international human rights standards to the national level. The automatic conversion of international human rights law into Sudan's domestic legal system has, however, elevated serious complications in terms of the real implementation of the law by law enforcement officials, as well as courts.[255]

The absence of legislative or judicial approaches towards international human rights law and standards confirms why constitutional Bills of Rights are not transformed into practice and incorporated at the national level.[256] The legislature has not clarified the status of international human rights law when it contradicts the national law and *Shari'a* law. The Chief Justice has not issued guidelines or policies providing directions on the implementation of international human rights at the domestic level.

6. Conclusion

The Constitution is the main source of fair trial rights in Sudan. However, the constitutional protection of the right to a fair trial has been weak in terms of the recognition and its effective implementation. The previous Constitutions of 1956 and 1964 did not fully guarantee internationally recognised fair trial rights. Although the Supreme Court in 1966 decided the unconstitutionality of the amendments of the Constitution, the democratic government at the time did not abide by the Court's decision. The Constitution of 1973 included most international fair trial rights standards,

[254] Art 48 of the INC provides 'subject to article 211 herein, no derogation from the rights and freedoms enshrined in this Bill shall be made. The Bill of Rights shall be upheld, protected and applied by the Constitutional Court and other competent courts; the Human Rights Commission shall monitor its application in the State pursuant to article 142 herein'. Also, art 211(a) of the INC provides '[t]o suspend part of the Bill of Rights. However, there shall be no infringement on the right to life, sanctity from slavery, sanctity from torture, the right of non-discrimination on the basis of race, sex, religious creed, the right in litigation or the right to a fair trial'.
[255] M Babikir (n 219 above) 26.
[256] M Babikir (n 219 above) 25.

but they have not been enforced due to the nature of the military regime at that time. The Transitional Constitution of 1985 included some of the international standards of fair trial rights, but they were repealed in 1989 due to the military *coup*. The Constitution of 1998 also included some fair trial rights, which were not completely in line with international standards of fair trial rights and practically there was an influence of the executive authority upon the judiciary which invariably affected the proper interpretation of the rights.

The INC is not exhaustive in terms of fair trial rights that it contains and even those in place are not fully in line with the international standards. In addition, the mechanisms for protecting the right to a fair trial such as the National Judicial Service Commission and the Constitutional Court have failed to protect fair trial rights due to many factors, including the numerous pieces of legislation that exist coupled with the influence of the executive.

According to the INC, one of the most important mechanisms to protect fair trial rights is the Sudanese Constitutional Court. However, the Court's jurisprudence has mostly supported existing laws such as those dealing with immunity of state officials. In several instances the jurisprudence of the courts was based on questionable arguments, for example, that the offences were so serious that they required maximum punishments while disregarding the defendants' claim that their confessions had been extracted under torture.[257] The jurisprudence has also been marked by its limited reference to binding international standards or relevant comparative experience.[258]

The right to a fair trial as provided for under Sudanese legislation is not in line with the requirements of international human rights law, in particular, the ICCPR. In comparison to international human rights standards, many subsidiary rights of the right to a fair trial have been left unrecognised in Sudanese law. There are many statutes in contradiction with the international human rights law. There are also problematic gaps and deficits

[257] See *Paul John Kaw & Others* (n 60 above).
[258] See for example, *Farouk Mohamed Ibrahim Alnour* (n 58 above).

between enacted legislation and its application by law enforcement institutions. The judiciary and the Constitutional Court, which according to the Constitution is the guardian of rights and freedoms, do not properly protect these rights in practice.

As mentioned before, one of the sources of law in Sudan is *Shari'a* law. Many scholars criticised the implementation of Islamic law, but did not criticise Islamic law itself. In fact, during various periods of Islamic history most Muslims countries including Sudan did not implement Islamic law properly, and they misused its principles by implementing the rigid interpretation of some provisions or use it as a tool to suppress their opponents.

In fact, centuries ago *Shari'a* law guaranteed most fair trial rights. However, there are some areas of *Shari'a* law that do not meet the international standard of fair trial rights. There are liberal interpretations of many of these contradictions, for example, the liberal interpretation to admit a single female witness.[259] Sudanese law took the traditional interpretation which is obvious in contradicting with the international standards of a fair trial and violate article 14(1) of the ICCPR.

There is nothing under Islamic law that prohibits states from fulfilling the obligation to provide effective domestic remedies in case of the violation of the rights of individuals guaranteed under the international human rights law including the right to a fair trial. The main principle in Islam is that any act is allowed, if there is no provision to prohibit it.

With regard to custom as source of law, the criticisms directed at Sudanese customary law are poor treatment of women and children. In addition, the customary law in Sudan is not found in written form. The unwritten form may lead to conflict between the customary law and the Criminal Law and its procedure. Moreover, the customary law is confronted from several ways, mostly by legislative law, *Shari'a* law, and International

[259] *Ansar Burney* (n 132 above) 102.

human rights law. Procedures to be followed according to custom does not comply with the fair trial rights enshrined in international human rights law and the INC.

Sudan ratified the ICCPR and the ACHPR in 1986. There are many international human rights instruments which Sudan has not ratified yet. According to article 27(3) of the Bill of Rights in INC, the provisions and standards of fair trial rights provided by the ICCPR and the ACHPR should be implemented in Sudan because they became part of Sudanese Bill of Rights. According to the supremacy of the Constitution, guaranteed in article 3 of the INC all other forms of law or regulations which are in violation of fair trial rights should be repealed.

It should be noted that some of the safeguards or the standards of fair trial rights in Sudanese law are not in conformity with the norms and standards of the relevant global or regional instruments. Pursuant to massive human rights violations in Sudan, it is important to subject the supervision of the Human Rights Council by a special rapporteur[260] and later independent expert[261] to monitor human rights situation in Sudan.

The impact of the ratification of treaties governing fair trial rights by Sudan is insignificant as domestic laws remain mainly irreconcilable with international standards. A reason for the inconsistency is that an appropriate approach at domesticating international law in Sudan is uncertain. For instance, it is not clear whether Sudan is a monist or dualist state. The lack of clarity of the status is also evidenced in the jurisprudence of Sudan on this issue.[262] A further issue relates to the plethora of domestic laws in existence which questions the applicability of international standards on fair trial rights in Sudan.

Throughout the study of the sources of fair trial rights in Sudan, there are factors that have affected the compatibility of international standards both in realisation and

[260] Council resolutions 6/34, 6/35, 7/16 and 9/17.
[261] Council resolution 11/10.
[262] See pages 71--76 of this thesis.

implementation including poverty, lack of awareness about rights, laws that are contrary to fair trial rights, religion, lack of political will, and unsettled status of domestication of international human rights law.

Chapter Three

The compatibility of the right to a fair trial under Sudanese law with international human rights law: The pre-trial phase

Many violations of the right to a fair trial in Sudan occur during the pre-trial stage of the criminal process. This chapter discusses specific pre-trial rights[1] as recognised under international, Sudanese and Islamic law. The pre-trial rights to be discussed and analysed are: (1) the right against arbitrary arrest or detention; (2) the right to be presumed innocent; (3) the right not to be compelled to testify against oneself or confess guilt; (4) the right to *habeas corpus* and right to be brought promptly before a judicial authority; (5) the right to bail; and (6) the right to legal service.

1. The right against arbitrary arrest or detention

1.1. The prohibition against arbitrary arrest or detention

The right against arbitrary arrest and detention is guaranteed in international and regional human rights law, as well as in terms of *Shari'a* law. Pre-trial detention should never be used as punishment and should only be used in exceptional circumstances.[2] International law identifies three instances were arrest and detention is arbitrary, these being:

> (1) an arrest or detention which has no valid legal basis, for example, an arrest based on an invented criminal charge that does not exist in the Penal Code, (2) an arrest or detention intended to deny the exercise of fundamental rights guaranteed by international or constitutional law such

[1] Although the scope of this chapter is on pre-trials, we will however stray to trial rights to an extent they are relevant pre-trial rights.
[2] N Adib 'At the state's mercy: Arrest, detention and trials under Sudanese law' in L Oette (ed) *Criminal law reform and transitional justice* (2011) 124.

as the right to freely express an opinion, (3) an arrest or detention where essential procedural guarantees are not observed so as to give the deprivation of liberty an arbitrary character.[3]

The HRC specifies that the meaning of arbitrariness is 'not to be equated with against the law but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law remand in custody pursuant to lawful arrest must not only be lawful but reasonable in the circumstances.'[4]

As part of the efforts to protect individuals against arbitrary arrest and detention, the UDHR in articles 3 and 9,[5] and the ICCPR in articles 9 and 10 enshrine the right to liberty, security and dignity all of which may be impacted through arbitrary arrest and detention. Article 9, of the ICCPR for instance, allows for pre-trial detention in exceptional circumstances and requires that such detention should be for as short a period as possible. The article guarantees the right to seek compensation to victims of unlawful arrest or detention. Article 10 requires detained persons to be treated with dignity and requires separation of children from adults. Additional measures have been adopted at international levels that are aimed at ensuring that detainees are held in acceptable conditions.[6]

At the African regional level, article 6 in the ACHPR guarantees the right to liberty and security, as well as prohibiting deprivation of freedoms by arbitrary arrest, unless there is reason or condition laid down by law. Article 6 of the ACHPR has been criticised for

[3] 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* issued by the Office of the High Commissioner for Human Rights on 28 November 2008 12. See also, OHCHR *Fact Sheet No. 26: The Working Group on Arbitrary Detention* http://www.unhchr.ch/html/menu6/2/fs26.htm (accessed 12 October 2013).
[4] *Mukong v Cameroon* Communication No. 458/1991 UN Doc. CCPR/C/51/458/1991 (1994) para 93.
[5] Art 3 (security of person) & art 9 (right to liberty).
[6] See, for example, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles), adopted by consensus by the UN General Assembly in 1988. See also, the Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules), adopted in 1955 by the First UN Congress on the Prevention of Crime and the Treatment of Offenders and approved by the UN Economic and Social Council. UN Doc. A/CONF/611, Annex 1, E.S.C. res. 663 C, 24 UN. ESCOR supp. (No. 1) at 11, UN Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 UN ESCOR supp. No.1) at 35, UN Doc. E/5988 (1977).

not sufficiently dealing with the pre-trial stage.[7] The ACHPR is strengthened by additional measures that set basic standards for those deprived of their liberty.[8]

In Sudan, officials have the authority to detain people arbitrarily and in some intances without trial. The government uses the excuse of emergencies to justify such detentions, even though the African Charter does not allow for derogations to be made during emergencies.[9] In terms of time, the African Charter does not define the phrase 'reasonable time'. Generally, detention and trial, which are often the areas where systematic violations of civil and political rights occur, are not dealt with adequately in the African Charter.[10]

As far as Islamic law is concerned, the background to prohibiting arbitrary arrest and detention can be found in the *Sunnah*, where evidence exists that personal liberty and security are guaranteed in Islamic law. An example of an objection to arbitrary arrest and detention can be traced to Prophet Mohamed, who at Medina intervened on behalf of some persons, who were arrested while the Prophet was giving a sermon in the mosque. It is clear that there was no reason given as to why these persons were arrested and detained, hence, the Prophet ordered that 'the detained persons be released since their arrest and detention could not be justified.'[11] This event accommodates the contemporary constitutional law remedy of *habeas corpus* guaranteed under article 9(4) of the ICCPR. Evidently, there is no contradiction between *Shari'a* law and the significant procedural safeguards to guarantee liberty and security of the person under article 9(2) to 9(5) of the ICCPR.[12] Islamic jurists such as Baderin

[7] F Viljoen 'Introduction to the African Commission and the regional human rights system' in Heyns C (ed) *Human rights in Africa* (2004) 404.
[8] See for example, Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island Guidelines) www.achpr.org/instruments/roben-island-guidelines-2008 www.achpr.org/instruments/roben-island guidelines-2008 (accessed 29 September 2010).
[9] N Udombana 'The African Commission on Human and Peoples Rights and the development of fair trial norms in Africa' (2006) 6 *African Human Rights Law Journal* 302.
[10] C Heyns 'Civil and political rights in the African Charter' in M Evans & R Murry *The African Charter on Human and Peoples' Rights: The system in practice 1986–2000* (2002) 155.
[11] M Baderin *International human rights and Islamic law* (2003) 89.
[12] As above.

have also accepted that an individual could not under *Shari'a* law be deprived of his liberty without a legally valid jurisdiction.[13] The Islamic Declaration in article 18(a) provides that '[e]veryone shall have a right to live in security for himself, his religion, his dependants, his honour and his property' and to article 20 provides that '[i]t is not permitted without legitimate reason to arrest an individual, or restrict his freedom to exile or to punish him.'

The Sudanese Constitutions of 1956[14] and 1964[15] also provided that 'no person may be arrested, detained, imprisoned or deprived of the use or ownership of his property, except by due process of law.' Article 65 of the Constitution of 1973 provides for the freedom of accused persons from torture, coercion, or inducement and the nullity of all evidence obtained through such means, the legal accountability of persons involved in such actions, and the right of the victim to compensation and the right to be released on bail.[16] Under the Constitution of 1998 '[e]veryone is free and shall not be arrested, detained or imprisoned except in accordance with the law which shall prescribe the charge, the maximum time limit that one may be held without charge, the means of release and the conditions of treatment while in detention.'[17] However, the previous constitutions' standards in this regard were irreconcilable to international standards.

In terms of the current Constitution, the Interim National Constitution of 2005 (INC), regarding personal liberty, '[e]very person has the right to liberty and security of person; no person shall be subjected to arrest, detention, deprivation or restriction of his or her liberty except for reasons and in accordance with procedures prescribed by law.'[18] Sudan's INC in article 34(2) states that '[e]very person who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest and shall be promptly informed of any charges against him or her.'

[13] Baderin (n 11 above) 90.
[14] Art 4.
[15] Art 4.
[16] See also art 67 of the 1973 Constitution.
[17] Art 30.
[18] Art 29.

In comparison to articles 29 and 34 of the INC, the ICCPR provides greater detail. The differences and similarities include the following:

- The ICCPR specifies that arrest and detention must not only be lawful according to the national law, they must also not be arbitrary.[19] This means that the national law has to conform to the pertinent international law.[20] Article 29 of the INC does not explicitly recognise the prohibition of arbitrary arrest and detention. However, by virtue of article 27(3) this article is to be interpreted in line with article 9(1) of the ICCPR and article 6 of the ACHPR, which both unequivocally forbid the arbitrary arrest and detention.[21]
- The right to be brought promptly before the competent judicial authority which guaranteed by ICCPR is not guaranteed in INC.[22]
- The ICCPR specifies that a trial should take place within a reasonable time or the person should be released. In Sudan, the detention duration before bringing the detained person before the competent judicial authority does not meet the meaning of prompt, the duration of pre-trial detention is not clear, as the law does not provide a specific time frame.[23]
- Right to *habeas corpus* for anyone who has been the victim of illegitimate arrest or detention which guaranteed by ICCPR is not guaranteed in INC.
- An enforceable right to compensation[24] which guaranteed by ICCPR is not fully guaranteed in INC.

Under Sudanese law, the powers of detention apply to a wide ambit of offences containing the probability of being arrested on suspicion. The law does not adequately stipulate what constitutes 'suspicious circumstances'[25] that act as an activating mechanism for an arrest. Consequently, the police have powers to define the grounds

[19] *Mukong v Cameroon* (n 4 above) para 8.9.
[20] Adib (n 2 above) 122.
[21] Adib (n 2 above) 124.
[22] See arts 29 & 34 of the INC and arts 9 & 14 of the ICCPR.
[23] L Chenwi *Towards the abolition of the death penalty in Africa: A human rights perspective* Pretoria University Law Press 2007 57.
[24] Adib (n 2 above) 122.
[25] Sec 68(2)(b) provides as follows: 'The policeman, or people's administrator may arrest, without warrant, any person found in suspicious circumstances, and does not present reasonable grounds for his presence, or is unable to give satisfactory particulars in such circumstances'. See Adib (n 2 above) 123.

for arrest in a given case, and these powers increase the jeopardy of exploitation.[26] In United States of America (USA), for example, the ambiguity of the law that granted police powers to arrest on suspicious grounds was declared unconstitutional in the case of a vagrancy law that was determined to provide fertile ground for incrimination of persons based on vague and imprecise terms that were open to interpretation by the courts at will.[27]

In terms of Sudan's CPA, an arrest can be done without a warrant of arrest and on the basis of 'suspicious circumstances' if, for instance, one is found with property suspected to be stolen, or for not giving his or her name and address.[28] In addition to the Sudanese Constitution, section 4 of the Sudan CPA sets out the main principles that need to be observed during arrest and detention.[29] One of these principles in section 4(f) provides that 'due regard shall, as far as possible, be had to lenity in the procedure of inquiry, summons, and exercise of the powers of arrest shall not be resorted to saving where necessary.' The arrest may be conducted on the basis of a warrant issued

[26] Adib (n 2 above) 123.
[27] As above 123. See also, the case of *Papachristou v City of Jacksonville* 405 US 156 (1972).
[28] S Parmer 'An overview of the Sudanese legal system and legal research' www.nyulawglobal.org/globalex/sudan.htm (accessed on 29 September 2010). See also, sec 68 of CPA.
[29] In addition to sec 4 there are a set of detainee's rights adopted in CPA under sec 83 including: Right to treatment shall preserve the dignity of the human being; no physical or mental hurt allowed, and the accused should be provided with appropriate medical care. The restriction of accused freedom shall not be more than may the necessity for preventing his or her escape. The right to contact his or her advocate and the right to meet the prosecution attorney or the magistrate. The right to be placed into custody of the Police, which assumes arrest, or inquiry, and he could not be transferred, or placed, in any other place, except the Prosecution Attorneys Bureau, or the court approved. Right to inform his or her family, or the body to which he belongs, and contact the same, upon the approval of the Prosecution Attorneys Bureau, or the court.Right to inform or notify family or the body concern by the Criminal Police, the Prosecution Attorneys Bureau or the court if the arrested person is juvenile, or suffering from a mental infirmity, or any disease.Right to obtain a reasonable amount of foodstuffs, clothing and cultural materials, at his own cost, subject to the conditions relating to security and public order. See secs 59, 72, 75(1), 86(1), 93, 95(a), 95 (b), 95(f), 86(1), See also, sec 59 of the Child Act 2009. In respect of the Child Act, sec 59 states that '(1) No procedure of arrest, or detention shall be taken, against a Child, save after summoning the guardian, and no arrest warrant shall be executed, save by the Family and Child Protection Unit. (2) The Prosecution Attorney, or Magistrate, who has issued an arrest warrant, shall write a record, wherein he or she shall show the reasons, which justify the same, and set forth in the warrant all the social, psychological and instructional measures, which have to be taken, on the part of the Family and Child Protection Unit, upon executing the arrest warrant. (3) The Family and Child Protection Unit, upon arrest of the Child, shall, as far as possible, forthwith notify both, or one of his or her parents, his or her guardians, or those, who exercise supervision over him or her. (4) No Child shall be detained, or kept, upon his or her precautionary detention, with adult persons'.

by a Prosecution Attorney or Magistrate and the arrest itself may be undertaken by a police officer or administrator.[30]

In terms of periods of detention, the CPA allows police to detain people for a period not exceeding 24 hours for inquiry. The prosecution attorney can renew detention in all cases for a period not exceeding three days for enquiry. The magistrate can renew detention every week for a period not exceeding two weeks. The superior magistrate can renew detention every week for a period not exceeding six months.[31] One of Sudanese human rights activist criticised section 79 of the CPA arguing as follows:

> Article 79 of CPA is wider in scope as it provides the authorities with broad powers of arrest and detention for the purpose of an inquiry although interrogating a suspect and taking his or her testimony does not require such powers a suspect can simply be summoned. A suspect may be arrested or detained for a period not extending beyond the time required to achieve the purpose of the detention. It should not lengthen to extent that it deprives the suspect of his personal liberty without valid ground.[32]

The views expressed above are compatible with article 6(1) of the Tokyo Rules,[33] which requires that pre-trial detention should be used as a means of last resort and article 6(2) that calls for restricting detention so that it does not last longer than necessary.[34] Accordingly, Sudan as state party to ICCPR should guarantee that the allowable legal duration of detention in police custody is limited in duration.

In Nigeria, for example, Nigerian law requires that, within 24 hours, detained persons must be informed of their suspected crime.[35] Such person shall be brought before a court of law within 24 hours if the court is within 40 km from the place of detention or 48

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[30] See secs 67 & 68 of CPA. In Darfur region, Administrator is usually a tribal leader appointed by government in terms of 1991 Native Administrative Act.
[31] See sec 79 of the CPA. The court can order detention for trial (sec 80) can order detention for up to one month, renewable weekly and superior magistrates can order detention for up to six months renewable monthly.
[32] Adib (n 2 above) 125.
[33] Adopted by UNGA on 14 October 1990.
[34] Adib (n 2 above) 125.
[35] See sec 35(3) of 1999 Nigeria Constitution.

hours if the distance is longer. In addition, the trial must take place within two months from the date of arrest or detention in the case of an individual not permitted to bail or within three months in the case allowed to bail.[36] Nevertheless, this is not the case in practice particularly in cases wherever an individual is suspected to have committed a capital crime.[37]

Sudan's CPA allows police supervision or restriction of movement of accused persons.[38] It allows for free legal representation only for people facing grievous charges.[39] The right to free legal representation can only be used at the trial stage and not during the pre-trial stage. In addition, the CPA gives a right to translation of trial proceedings, but not pre-trail procedure, thereby once again violating an accused person's right at the important pre-trial stage.[40] Following a 2002 amendment to the CPA, additional powers have been granted to police, including the powers to investigate, arrest, interrogate or detain regardless of magisterial investigation as was legally required to safeguard the right of persons in conflict with the law.

In principle police have to advise suspects of their pre-trial rights, including the right to consult a lawyer, and the right to remain silent. However, in practice, a person under investigation can be imprisoned for up to one month or be fined for committing an offence if he or she chooses to refuse to answer the question posed to him or her by the investigator.[41]

With the exception of a vague reference, the CPA fails to guarantee in clear terms an accused's right to meet his or her lawyer by specifying timeline, purpose, frequency or

[36] See L Chenwi (n 23 above) 58.
[37] As above.
[38] Parmer (n 28 above) www.nyulawglobal.org/globalex/sudan.htm (accessed on 29 September 2010). See also, secs 84 & 85 of CPA.
[39] See sec 135 of CPA.
[40] See sec 137 of CPA.
[41] See sec 98 of CPA which provides that: 'Whoever is required by a competent public servant to answer questions which he is legally bound to answer, or to sign statements made by him, refuses to do the same, shall be punished, with imprisonment, for a term, not exceeding one month, or with fine, or with both'.

confidentiality of such meetings.[42] In addition, the right to meet a lawyer is subject to the prosecution attorney's bureau approval.[43] Even though the principle is set out, the details of how it is to be realisedare left out to the discretion of prison regulations and other such instruments which have in practice weakened the practical value of the guarantee. The right of the accused to meet his or her lawyer should always be granted irrespective of the seriousness of the offence the accused is suspected of having committed, and irrespective of whether the police investigation has been completed or not.[44] The right to access and interact with legal representatives has been widely accepted in some jurisdictions as is the case in Europe where the European Court of Human Rights has held that an accused must have the advantage of the assistance of a lawyer at the early stages of police interrogation where the rights of the accused may be irretrievably prejudiced.[45]

At the pre-trial stage, lawyers face impediments in seeking to ensure their clients' rights throughout the investigation stage. The previous criminal procedure laws provided for the confidentiality of the case diary, which meant that the defence lawyer was forbidden from revising the investigation record. This practice continues today albeit the relevant provision is no longer included in the CPA. The legal basis of this practice is a circular from the Minister of Justice denying both the defence and prosecution lawyers the right to review the case diary. The practice in Sudan of precluding lawyers from all investigation and interrogation procedure can be attributed to the lack of obvious safeguards laid down in the Sudan's procedural laws.[46]

1.2 Minimum standards for places of detention

[42] See sec 83(3) of CPA.
[43] Adib (n 2 above) 129.
[44] Adib (n 2 above) 127. The case is *Sudan Government v Dikran Haygounim* Sudan Court of Appeal AC/CR/REV/317/1967 SLJR (1967) 208.
[45] *Murray v UK* 22 ECHR 29 (1996) para 66.
[46] Adib (n 2 above) 127--128.

Minimum standards for places of detention should be applicable to all places of detention.[47] The State should ensure that all detention facilities operate under the supervision of the prison administration and uphold all the requirements of article 9 of the ICCPR.[48]

Pursuant to the African Commission's Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines),[49] unauthorised places of detention are prohibited, and as such it should be a punishable offence to hold a person in a secret or unofficial place of detention.

According to the Robben Island Guidelines, any person deprived of liberty shall be detained in an officially recognised place of detention.[50] In addition, information on the detention and place of detention should be made available to the family, legal representative or to any other person having a legitimate interest in the information relating to the detained person.[51]

In Sudan, it is not uncommon for people to be detained in unrecognised places for detention. For example, thirteen persons were detained as a result of a demonstration in which they were protesting against the building of the Kajbar Dam. Four of the demonstrators were detained incommunicado for 10 weeks, with the place of detention being unknown.[52] That constituted a violation of article 9 of the ICCPR.[53]

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[47] Places of detention by police, security forces, and armed forces. Also should be applied for children, women and mentally ill persons.
[48] See Concluding observations of the HRC: *Sudan* UN Doc. CCPR/C/SDN/CO/3/CRP.1 26 July 2007 para 22.
[49] The Robben Island Guidelines, adopted by the African Commission on Human and Peoples' Rights, meeting at its 32nd Ordinary Session, held in Banjul, The Gambia, from 17 to 23 October 2002.
[50] Art 23 of the Robben Island Guidelines.
[51] Art 31 of the Robben Island Guidelines.
[52] Amnesty International *Report 2008: Sudan* http://www.amnesty.org/en/region/sudan/report-2008 (accessed 10 October 2010). See also, Concluding observations of the HRC: Sudan UN Doc. CCPR/C/SDN/CO/3/CRP.1 (July 2007) para 22.
[53] Concluding observations of the HRC: *Sudan* UN Doc. CCPR/C/SDN/CO/3/CRP.1 26 July 2007 para 21.

Pursuant to the Robben Island Guidelines, all persons deprived of their liberty should have access to medical facilities and aid and have the right to be visited by and communicate with family members. Further, measures should be taken to conform to international standard,[54] which includes improved conditions in places of detention, the reduction of over-crowding, the use of non-custodial sentences for minor crimes, encouragement to professional medical bodies to look after detainees, and the facilitation of visits by non-governmental organisations (NGOs) to places of detention.

Excluding a detained person from access to a doctor or family members is a violation of his or her right a fair trial, the right to health care and the right to humane treatment. The right of detainees to have access to a doctor and family members should be laid down in the CPA. The detained person should be provided with proper medical care.[55] Accordingly, the HRC in 2007 asked Sudan that in its periodic state next report under the ICCPR, information should be supplied on the steps taken to uphold the rights of detainees and the methods employed to monitor the conditions under which detainees are kept.[56]

According to the Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa, states should provide the necessary facilities to a detained person in order for him or her to communicate with his or her lawyer, doctor, family and friends, and in the case of foreign nationals, his or her embassy or consular post or an international organisation.[57] The Principles further enshrine the detainee's right to dignity and averts any corporal or moral hurt. It forbids taking excessive benefit of the position of a detained or imprisoned person for the purpose of forcing him or her to confess, a forced confession may lead to a conviction or to testify against any other person. Furthermore, a detained person should not even with his or her permissionbe subjected to any medical or scientific testing which could be harmful to his or her health.

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[54] UN Standards Rules for the Treatment of Prisoners.
[55] The 4th and 5th Periodic Reports of the Republic of the Sudan in Accordance with Article 62 of the African Charter on Human and Peoples Rights for the Period 2008 – 2012 para 96.
[56] Concluding observations of the HRC: *Sudan* CCPR/C/SDN/CO/3/CRP, 1 26 July 2007 para 21.
[57] Art 13(2)(b)(c)(d) of the Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa.

Supervision should be done independent authorities to ensure that all the safeguards of detentions are practiced and supervision has the added value of ensuring that detainees can complain regarding any missing safeguards. States are accordingly required to ensure those officers or other individuals who subject arrested or detained individuals to acts of torture or to cruel, inhuman or degrading treatment are punished. In addition, victims of abuse can claim compensation.[58]

In Sudan, supervision over the pre-trial procedures is undertaken by the Prosecution Attorney.[59] However, the challenge is that the prosecution authority in Sudan falls under the Ministry of Justice which is a part of the executive authority. The current arrangements are ones in which the government authorities are supposed to supervise themselves.

Pursuant to the Robben Island Guidelines, independent complaint mechanisms should be established to receive, investigate and take suitable action on accusations of torture, cruel, inhuman or degrading treatment or punishment. Also, it calls for autonomous domestic institutions such as human rights commissions, ombudspersons and committees of members of parliament, to establish and strengthen the mandate to conduct visits to all places of detention and to generally address the matter of the preclusion of torture, cruel, inhuman and degrading treatment or punishment, guided by the UN Paris Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights. In respect of cases relating to arbitrary arrest and detention, torture, degrading or ill-treatment, the detained person has a right to compensation.

1.3 Specific laws affecting detainees' rights

There are many laws in Sudan that undermine the rights of arrested or detained persons as guaranteed by the international human rights law and the Sudanese Constitution. Some of the laws include the Emergency and Protection of Public Safety

[58] See arts 12 & 49(c) of the Robben Island Guidelines.
[59] See for example, secs 19, 20, 39, 55 & 56 of the CPA.

Act of 1997, the Khartoum Public Order Act of 1998, the Anti-Terrorism Act of 2001, the Armed Forces Act of 2007, and the National Intelligence and Security Act of 2009.[60]

The Khartoum Public Order Act places restrictions on public and private music, cinema or theatre shows,[61] with harsh penalties in place for offenders.[62] The procedure used in practice to prosecute accused persons according to this Act does not guarantee the minimum requirements of fair trial rights, for example, after detention the accused person is immediately sentenced without sufficient time being allowed for a person to consult a lawyer.[63]

The National Intelligence and Security Act of 1999 includes investigations, searches and detention of persons. The Act also provides for the power of the head of the security service forces to detain any person for a period of up to ten months without laying any charge against him or her and without any judicial review for the reason of detention.[64] The power conferred by the Act was in violation of the 1998 Constitution.[65] Through the law, the National Security Council is empowered to extend the duration of the detention indefinitely. In further erosion of individual rights, members of the security

[60] This decree was originally issued by the Governor of Khartoum State but later ratified by the Assembly of Khartoum State in 1996. This Act has been issued by the government of Khartoum State in pursuance of art 41 of the Eleventh Constitution Decree.

[61] Sec 7(1) provides as follows: 'Every person granted permission for a party with music shall respect the following restrictions: a) The party shall end by 11 p.m. b). There shall be no dancing between men and women and women shall not dance in front of men. c) There shall be no shooting. d) The singing of trivial songs is prohibited. (2) In cases where the restrictions mentioned in paragraph (1) are violated, the police may take the necessary steps, including stopping the party. Sec 8 Musical parties, cinema or theatre shows, exhibitions or other such events, as well as the continuance of the above-mentioned during the hours of 12 a.m. to 2 p.m. on Fridays is prohibited'.

[62] Sec 26 in the case of any contravention of this Act, a person may be punished by one or more of the following punishments: a) Imprisonment for a term not exceeding five years. b) A fine. c) Both of the above. d) Whipping. e) Forfeiture of any instrument used in such contravention. f) Closure of the premises for a term not exceeding 2 years.

[63] See, for example, 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, 12th November 2009 8--13 available at http://www.pclrs.org/downloads/Miscellaneous/Public%20Order%20Submission%20Paper%20MASTER%20FINAL.pdf; accessed 20 October 2014. See also *Report of the independent expert on the situation of human rights in the Sudan*, Mohamed Chande Othman, UN Doc. A/HRC/14/41, 26 May 2010, para.29.

[64] Sec 30 & 31.

[65] See art 30.

forces are immune from any civil or criminal proceedings against them for acts committed in connection with their official work. The Act, therefore, undermines the guarantees of the rule of law and equality before the law by providing that - members of security forces are not subjected to a court of law.

In 2009, a new National Intelligence and Security Act was enacted, repealing the 1999 law. The new Act gives the Security Council, the right to extend the period of detention, for a period not exceeding two months.[66] Under the new Act, detention is reduced to four and half months. However, an individual can be released briefly and then detained again for four and half month period. The new Act, therefore, negates any of the guarantees on arrest, detention, bail, search and treatment of individuals as provided in the CPA. The new Act provides immunity to members of security and their collaborators.

The National Intelligence and Security Act, in section 51, provides for a positive duty to inform the detainee about the reason for his or her arrest and also to notify his or her family. However, the limitation to such notification is that it should not prejudice the investigation. This provision is contrary to international standards that provide for a right of access to a lawyer of one's choice at the earliest stages of an investigation. The detainee has no right to challenge the legality of the detention if such detention is within the initial four and half months period.[67] These limitations of the law are contrary to the provisions of the ICCPR, which guarantee the right to be promptly brought before a judicial body and for the right to *habeas corpus*.[68]

In Sudan, the right to compensation according to the Security Act sets out that the initiation of a case against a member or collaborator is subject to the approval of the director of the security organ in the case of civil or criminal procedure. The director grants this approval whenever it transpires that the subject of responsibility is not

[66] Sec 50.
[67] Sec 51.
[68] See art 9(3) & 9(4).

connected with official work, provided that the trial of any member or collaborator before a criminal court shall be secret, during service or after the termination of service as to such act in linking with his official work. This affects the right to compensation against the arbitrary arrest or detention and compensation against inhuman or degrading treatment and torture.

The provisions of the 2009 National Intelligence and Security Act contradict the HRC recommendation,[69] requiring that the notion of national security be obviously defined by law and that police and security officers are required to state in writing why an individual has been detained. In addition, such information should be available to the public and be reviewable by courts of law. Moreover, the training courses of security staff in the area of international fair trial standards are very rare.[70]

Arbitrary arrests and detentions are a common feature of many states including Sudan. This is a practice particularly evident of autocratic and dictatorial states or during fighting and counter-terrorism operations.[71] Various cases demonstrate to the arrest and detention, with or without charges, of political opposition figures, human rights activists, journalists and others on unsatisfactory grounds.[72]

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[69] Concluding observations of the HRC: *Sudan* CCPR/C/79/Add.85 19 November 1997 para 13.

[70] Only Three training courses were held to qualify the staff in the area in line with the International Standards. Their training courses were carried out in collaboration with the International Committee of Red Cross (February-June-September) 2006. The Third Periodical Report of the Republic of the Sudan under Article 62 of the African Charter on Human and People's Rights May 2006 para 109.

[71] J Mujuzi 'Challenges the ugly face of criminal laws in East Africa: Repressive legislation and human rights in Uganda, Kenya and Tanzania' in L Oettee (ed) *Criminal law reform and transitional justice: Human rights perspectives for Sudan* (2011) 115.

[72] Report of the independent expert on the situation of human rights in the Sudan, Mr. Mohammed Chande Othman, Human Rights Council Fifteenth session, 14 September 2010, which stated that on 16 May, the leader of the Popular Congress Party (PCP) and a prominent critic of the Government was arrested and held without charge or judicial oversight until 30 June. Also on 16 May, four journalists of Rai al Shaab, a PCP affiliated newspaper, were arrested and detained. They were subsequently tried by a Khartoum court, with three receiving prison sentences of two to five years on charges of 'attempting to destabilise the constitutional system'. One of them told the court that he had been severely tortured while in custody of the National Security. See, Tenth periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in theSudan *Arbitrary arrest and detention committed by national security, military and police* issued by the Office of the High Commissioner for Human Rights on 28 November 2008. See also, *Amnesty International Report 2010: Sudan* http://www.amnesty.org/en/region/sudan/report-2010 (accessed 8 October 2012), *Amnesty International Report 2011: Sudan* http://www.amnesty.org/en/region/sudan/report-2011 (accessed 8 October 2012)

The Human Rights Committee (HRC) recommended that '[m]embers of the police and security forces should be subject to prosecution and civil suits for abuse of power without any legal restriction',[73] accordingly any provisions that are inconsistent with the position of the HRC should be repealed.[74]

The Emergency and Protection of Public Safety Act of 1997,[75] provides the statutory framework for emergencies and gives competent authorities the power to arrest anyone 'suspected of participating in crimes related to the declaration of emergency.'[76] However, the provision does not specify the crimes in question. The broad power given to the authorities without determining the crimes lead to great violations of detainees' rights especially in the Darfur region where the emergency still applies. The current position is in contradiction to the Human Rights Council's group of experts[77] sent to Sudan who recommended that emergency laws should not grant security agencies broad powers.

The Act does not deliver any protection against arbitrary arrests and detentions. The authority is provided extensive power to make precautionary arrests and detentions to include that if an individual has acted or may act in a way that affects public security or public safety or participated in any offence associated to the declaration, such person may be arrested and detained. [78] The Emergency Act does not provide for a time limit for detention, even though the emergency bylaws indicate that the order of arrest should be made provisionally.[79] The law makes no provision for any judicial authority to supervise the detention period.

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and *Human Rights Watch Report 2012: Sudan* http://www.hrw.org/world-report-2012/world-report-2012-sudan (accessed 8 October 2012).

[73] Concluding observations of the HRC: *Sudan* CCPR/C/79/Add.85 19 November 1997 para 17.

[74] As above.

[75] Act No. 1 of 1998.

[76] Sec 5.

[77] Mandated by the Human Rights Council resolution 4/8.

[78] A Medani 'A legacy of institutionalized repression: Criminal law and justice in Sudan' in L Oette (ed) *Criminal law reform and transitional justice: Human rights perspectives for Sudan* (2011). 83.

[79] Sec 15 of the Emergency and Public Safety Bylaw of 1998.

In addition, this law confers upon the President the powers 'to give the authorities any other powers deemed necessary and to set up special prosecution offices and special courts.'[80] The President or any person exercising delegated authorities can identify the procedures of the exceptional courts, which may issue extra penalties for a range of crimes. These laws produce a system that gives the executive extremely wide powers, which are almost unrestricted by any guarantees or judicial oversight. The use of emergency laws in Darfur has been a major concern. It has led to the interruption of peaceful civil society activities and caused an arbitrary and prolonged detention without any procedural guarantees or efficient oversight, which significantly heightens the risk of torture.[81]

The Armed Forces Act of 2007 is another of Sudan's laws that impacts on pre-trial rights. Although the Act should apply to military personnel, it can be extended to civilians even though its procedures differ from those of the CPA.[82] Cases have been recounted from the Three Areas[83] in which the Sudan Armed Forces randomly arrested and detained civilians, violating jurisdictional bounds imposed by Sudanese law, as well as the elementary procedural rights of the victims.[84] Many provisions of Armed Forces Act are in contradiction with the international standards of pre-trial rights, and should be repealed.

Another law impacting on arrest and detention and pre-trial rights in Sudan is the Anti-Terrorism Act of 2001. In this Act, the definition of unlawful acts is very broad which gives rise to serious concerns about the compatibility between the Act and human rights

[80] Medani (n 78 above) 84.
[81] As above.
[82] Persons subject to the provisions of Armed Forces Act 2007 sec 4, which states that (1) There shall be subject to the provisions of this Act, the following persons:- (h) any person accused of committing one of the offences provided for in Chapter II, of Part III, hereof, in the following cases:- (i) the accused holding the Sudanese nationality; (ii) the accused being present in the Sudan after committing the offence; (iii) the victim being of Sudanese nationality; (iv)the offence being committed totally, or partially in the Sudan, in its territorial waters, or airspace, or on aircrafts, or vessels, which hoist the Sudanese flag.
[83] Blue Nile, South Kordofan & Abyie.
[84] See 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* issued by the Office of the High Commissioner for Human Rights 22.

provisions of the INC.[85] According to the Anti-Terrorism Act, the courts that try the cases are special courts established by the Chief Justice and not the ordinary courts.[86] The pre-trial procedure is conducted before a special prosecution officer.[87] The Chief Justice in consultation with the Minister of Justice issues the rules of procedure for these courts. A Sudanese human rights activist noted '[t]he Minister of Justice is a member of the executive whose participation in the establishment of trial courts is a flagrant violation of the principles of independence of the judiciary and of the separation of powers.'[88] In addition, the Act enables the Chief Justice to establish a special court of appeal.[89] This is a clear violation of the right to equality before the law and courts. There is no need for such special court of appeal and the CPA provisions contain the hierarchy of courts which include a Court of Appeal. Moreover, the special court of appeal is authorised to confirm the verdicts of the death penalty and life imprisonment. This is a noticeable violation of the CPA, which provides such power exclusively to the Supreme Court.[90]

The rules of procedure of these special courts[91] provide that the rules of procedure should apply notwithstanding any provision of the Criminal Procedure Act and the Evidence Act. This provision makes the rules superior irrespective of the CPA provisions or other constitutional principles contained in the Evidence Act. The rules reduced the period of appeal to one week which is a violation of CPA which provide for a two week period for an appeal. The normal procedure gives the convicted person the right to approach the Supreme Court to contest the court of appeal decision. However, under the Anti-Terrorism Act, appeal is limited to only one stage which is the Special Court of Appeal. The Anti-Terrorism Act also introduces trials in *absentia*. The Act undermines the rights of arrested or detained persons by stating that the right to legal representation is not guaranteed in pre-trial stage and that the accused person should only appoint his or her defence counsel as soon as informed of the date of trial.

[85] See sec 5 of the Act.
[86] Constitution of special courts sec 13 and special court of appeal sec 14.
[87] Special prosecution office sec 15.
[88] Medani (n 78 above) 79.
[89] Sec 14.
[90] Medani (n 78 above) 80.
[91] Order No. 82 of 2008.

Valuable time is lost during which an accused could have better prepared for his or her defence. In addition, many 'requests by lawyers to meet defendants before the trial were adamantly rejected by the trial courts.'[92] Moreover, the rules authorise courts to convict on the basis of confessions, even though no investigation takes place to determine the circumstances under which the accused made the confession.[93] In the case of *Saboon*,[94] more than hundred persons were sentenced to death by special courts established pursuant to the Anti-Terrorism Act. Many accused persons were only provided access to a lawyer after their trial had begun.[95] The special courts relied on the confessions of the accused person which has been obtained under torture as the main evidence.[96]

2. The right to be presumed innocent

2.1. Content and implications of the presumption of innocence

A basic principle of the pre-trial stage as well as the right to a fair trial is the right of everyone charged with a criminal offence to be presumed innocent until proved guilty according to law and after a fair trial.[97]

The right to be presumed innocent starts with a treatment of suspects from the time the criminal charges are filed up to the stage immediately before the trial. The importance of this right is not only the protection of individuals in criminal proceedings, but also 'to maintain public confidence in the enduring integrity and security of the system.'[98]

In terms of international law, the right to be presumed innocent is guaranteed in numerous international instruments including the UDHR,[99] the ICCPR,[100] the African

[92] Medani (n 78 above) 80.
[93] As above.
[94] *Kamal Mohamed Saboon v Sudan Government* CS/60 of 2009.
[95] As above
[96] Medani (n 78 above) 80.
[97] Amnesty International *Fair trial manul* Amnesty International Publications (1998) 102.
[98] P Bekker *et al Criminal procedure handbook* (2005) 16.
[99] Art 11.
[100] Art 14(2).

Charter,[101] the Arab Charter on Human Rights,[102] the Universal Islamic Declaration of Human Rights[103] and also many rules in non treaties, the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment (Body of Principles),[104] the Resolution on the Right to Recourse and Fair Trial.[105]

Sudan is a party to the ACHPR and the ICCPR which guarantees the right to be presumed innocent in article 7(1)(b)[106] and article 14(2) respectively.[107] According to article 27(3) of the current Sudanese Constitution (INC), the ICCPR and the ACHPR have become part of the Bill of Rights. However, the real challenge lies not in the ratification of, but in the domestication of these standards.[108]

The principle of innocence is an important principle and fundamental to Islamic law where it means that everyone is born free of instinct, sin or liability. Prophet Mohamed said that 'everyone born on instinct free' and the *Qur'an* states that probability cannot affect the right. Prophet Mohamed said that 'Drop *hudud*[109] for Muslims as much as you can'[110] and the Prophet having advised 'that one should avert the *hudud* punishment in case of doubt because error in clemency is better than error in imposing punishment.'[111] The origin for every human being is the innocence and, therefore an accused is innocent until proven guilty.

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[101] Art 7(1)(b).
[102] Art 7 of the Arab Charter of Human Rights, adopted 15 September 1994 in Cairo.
[103] Art 5 Universal Islamic Declaration of Human Rights adopted on 15 April 1980.
[104] Principle 36(1).), Body of Principles G. A. res. 43/173, Annex, 43 UN.GAOR supp (No.49) at 298, UN Doc.A/43/49 (1998).
[105] Art 2(d).
[106] Art 7(1)(b) of the ACHPR which reads 'the right to be presumed innocent until proved guilty by a competent court or tribunal'.
[107] Art 14(2) 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'.
[108] Chenwi (n 23 above) 277.
[109] *Hudud* are crimes determined by the *Qura'n* or *Sunna* that carry fixed punishments (*Zina* 'fornication or adultery', *Qadf* 'false accusation of adultery', *Sariqa* 'theft', *Haraba* 'robbery', *Alshurb* 'drinking Alcohol', *Ridda* 'apostasy'.
[110] W Al-Zuhayli, *Al-Figh al-Islami wa–Adillatuh* (Arabic) 1997 vol 7 p. 5307.
[111] Baderin (n 11 above) 80.

As an important principle in Islamic law, the presumption of innocence underscores the extent of the law in carrying out punishment which is why maximum care is taken to safeguard that no mistake is made. This is appropriately described by the Prophet Mohamed who said 'the ruler that makes a mistake in the pardon is better than one who makes a mistake in the sentence.'[112] Furthermore, Prophet Mohamed told Ali Ibn Abi Talib when he was appointed as a Governor to Yemen, 'don't make any sentence until you hear from both parties.'[113] *Shari'a* in treating an accused person starts from the legal rule that the essence in man is innocence until his guilt is proved beyond reasonable doubt.[114]

This right to be presumed innocent has been guaranteed in all Sudanese Constitutions since independence: the Constitution of 1973,[115] the Constitution of 1985,[116] the Constitution of 1998,[117] and article 34(1) of the Sudan INC provides that an accused is presumed innocent until his or her guilt is proved according to the law.

As mentioned earlier,[118] the main legislation of the fair trial rights in Sudan is the CPA of which guarantees the right to be presumed innocent. In terms of the CPA, 'an accused is presumed innocent until his conviction is proved, and he is entitled to be subject to fair and prompt inquiry and trial.'[119]

Furthermore, section 5 of the Evidence Act of 1994 entrenchess this right in its basic rules, where it states that one of the main rules that courts should consider is that 'the

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[112] G Hussein 'Basic guarantees in the Islamic criminal justice system' in M Abdel Haleem *et al* (eds) *Criminal justice in Islam: Judicial procedure in the Shari'a* (2003) 45.
[113] Ibn Magah *Sunn Ibn Magah* Dar Elmariffa Beirut 1997.
[114] H Alzaki previous Chief Justice of Sudan 'Criminal justice in Islam' a paper presented before the seminar on enriching the universality of human rights: Islamic Perspectives on the Universal Declaration of Human Rights, Geneva, 1998. www.sudanlaws.net (accessed 7 November 2010).
[115] Art 69 stated that the right to the presumption of innocence and freedom of the accused not to incriminate himself or herself.
[116] Art 28 pointed out that the right to be presumed innocent until proven guilty according to law.
[117] Art 32 guaranteed that the right of the accused to the presumption of innocence, a prompt and fair trial, defense, choice of counsel, and the right not to be tried for acts that were not defined as crimes at the time they were committed.
[118] See chapter 2 sub-title: Criminal Procedure Act 41--50.
[119] Sec 4(c) of the CPA.

accused is presumed innocent until he is proved to be guilty beyond reasonable doubt.'[120]

Although the law does not allow the accused or his lawyer to attend the investigation or even to get a copy of the case record, in terms of judicial precedents the accused nonetheless has the right to contact a lawyer. Furthermore, the right to be presumed innocent obliges public authorities, particularly prosecutors and the police, not to make declarations about the guilt or innocence of an accused before the result of the trial.[121] It also means that the authorities have a mandate to preclude the news media or other influential social groups from manipulating the result of a case by pronouncing on its merits. The right to be presumed innocent is directly connected to the right to be tried within a reasonable time. This right requires that 'prosecution or respondent state should not make an open statement prior to and during the trial in press conference or public gatherings pronouncing an accused guilty of the crime.'[122]

In Sudan, however, it has been noted that sometimes the authority makes press announcements concerning accused persons' commission of criminal offences prior to trial. In the case of *Law Office of Ghazi Suleiman v Sudan*,[123] brought before the African Commission, the complainant alleged that article 7(1) of the African Charter was violated. Other allegations by the complainant included concerns that victims were declared guilty in public by investigators and senior government officials. It was alleged that the government organised extensive publicity about the case, with the intention to convey to the public that there had been an attempted *coup d'etat* and that those who had been detained were involved in it. The government indicated open aggression towards the victims by announcing that 'those responsible for the bombings' will be executed. The African Commission[124] found Sudan in violation of the right to be

[120] Sec 5(b) of the CPA.
[121] HRC General Comment 13: Administration of justice (article 14 of the ICCPR) adopted 13 April 1984, HRC/GEN/1/Rev.9, para 7.
[122] Chenwi (n 23 above) 298.
[123] *Law Office of Ghazi Suleiman v Sudan* Communication No. 299--98 (2003) AHRLR 134 (ACHPR 2003).
[124] Taken at the 33rd ordinary session held in Niamey, Niger, May 2003.

presumed innocent, under article 7(1)(b) of the African Charter.[125] Further, the African Commission urged the government of Sudan to implement its legislation in line with the African Charter and requested the government to duly compensate the victims. The African Commission condemned state officers for the publicity and declaring the suspects guilty of an offence before a competent court had established their guilt. Accordingly, the African Commission held that the negative publicity by the government violated the right to be presumed innocent, guaranteed by article 7(1)(b) of the African Charter.[126]

In a similar case cited as *Media Rights Agenda v Nigeria,*[127] the complainant alleged a violation of article 7(1)(b) of the Charter. The complainant alleged in this communication that earlier to the creation of the tribunal, the military government of Nigeria organised extreme pre-trial publicity to convince members of the public that a *coup d'état* conspiracy had occurred and that those detained in linking with it were guilty of treason. The complainant alleged further that any potential claim to national security by preventing members of the community and the press from the trial by the court cannot be acceptable, and, therefore, is violating the right to a fair trial, particularly the right to the presumption of innocence.[128] The government did not challenge the validity of the complainant's submissions. The African Commission accepted these as the facts of the case and, therefore, found the government of Nigeria in violation of the right to be presumed innocent, under article 7(1)(b) of the Charter.[129]

The presumption of innocence is, however, not considered to be violated if the authorities notify the public about criminal investigations and in so doing name a suspect, or specify that a suspect has been detained or has pleaded guilty, if there is no

[125] Also, the African Commission in this Communication found Sudan in violations of arts 5, 6 & 7(1)(a)(c)(d) of the ACHPR.
[126] *Law office of Ghazi Suleiman* case (n123 above) para 56.
[127] *Media Rights Agenda v Nigeria* Communication No. 224/98 (2000) AHRLR 262 (ACHPR 2000). Decided at the 28th ordinary session, Oct/Nov 2000, 14th Annual Activity Report.
[128] As above para 47.
[129] As above para 48.

statement that the individual is guilty.[130] To ensure that the right of an individual to a fair trial is protected, core principles that must be clearly adhered to regarding presumption of innocence are: the principle to burden of proof and proof beyond reasonable doubt.

In Sudan, the right to be presumed innocent is also violated by detaining the accused person of prolonged detention without being charged. The general rule based on the presumption of innocence means that 'no one should be held in detention any longer than necessary, especially where it has yet to be proven that he or she is guilty of an offence that is liable to imprisonment.'[131]

One of the main principles relating to the right to be presumed innocent is that the burden of proof lies with the prosecution. A second overarching principle of the presumption of innocence is that the evidence should be beyond reasonable doubt.[132]

2.2 The burden of proof

The principle of burden of proof requires that the prosecution must prove an accused person's guilt. If reasonable doubt exists, then the accused person must not be found guilty. In conformity with the presumption of innocence, the guidelines of evidence and conduct of a trial must guarantee that the prosecution abides by the burden of proof during the trial.

The HRC has pointed out that because of the presumption of innocence, the burden of proving the charge rests on the prosecution. The accused must be proven guilty beyond a reasonable doubt.[133] Although the standard of proof is not explicitly stated in international standards, 'no guilt can be presumed until the charge has been proved

[130] *Krause v Switzerland* 13 DR 73, 3 October 1978; see also, *Worm v Austria* (83/1996/702/894), European Court 29 August 1997
[131] Mujuzi (n 71 above) 118.
[132] R Clayton & H Tomlinson *Fair trial rights* (2001) 46.
[133] See HRC General Comment 13 (n 121 above) para 7. See also, *Gabre-Salassie & IHDRA (on behalf of former dergue officials) v Ethiopia* Communication No. 301/2005, African Commission's decision on 7 November 2011, paras 178 & 180 http://www.worldcourts.com/achpr/eng/decisions/2011.11 (accessed 23 April 2014).

beyond reasonable doubt.'[134] However, article 66(3) of the ICC Statute states that in order to convict the accused, the Court must be persuaded of the guilt of the accused beyond a reasonable doubt.

In Sudan, this principle is not fully recognised. For example, the law obliges the accused rather than the prosecution to elucidate components of certain crimes. An accused person may, for example, be forced to clarify their presence at or near the place where a crime happened, or whether or not they had contraband or stolen goods in their possession. [135] Such requirements, when incorporated into law, are known as statutory presumptions.[136] The law does not define this statutory presumption and forces a person to respond. These have been challenged on the grounds that they shift the burden of proof from the prosecution to the accused, in obvious violation of the presumption of innocence.

In a number of international bodies and national jurisdictions, the principle of the presumption of innocence has been galvanised and is now widely accepted in legal proceedings. In reference to statutory presumptions, for example, the European Court of Human Rights has found that 'statutory presumptions do not necessarily violate the presumption of innocence, as long as they are defined by law and are reasonably limited. They must also preserve the right of the accused to a defence, in other words, they must be capable of rebuttal by the accused.'[137]

The African Commission has found in a communication against Nigeria[138] that the government has not contradicted the allegations.[139] The Court sentence relied on indirect evidence connecting the accused to the act of the homicides, but held that they

[134] HRC General Comment 13 (n 121 above) para 7.
[135] Secs 68(2)(b) & 68(c) of CPA.
[136] Adib (n 2 above) 130.
[137] See *Pham Hoang v France* (66/1991/318/390) 25 September 1992, finding that a French customs law, which created rebuttable assumptions, did not violate the presumption of innocence. See also, Amnesty International *Fair trial manual* (n 97 above) 103.
[138] *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa & Civil Liberties Organisation v Nigeria* Communications 137/94, 139/94, 154/96 & 161/97. Decision at the 24th ordinary session, Oct 1998, 12th Annual Activity Report.
[139] *International Pen & Others* case (n 138 above) communication 154/96.

had failed to found that they did not commit the offense alleged. The allegation has also confirmed that earlier to and throughout the trial leading representatives of the government pronounced that accused was guilty of the offenses at several press conferences. As the allegations have not been challenged, the Commission found a violation of the right to be presumed innocent, under article 7(1)(b).[140]

According to some African states, for example, in South Africa, in the case of *Thebus and Moegamat Adams v The State,*[141] the appellants claimed that their conviction under the doctrine of common purpose[142] deprived them of the right to be presumed innocent. Section 35(3)(h) of the Constitution of the Republic of South Africa, 1996 guarantees to every accused person the right to a fair trial, which comprises the right to be presumed innocent.[143] The appellants argued that the substantive influence of the doctrine of common purpose was to distribute with the requirement of a fundamental link between the conduct of the accused and the criminal result. The Constitutional Court found that the State is required to prove beyond a reasonable doubt all the components of the offence charged in terms of a common purpose throughout the trial. When the doctrine of common purpose is correctly applied, there is no reasonable probability that an accused person could be convicted despite the existence of a reasonable doubt as to

[140] *International Pen & Others* case (n 138 above) para 96.
[141] *Thebus & Moegamat Adams v The State* (2003) AHRLR 230 (SACC 2003.
[142] The doctrine of common purpose, is a legal doctrine in some common law jurisdictions that imputes criminal liability on the participants to a criminal enterprise for all that results from that enterprise. A common incidence of the application of the rule is to impute criminal liability for assaulting a person with a knife on all the participants to a riot who knew or were reckless as to knowing that one of their number had a knife and might use it, even when the imputed participants did not actually have knives themselves. In English law, the doctrine derives from *R v Swindall & Osborne* (1846) 2 Car. & K. 230, where two cart drivers engaged in a race. One of them ran down and killed a pedestrian. It was not known which one had driven the fatal cart, but since both were equally encouraging each other in the race, it was irrelevant which of them had actually struck the man so both were held jointly liable. Thus, the parties must share a common purpose and make it clear to each other by their actions that they are acting on their common intention so that each member of the group assumes responsibility for the actions of other members in that group. When this happens, all that flows from the execution of the plan will make them all liable.
[143] In *S v Bhulwana,* O'Regan J, speaking for the Court in another case, held that: '[t]he presumption of innocence is an established principle of South African law which places the burden of proof squarely on the prosecution. The entrenchment of the presumption of innocence in sec 25(3) (c) must be interpreted in this context. It requires that the prosecution bear the burden of proving all the elements of a criminal charge. A presumption which relieves the prosecution of part of that burden could result in the conviction of an accused person despite the existence of a reasonable doubt as to his or her guilt. Such a presumption is in breach of the presumption of innocence and therefore offends section 25(3)(c). 68'.

his or her guilt. The court determined that the common purpose doctrine does not entrench the right to be presumed innocent.[144]

In Kenya,[145] the High Court held that the reasoning that the accused will falsely alter his own evidence or his own case before the trial commences is in order to escape conviction and, therefore, the accused is guilty of the crime he or she is charged with and is expected to act deceitfully. Such reasoning infringes section 77(2)(a) of the Constitution of Kenya that confers the accused with the right to be presumed innocent until he or she has provided evidence or confessed his or her guilt.[146]

In Nigeria,[147] the Federal High Court found that it is established law that 'a prisoner on death row has rights enforceable under the Constitution. An accused awaiting trial is presumed innocent until proven guilty; the accused also enjoys similar enforceable rights under the provision of section 46(1) of the Constitution.'[148]

In the Cameroon case of *The People v Nya and Others*,[149] the court of first instance found that the presumption of innocence is a substance of law and fact. The accused were not released although a court order was granted to this effect, but instructions from the General Prosecutor contradicted the court order. The court held that the constitutional right of the defendants' presumption of innocence has been violated,[150] and ruled that the presumption of innocence of these five defendants has been violated.[151]

2.3 The standards of poof

[144] *Thebus & Moegamat Adams* case (n 141 above) para 43.
[145] *Juma & Others v Attorney-General* (2003) AHRLR 179 (KeHC 2003).
[146] As above, para 25.
[147] *David & Others v Attorney General & Others* (2004) AHRLR 205 (NgHC 2004).
[148] As above, para 17.
[149] *The People v Nya & Others* (2005) AHRLR 101 (CaFI 2001).
[150] As above, para 6.
[151] As above, para 12.

In a Sudanese case, it was held that where there are discrepancies and contradictions in a witness's testimony to the extent that the Court is not satisfied that the crime was committed beyond reasonable doubt, the accused must be given the benefit of a doubt according to the cardinal rule in criminal law.[152]

The proof beyond reasonable doubt does not necessarily have the same degree or category. For example, there are two categories: Strong doubts and weak doubts. Strong doubts eliminate the elements or description of a crime, and significantly, the *hudud* punishment[153] is dropped although where the weak doubts do not eliminate the elements or description of a crime then *hudud* punishment is only dropped and not *ta'zir* punishment.[154]

The basic principles of law regarding the rights of the accused at pre-trial stage have been contentious in Sudan and other cases from Africa. For example, in many cases that have come before the African Commission,[155] the main accusation in these cases was that hundreds of prisoners were detained without trial or without being charged, and some were subjected to torture after arrest and detention.[156] The African Commission decided these are violations of articles 2, 4, 5, 6, 7(1)(a)(c)(d), 8, 9, 10 and 26. The African Commission strongly recommended to the government of Sudan to

[152] *Sudan Government v Awad Maki Mohamed Khalil* SLJR (1979) 114.
[153] *Shari'a* punishment for certain crimes.
[154] *Sudan Government v Al Haja Al Hussein Suliman* S. Ct. I Maj. Ct. / 84 / 1986 (1406 H).
[155] *Amnesty International & Others* v *Sudan* Communications 48/90-50/91-52/91-89/93.
[156] Also, the communications allege that the 28 army officers executed on 24 April 1990 were allowed no legal representation. The government states that its national legislation permits the accused to be assisted in his defence during the trial by a legal advisor or any other person of his choice. While before the Special Courts, the accused has the right to be defended by a friend to be approved by the Court. The government argues that the court procedures were strictly followed in the case of these officers. While there is a simple contradiction of testimony between the government and the complainant, the Commission must admit that in the case of the 28 executed army officers basic standards of fair trial have not been met. Indeed, the Sudanese government has not given the Commission any convincing reply as to the fair nature of the cases that resulted in the execution of the 28 officers. It is not sufficient for the government to state that these executions were carried out in conformity with its legislation. The government should provide proof that its laws are in accordance with the provisions of the African Charter, and that in the conduct of the trials the accused's right to defence was scrupulously respected. In this case, the very fact that the accused's choice is subject to the assent of the Court before which he is to appear constitutes a violation of the right to be represented by counsel of one's choice, as provided for in article 7 of the African Charter.

bring an end to occurrences of these violations in order to abide by its commitments under the African Charter.

The presumption of innocence is undermined by the CPA,[157] which gives authority to the Superior Prosecution Attorney, or the magistrate of the General Criminal Court to publish the names of a person against whom an arrest warrant has been issued, but who has absconded, requiring him or her to appear at the nearest police station within seven days failing which his or her properties can be attached and sold.[158] Such a procedure violates the right to be presumed innocent, because the absconded person has not yet been convicted to warrant a confiscation his or her properties and subsequent sale thereof.

A further example of a violation of the right to be presumed innocent is in case where a woman who is charged with an offence of *Zina* (adultery) on the basis of that her pregnancy is adequate evidence if she is not married. Such charge contradicts the legal and constitutional presumption of innocence and directly shifts the burden to the woman to attest her innocence. Her partner in contrast will not be subjected to additional prosecution if he just denies *Zina*.[159] A women accused of *Zina* might escape a penalty by alleging rape, and in a significant precedent, the Sudanese Supreme Court[160] recognised the rape defence without necessitating the proof of that rape. The principle

[157] Sec 78 provides: '(1) Where the Superior Prosecution Attorney , or the Magistrate of the General Criminal Court has reason to believe that the person, against whom the arrest warrant has been issued has absconded, or is concealing himself, in order to evade execution of the warrant, he may publish a written proclamation, requiring him thereby to deliver himself, to the nearest police station, within a period, not exceeding one week, of the date of publishing the proclamation, and require thereby the public to help in arresting him. (2) The proclamation shall be published as follows:-(a) it shall be broadcasted, or published through the appropriate mass media; or (b) it shall be affixed to some conspicuous part of the house, where he lives, or some conspicuous part of the town, or village where he resides; or (c) a copy thereof shall be affixed to some conspicuous part of the Prosecution Attorneys Bureau, the court or the Sudanese Consulate, or Embassy in the country where he resides'.

[158] The Superior Prosecution Attorney, or the Magistrate of the General Criminal Court, at any time, after publication of the proclamation, provided for in sec 78, may order the attachment of any property belonging to the person, in respect of whom the proclamation has been issued. Where the proclaimed person does not appear, at the date specified in the proclamation, the attached property shall be under the disposal of the body, which issued the attachment order, in accordance with the provisions of sec 99.

[159] A Abdel Halim 'Gendered justice: Women and the application of penal laws in the Sudan' in L Oette (ed) *Criminal law reform and transitional justice: Human rights perspectives for Sudan* (2011) 231.

[160] *Alhaja Alhussien Suliman* (n 154 above).

of this case has been followed in numerous cases, the latest case in August 2012.[161] In another case,[162] the accused who was sentenced to death appealed and retracted her confession of *Zina.* The court decided to withdraw the *hudud* punishment (stoning) and said the divorced women should not be treated as one of valid marriage. For those reasons, the Supreme Court dismissed the case of *Zina* against her.

Another provision of the CPA also appears to contravene the presumption of innocence as it grants the Governor or Commissioner the power to evict from a house or close shops, when it has been evidenced to him, after conducting the essential investigation, that any house or shop deals in alcohol, tranquilizers, psychotropic, gambling or prostitution.[163] Such an eviction or closure may be for a period of one year and without a court decree of conviction. Such measures undermine the presumption of innocence.

3. The right not to be compelled to testify against oneself or confess guilt

No person charged with a criminal offence may be compelled to testify against himself or herself or to confess guilt. This proscription is consistent with the presumption of innocence, which places the burden of proof on the prosecution in accordance with the international application of this principle.

This right has been guaranteed in many global and regional human rights instruments, including the ICCPR,[164] the Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment (Body of Principles),[165] the International Criminal Tribunal for the Former Yugoslavia (ICTY) Statute,[166] the International Criminal

[161] *Intisar Alsharif Abdalla* been charged with *Zina* in May 2012 sentenced by stoning to death. The Court of Appeal repealed the sentence by reason she was divorced.
[162] *Sudan Government v Kalthoum Khalifa Ajabna* HC/48/ 1992.
[163] Sec 129 of the CPA.
[164] Art 14(3)(g) of the ICCPR provides as follows: 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (g) not to be compelled to testify against himself or to confess guilt'.
[165] Principle 21.
[166] Art 21(4)(g).

Tribunal for Rwanda (ICTR) Statute,[167] the International Criminal Court (ICC) Statute.[168] The African Charter does not expressly set out and guarantee the right against self-incrimination. The omission from the African Charter is unfortunate, as many accused persons are coerced into a confession in many African states.[169] However, the African Commission stated that article 7(1)(b), which specifies that every person shall have the right to have his cause heard, comprises the right to be presumed innocent until proven guilty by a competent court which is universally recognised, and that the person has a right to remain silent. This means that no accused should be forced to testify against or incriminate himself or herself or make a confession under pressure.[170] The Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa are meant to guarantee that any evidence obtained through the use of torture, cruel, inhuman or degrading treatment or punishment shall not be acceptable as evidence in any proceedings, except against those persons accused of torture as evidence that the statement was made.[171]

The European Court of Human Rights does not explicitly mention the right against self-incrimination, but the European Commission noted that this principle constituted a fundamental principle, which protects everyone against being treated by public officials as if they were guilty of an offence even before such guilt is established by a competent court.[172]

Moreover, the European Court has stated that:

> [a]lthough not specifically mentioned in article 6 of the European Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion

[167] Art 20(4)(g).
[168] Art 67(1)(g)
[169] E Anakumah *African Commission on Human and Peoples' Rights: Practice and procedure* (1996) 131.
[170] Communication 218/98, *Civil Liberties Organisation, Legal Defence Centre and Assistance Project v Nigeria* (2001) AHRLR 75 (ACHPR 2001), decided at the 29th Ordinary Session, April-May 2001, 14th Annual Activity Report para 40. See also, arts 6(2) & 14(3)(g) of the ICCPR.
[171] Robben Island Guidelines www.achpr.org/instruments/roben-island-guidelines-2008 (accessed 29 September 2010).
[172] In *Krause v Switzerland* 7986/77, 13 DR 73, 3 October 1978.

> of a fair procedure under article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of article 6.[173]

The proscription against compelling an accused to testify or confess guilt is comprehensive. It forbids the authorities from engaging in any method of intimidation, whether direct or indirect, corporal or mental. It bans torture and cruel, inhuman or degrading treatment. It prohibits treatment which infringes the right of detainees to be treated with respect and offends the inherent dignity of the human being.[174] There should be sanctions to compel the accused to testify.

With reference to *Shari'a* law, the subject of being compelled to incriminate oneself was addressed by the second Caliph, Omer Ibn Al-Khatab who said 'a man would not be secure from incriminating himself if you made him hungry, frightened him or confined him.'[175] There is a small number of later Hanafi Jurists, the most famous of them Ibn Abdin, who on the contrary seem to have undermined the principle of not being compelled to incriminate oneself, as they allowed for beating of the accused in order to get a confession of guilt if he was already known as an evil man.[176] Ibn Hazm did not permit torture as such, but they allowed the use of the results of torture as evidence except in *Hudud* crimes.[177]

In terms of Sudanese law, the CPA laid down the application of the principle against self-incrimination by stating that 'the life and property of the accused is inviolable, he shall neither be forced to incriminate himself, nor shall he be required to take the oath, save in otherwise than *hudud* offences to which a private right of a third party relates.'[178] An accused person should not be compelled to testify against himself or herself or to

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[173] *Murray v United Kingdom* (n 45 above) para 45
[174] See HRC General Comment 13 (n 119 above) para 14; *Kelly v Jamaica* (253/1987) 8 April 1991, Report of the HRC, (A/46/40), 1991, at 246.
[175] M Khalil 'Islam and challenges of modernity' winter/spring 2004 *Georgetown Journal of International Affairs* 100.
[176] Khalil (n 175 above) 101.
[177] Khalil (n 175 above) 102.
[178] Sec 4(d).

confess his or her guilt. The accused's silence should not be considered evidence against him or her.

According to the Evidence Act of 1994, evidence shall be rejected if it violates the principles of *Shari'a* law, law, justice or public order.[179] Evidence obtained by unlawful means that evidence shall not be excluded just because it has been obtained by illegitimate means whenever the court is satisfied that it is independent and acceptable.[180] However, the same Act required corroboration to such evidence.[181]

Previously, Sudan's law of evidence provided that 'reasonable evidence obtained by unlawful ways is not deniable if the court is satisfied with appropriateness of the evidence in objection terms.'[182] The question here was how unlawful means could be considered reasonable. The courts of Sudan have earlier held in the case of *Sudan Government v Adam Ahmed Mohamed*[183] that the judicial confession as a result of torture or coercion may not be admitted even if affirmed at a magisterial inquiry. Accordingly, the Court of Appeal in this case overturned the decision of the lower court which had convicted an accused who had been tortured.[184] The Court of Appeal ordered criminal proceedings against the policemen who participated and carried out the torture. This decision is compatible with international human rights law and *Shari'a* law.

[179] Sec 9(1)(a).
[180] Sec 10(1).
[181] Sec 10(2).
[182] Sec 11 of the Evidence Act of 1983.
[183] *Sudan Government v Adam Ahmed Mohamed* SLJR 1978.
[184] On 10 August 1976, the complainant, a merchant in Omdurman, reported to the police that when he opened his shop in Omdurman Suk (market), he found a hole in the roof, and his safe was broken with more than six thousands pounds missing. An information was lodged and the accused, a porter who knew a lot about the shop fell under suspicion and was arrested, during his interrogation, the accused said that the two other accuseds, Abdallah Musa and Salim Ahmed Salim, participated with him in the break-in. The three accused recorded judicial confessions, but retracted them at the Major Court stage where they stated that the confessions were taken as a result of torture and coercion. The Major Court convicted the first accused, the applicant, and acquitted the second and third accused, although it was proved before the Court that all three accused were in fact tortured by the police and the confessions extracted from them were a result of such coercion.

The HRC in its 2007 concluding observations expressed concerns that confessions obtained in violation of the ICCPR are not explicitly proscribed under Sudanese law, and that such confession has been used in some inquiries and has culminated in death sentences.[185] The HRC stated that Sudan should prohibit the use of confession obtained in violation of article 7 of the ICCPR. The HRC recommended that Sudan should also indicate the number of appeals in its next report, for review of convictions resulting from unfair trial or use of a confession obtained under torture.[186] The HRC has extended the proscription on the use of evidence obtained under pressure by affirming that 'the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.'[187] The HRC stated that: 'the law should require that evidence provided by any form of compulsion is wholly unacceptable.'[188] The HRC has also stated that 'confessions obtained under duress should be systematically excluded from judicial proceedings.'[189]

If an accused declares throughout the course of proceedings that he or she has been forced to make a statement or to plead guilty, the judge should have authority to consider such an accusation at any phase.[190]

All detainees and convicts, or advocates or families acting on their behalf, have the right to complain to the authorities of torture or ill-treatment, in confidence. All such complaints should be quickly dealt with and responded to without unnecessary delay. If the complaint is disallowed or extremely delayed, the complainant is permitted to carry it before a judicial or other authority. The complainant should suffer no partiality or bias as a consequence of making a complaint.[191]

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[185] Concluding observations of the HRC: *Sudan* UN Doc/CCPR/C/SDN/CO/3/CRP.1 (July 2007) para 25.
[186] As above.
[187] HRC General Comment 20: Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment (article 7of the ICCPR) forty-fourth sessions, adopted on 10 March 1992, para 12
[188] HRC General Comment 13 (n 121 above) para 14.
[189] Concluding observations of the HRC: *Georgia* UN Doc. CCPR/C/79/Add.75 at para.26 (5 May 1997).
[190] HRC General Comment 13 (n 121 above) para 15.
[191] Principle 33 of the Body of Principles.

Evidence produced as a consequence of torture, cruel, inhuman or degrading treatment, or other intimidation, including a declaration of guilt by the accused, must be eliminated by the court except in proceedings carried against alleged committers of torture, ill-treatment or coercion.[192] Other international standards are wider, rejecting not only statements provoked as a consequence of torture, but also those produced as an outcome of other cruel, inhuman or degrading treatment.[193]

These principles apply not only to statements made by the accused but also to statements made by any witness.[194] The Body of Principles bans taking benefit of the situation of detainees to force them to testify or confess, or using violence, threats or means of interrogation which detriment their capacity of decision or their sentence.[195] Moreover, non-compliance with these doctrines in obtaining evidence must be taken into account in determining the admissibility of such evidence.[196]

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa require prosecutors to inform the court in cases when evidence was obtained through violations of human rights. Prosecutors may not use such evidence, and are required to take measures to make sure that those guilty for using such means are brought to justice.[197]

Article 8(3) of the AMCHR stipulates that a confession of guilt by an accused person shall be valid only if made without any kind of coercion. This pertains only to confessions of the accused, rather than 'any evidence'. It also obliges rejection of a confession if there was coercion of any kind, including any conduct which, while coercive, might not extend to torture or other cruel, inhuman or degrading treatment.

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[192] See art 12 of the Declaration against Torture, art 15 of the CAT, art 10 of the Inter-American Convention on Torture.
[193] Art 12 of the Declaration against Torture, art 69(7) of the ICC Statute, guideline 16 of the Guidelines on the Role of Prosecutors; see principle 27 of the Body of Principles.
[194] Art 69(7) of the ICC Statute states that evidence obtained by means of a violation of this Statute or internationally recognised human rights shall not be admissible if: a) The violation casts substantial doubt on the reliability of the evidence; or b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.
[195] Principle 21 of the Body of Principles.
[196] Principle 27 of the Body of Principles.
[197] Guideline 16.

The Inter-American Commission enunciated its opinion that the use of confessions obtained while the accused was arrested incommunicado (deprived of access to a lawyer) infringed the accused's rights under the American Convention.[198]

Under the South African Constitution, an arrested person must be informed of the right to remain silent and the impacts of not remaining silent. The right to remain silent in the pre-trial stage is aimed at protecting the fundamental freedom and dignity of an accused person.[199] On arrest, a person cannot be forced to make any confession that might be used against him or her in a court of law.[200]

The right to silence requires clear notification that the person concerned has the right to refrain from giving any testimony and that any testimony given may be used against him or her in a court of law. If police fail to do so, any evidence given by that person shall be deemed inadmissible as evidence in his or her trial.[201]

Sudanese law, however, does not recognise such a positive duty. In fact, a person being investigated by police might face imprisonment for a term of up to one month or a fine for committing an offence under section 98 of the Criminal Act of 1991,[202] if he or she chooses to refuse to answer the question posed to him or her by the investigator.

Further, under Sudanese law, plea-bargaining is another example of the violation of this right. Section 59 of the CPA gives the Superior Prosecution Attorney (SPA) the authority to plea-bargain and tender pardon to the accused concerned. In order to obtain the testimony of an individual accused with others of a crime having a *ta'zir* punishment, in which he has no major role, the SPA may take a decision, before trial, on condition that

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[198] Resolution no. 29/89 of 29 September 1989 (Nicaragua) Annual Report of the Inter-American Commission, 1989--1990, OEA/ Ser. L/V/II.77 doc.7 rev.1.1990, at 73- 96

[199] *Thebus & Another* case (n 139 above) para 54. See also, sec 35(1)(b) of the South African Constitution.

[200] *Thebus & Another* case (n 141 above) para 56.

[201] *Miranda v Arizona* 384 U.S. 436 (1966).

[202] Which provides as follows: 'Whoever is required by a competent public servant to answer questions which he is legally bound to answer, or to sign statements made by him, refuses to do the same, shall be punished, with imprisonment, for a term, not exceeding one month, or with fine, or with both'.

the accused shall reveal the entire of the facts and circumstances connecting to such crime, and about any other individual, who has relation thereto, of which he has knowledge. In this case, the accused shall be examined as a witness at the trial, and shall also be examined, addressed and tried as an accused. Where a decision of his or her conviction has been passed and penalty given, the court shall determine in a separate session, his compliance with all the conditions, upon which clemency has been offered. Where it has been evidenced that he has complied, it shall pass a command of acquittal. Where it has been evidenced that he has not complied, by hiding a crucial matter, or presenting an untrue testimony, it shall pass an order of executing the verdict passed.[203] This section also contradicts Islamic law, which is excluding this evidence. The testimony of an accomplice should not be taken according to Sudanese case, unless there is corroboration.[204]

Examples of how individuals have been compelled to confess were best illustrated in two cases. One is the case of nine men accused of slaughtering a newspaper editor, who was found, decapitated in 2006. The men were executed after the Supreme Court upheld their death sentences. Although all nine retracted their confessions alleging that these had been extracted under torture, the Appeal Court accepted their 'confessions' as evidence against them. All nine were from Darfur.[205] In another case, four men were sentenced to death for the killing of USAID employee and his driver.[206] Three of the accused persons alleged that their confessions had been obtained under torture. The Court of Appeal referred the case back to the Court of First Instance which upheld the death sentences.[207]

4. The right to *habeas corpus* and to be brought promptly before a judicial authority

[203] Art 59(2).
[204] *Sudan Government v Mohamed Yousif Mustafa & Others* SLJR 1966.
[205] REDRESS & ACJPS *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* (2012) 3.
[206] The family of the driver forgave the four men, as they are allowed to do under *Shari'a* law in Sudan.
[207] *Amnesty International Report 2010: Sudan* http://www.amnesty.org/en/region/sudan/report-2010 (accessed 6 April 2014).

An arrested person's right to be placed promptly under a judicial authority is one of the most important fair trial rights at the pre-trial stage. The right aims to ensure that all persons deprived of their liberty should be brought promptly before a judicial authority, and should have the right to a defence or right to legal counsel.[208] This right to a defence or legal counsel gives the detained person an opportunity to challenge the lawfulness of their detention. In addition, the detainee has the right to be informed of the reason for his or her detention.

The right to *habeas corpus* and to be brought promptly before a judicial authority is not unequivocally stated in the Sudanese CPA even though the right is guaranteed by the ICCPR.[209]

The right to *habeas corpus* is enshrined in a number of international instruments.[210] The ACHPR contains no provision concerning the right of *habeas corpus* as such, but the African Commission, in its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, has set out that any form of detention and all measures affecting human rights shall be subject to the effective control of a judicial or other authority, implying that the African Commission accepts that *habeas corpus* is recognised as one of the measures of detention.[211] African states are obliged to prevent arbitrary arrest and detention or disappearances, and states should accordingly establish procedures that oblige police or other officials with the authority to arrest and

[208] Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines).
[209] L Oette 'Law reforms in times of peace processes and transitional justice: The Sudanese dimension' in L Oette (ed) *Criminal law reform and transitional justice: Human rights perspectives for Sudan* (2011) 23. See arts 9 & 14 of the ICCPR.
[210] See art 9(4) of the ICCPR & art 5(4) of ECHR.
[211] The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para 13(3) states that a) anyone who is arrested or detained on a criminal charge shall be brought before a judicial officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. b) The purpose of the review before a judicial or other authority includes to: 1. assess whether sufficient legal reason exists for the arrest; 2. assess whether detention before trial is necessary; 3. determine whether the detainee should be released from custody, and the conditions, if any, for such release; 4. safeguard the well-being of the detainee; 5. prevent violations of the detainee's fundamental rights; 6. give the detainee the opportunity to challenge the lawfulness of his or her detention and to secure release if the arrest or detention violates his or her rights.www.achpr.org/instruments/fair-trial (accessed 29 Sep 2010).

detain to notify the suitable judicial official or other authority of the arrest and detention.[212] The judicial official or other authority should exercise control over the official detaining the person.[213] The judicial body should decide without delay on the lawfulness of a detainee's incarceration and order release if the detention is unlawful. In short, the African Commission is of the view that no circumstances whatsoever should be invoked as an excuse for rejecting the right to *habeas corpus*.[214] The ACHPR has repeatedly held that it is impermissible to detain individuals indefinitely without charge or trial.[215]

Efforts at guaranteeing an arrestee's rights during incarceration include requiring that an arrested person must be brought before a recognised authority such as a judge, prosecutor or police official. However, bringing an arrested person before some of these authorities, for example, prosecutors or police, may not in all cases serve the best interests of a detainee as these officials are not judicial officials and may not be impartial.[216] The right to *habeas corpus* assists to reduce the practice of arbitrary detention.[217]

Failure to adhere to *habeas corpus* is not uncommon in Sudan. One example is that of *Bushra Gamar Hussein Rahma*, a human rights defender from Southern Kordofan, who was released after being arrested and detained by the Sudanese Security Organ for twelve months without charge or access to a lawyer and with restricted access to his relatives.[218]

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[212] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para 13(2)(h).
[213] See n 209 above, para 13(3)(a).
[214] See *International Pen & Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) and *Civil Liberties Organisation v Nigeria* (2000) AHRLR 243 (ACHPR 1999).
[215] *Achuton & Another on behalf of Banda & Others v Malawi* Communications 64/92, 68/92 (1995) para 9, *Constitutional Rights Project & Others v Nigeria* Communications 140/94, 141/94 & 145/95 (1999) para 55.
[216] H Amin & K Ramadan 'The law of criminal procedure' in M Mahmoud (ed) *Sudan law and international human rights norms: Comparative research* 2002 367.
[217] Udombana (n 9 above) 307 & 310.
[218] Bushra Gamar Hussein Rahma is an X-ray technician and the founder of the Human Rights and Development Organization (HUDO) in Southern Kordofan State, Sudan. Prior to this, he was the director of Sudan Social Development Organisation (SUDO) in the Darfur region of Sudan, and from 2006 to 2008, he was a member of the Sudanese People's Liberation Movement (SPLM). *Amnesty International*

As the Community Court of Justice of the Economic Community of West African States (ECOWAS) found in the case of *Manneh v The Gambia,*[219] holding a person for a prolonged period of over a year without trial will be an unreasonable period, except where appropriate and distinct justification is given. The ECOWAS Court held that the arrest and detention of the plaintiff was in conflict with the rights protected in articles 6 and 7(1) of the African Charter.[220]

The right to *habeas corpus* is a safeguard against arbitrary detention, but this safeguard often lacks in Sudan.[221] For example, in the Darfur region, during the state of emergency, the legal system allows for preventive or administrative detention.[222] According to the CPA, a detained person must be brought before a competent authority. In fact, individuals are detained in police custody for 24 hours, which the CPA allows to be extended to three days.[223] The provision in the CPA that allows for an extension of the detention period before a detainee is brought before a competent judicial authority seems to violate both the INC and ICCPR.[224] According to the CPA, the continuation of detention should be for the purpose of an inquiry. The reasons for the continuation of detention are very broad and may be abused because there are alternative ways in which an inquiry can take place without continually depriving a person of his or her liberty.[225]

Arresting and detaining an individual presents opportunities for the abuse of their rights as most '[t]orture and other forms of ill-treatment are committed during the first 48 hours of being arrested and detained.'[226] International standards require that no detained

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*Report International Report 2012: Sudan*http://amnesty.org/en/library/asset/AFR54/031/2012/en/3d9563a5-6ee6-4be7abd92e8b2afca218/afr540312012en.pdf (accessed 8 Oct 2012)).

[219] *Manneh v The Gambia* (2008) AHRLR 171 (ECOWAS 2008).

[220] As above.

[221] Mujuzi (n 71 above) 117.

[222] Mujuzi (n 71 above) 118.

[223] Sec 179 of the CPA.

[224] See art 9(3) of the ICCPR & art 27(3) of the INC.

[225] Adib (n 2 above) p.130.

[226] Mujuzi (n 71 above) 118.

person should be held incommunicado and without access to legal assistance.[227] Such a standard is intended to avoid abuses taking place and also to ensure that a person knows of the charges against him or her.

In Sudan, the National Security Act of 2009 permits the state to detain an accused for up to four and half months before he or she appears before a judicial authority. Such a lengthy period of detention violates the right to be brought promptly before a judicial authority and the right to *habeas corpus*.

A detainee has the right to be promptly informed of the reason for being detained at the time of arrest and the right to be informed of the charge in a language he or she understands. Both the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa and the Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa provided for the same right and require states to respect this right.[228]

In the case of Sudan, the CPA recognises Arabic and English as the working languages in which communication to a person can be made, however exceptions can be made where necessary.[229] Providing language services appears to be aimed at assisting the judge more than the accused and is only delivered at the trial stage and not the pre-trial stage. The pre-trial stage is, however, very important because it is when the detainee must recognise the charges against him or her.

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[227] As above.

[228] Art 13(2) provides as follows: 'a) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest and shall be promptly informed, in a language he or she understands, of any charges against him or her. b) Anyone who is arrested or detained shall be informed upon arrest, in a language he or she understands, of the right to legal representation and to be examined by a doctor of his or her choice and the facilities available to exercise this right. c) Anyone who is arrested or detained has the right to inform, or have the authorities notify, their family or friends. The information must include the fact of their arrest or detention and the place the person is kept in custody. d) If the arrested or detained person is a foreign national, he or she must be promptly informed of the right to communicate with his or her embassy or consular post. In addition, if the person is a refugee or stateless person or under the protection of an inter-governmental organization, he or she must be notified without delay of the right to communicate with the appropriate international organization'.

[229] See secs 4(i) & 137(3) of CPA.

5. The right to bail

Bail is associated with the pre-trial phase and addresses the freedom of an individual. Bail also has consequences for the liberty of the accused during the trial stage pending the finalisation of the trial. Granting bail reinforces the presumption of innocence and burden of proof.[230] In the interests of justice, granting bail goes a long way to show that an accused is presumed innocent until proven otherwise. Any detainee has the right to be released from illegal detention, and has a right to be released on bail in case of legal detention.

Any legislation providing that persons charged with certain offences may not be granted bail means that the accused is subjected to being imprisoned until his case has been heard and the judgment pronounced.

In Sudan, bail in respect of certain crimes is prohibited, including crimes punishable with the death penalty.[231] In this case, if the arrest continues for more than six months, the head of the judicial authority makes whatever order is deemed appropriate.[232] The CPA gives the prosecution attorney or a judge the power to refuse bail where the release of an arrested person may lead to his escape, or prejudice the inquiry.[233] The detainee has no right to the decision made. According to the CPA, the detainee or his or her legal representative may not be present when the decision is made on the renewal of detention. Procedurally, equality of arms requires that there should be an adversarial hearing in deciding whether to grant bail in a given case. In the United Kingdom of Great Britain (UK), the laws effectively prohibit renewal of detention in *absentia*.[234]

Section 107(1) of CPA states in a crime concerning public property or a dishonoured cheque, the arrested person shall be released, after payment of an amount of money, not less than the amount subject of a criminal suit, or by giving a secured cheque or

[230] *The Republic v Gorman & Others* (2004) AHRLR 141 (GhSC 2004).
[231] Sec 106(1) of the CPA.
[232] As above.
[233] Sec 108 of the CPA.
[234] Adib (n 2 above) 133.

letter of credit. In terms of this provision, it seems to compel the detained person to reach a settlement or guarantee the payment of money for the benefit of the creditor, rather than to guarantee his or her appearance at trial.[235] This procedure treats the detained person as if he had already been convicted and that is contrary to the presumption of innocence and discriminates against persons who do not have means to make or secure payment. [236] This kind of legislation also seems to be contrary to the presumption of innocence.

In practice, many detained persons are denied the right to bail for years according to the provisions of CPA. The HRC considered a delay of over three and a half years between indictment and trial for homicide to be an undue delay contrary to article 14(3)(c) of the CCPR.[237] When an accused is charged with a serious crime such as homicide and bail is denied, then ideally the trial must be conducted expeditiously.[238]

6. The right to legal service

According to the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, all persons denied their liberty have a right to access legal services and assistance.[239] Legal service includes the right to a lawyer and the right to legal aid. Pursuant to the Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa, a detained person shall have prompt access to a lawyer and shall not be compelled to answer any questions or take part in any interrogation without his or her lawyer being present, except where he or she has waived this right in writing. Further, it states that a detained person should be provided with the necessary facilities to communicate with his or her lawyer. In further advancing this right, the HRC, for example, suggested in *Kelly v*

[235] Adib (n 2 above) 131.
[236] As above.
[237] *Gomez v Panama* Communication No. 473/1991 UN Doc.CCPR/c/54/D/473/1991 (1995).
[238] As above, para 8.5.
[239] See art 31 of the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa.

Jamaica[240] that an accused person has a right to meet an attorney at all times throughout the pre-trial period.

The right of detainees to have access to a lawyer should be laid down in the Criminal Procedure Act, and accordingly the HRC in 2007 asked Sudan that in its next periodic state report under ICCPR the country should present detailed information on the measures it has taken to uphold the rights of detained persons in practice, and on the ways and means employed to monitor conditions in incarceration.[241]

The right to consult a lawyer should apply from the beginning of the investigation, notwithstanding whether the individual subjected to an investigation is detained or not. The CPA does not explicitly provide for this right immediately after detention. A Sudanese human rights activist is of the view that the decision not to make provision for the right to counsel in the CPA at the early stage is deliberate and that '[t]he place of section 135 and omission of an explicit right of access to a lawyer at an earlier stage is not accidental; it reflects the legislator's intention to restrict this right to the prosecution stage.'[242]

Certain limitations exist as far as the right to legal service is concerned. For example, the law does not allow the accused or his or her lawyer to attend the investigation procedure, to read the investigation record or get a copy of the record. The CPA does not have provisions protecting the confidentiality of a case diary, but the Supreme Court in the case of *Sudan Government v El-Tahir Al-Jack Al-Nasri*[243] held that even though the CPA does not mention the need for the confidentiality of the case diary, the case diary should be confidential.

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[240] Communication No. 230/1988 UN.Doc. CCPR/c/537/1993 (1996).
[241] Concluding observation of the HRC: *Sudan* 19th session Geneva 9--27 July 2007 consideration of reports submitted by Sudan under article 40 of the ICCPR.
[242] Adib (n 2 above) 127.
[243] *Sudan Government v Eltahir Aljak Alnasri* AC-CR-REV-14-1966 SLJR 1966.

The right of the accused to meet his or her lawyer should always be granted irrespective of the seriousness of the offence the accused is suspected of having committed, and irrespective of whether the police investigation has been completed or not.[244] In the case of *Sudan Government v Dikairan Hagona*,[245] the Supreme Court held that a person who is under detention must not be deprived of the right to communicate with his or her lawyer at any time or under any conditions throughout the police investigation.

In practice, this right is not fully granted, and examples exist to illustrate the failure to allow accused persons to meet their legal representatives. For example, six men were executed for the murder of thirteen policemen at a camp for Internally Displaced Persons in the South of Khartoum in 2005. The six men were only permitted access to a lawyer five months after their arrest. All of them were allegedly tortured to force them to plead guilty.[246] The Constitutional Court upheld the death sentences regardless of the allegations of torture.[247]

Limitations exist in terms of who may qualify to access legal aid. The CPA limits the access to legal aid to persons who have committed what it terms 'serious offences' which would result in imprisonment sentences of seven or more years or where an accused will be sentenced to amputation or death or be declared insolvent.[248] In such cases, the Ministry of Justice, upon the request of the accused, can appoint a person to defend him or her, and the State bears all, or part of the expenses. It can be argued that limiting who may access legal aid undermines the right to legal service.[249]

7. Conclusion

[244] Adib (n 2 above) 127. The case is *Sudan Government v Dikran Haygounim* Sudan Court of Appeal AC/CR/REV/317/1967 SLJR (1967) 208.
[245] *Dikran Haygounim* case (n 44 above).
[246] UNMIS Submission to the Universal Periodic Review Sudan (2011) para 11.
[247] *Paul John Kaw & Others v Ministry of Justice & Next of kin of Elreashhed Mudawee* Case No.MD/QD/51/2008.
[248] See Sec 135 of the CPA amendment of 2009.
[249] Adib (n 2 above) 137.

Based on the above analysis, it can be noted that some of the pre-trial rights and standards and practices in Sudan are not in conformity with the norms and standards of the relevant global and regional instruments.

Gaps exist between the domestic law and international standards regarding the right to be presumed innocent. Sudanese law is not in line with *Shari'a* law which fully guaranteed this right. Many examples illustrate these gaps and incompatibility, such as: (1) the practice of press announcements convicting accused persons before their trials take place amounts to a clear violation of the right to be presumed innocent; (2) accused persons in some instances are required to explain elements of certain offences; (3) long detention without charge; (4) the powers given to the Superior Prosecution Attorney or the magistrate of general Criminal Court the right to sell the accused person's properties without trial; (5) the powers given to the governor or the Commissioner the right to evict from a home or close shops in certain cases; and (6) the burden of proof in a case of a woman facing *Zina* shifts to the accused person.

It is apparent that the right not to be compelled to testify against oneself or confess guilt is not fully guaranteed under Sudanese law. Whenever the court is satisfied that evidence obtained by unlawful means is independent and admissible without clear definitions of what independent and admissible means, the obtained evidence shall not be excluded just because it has been obtained by illegal means. The plea-bargaining and tender of pardon in section 59 of the CPA which gives the Superior Prosecution Attorney the power to offer tender of pardon, allows for compulsion to confess guilt. The right to silence is not guaranteed explicitly under Sudanese law. In addition, there is no positive duty on the investigatory authority to inform the accused person of his or her right to silence. In fact, a person being investigated by police, if he or she refuses to answer the question by the investigator might face imprisonment or a fine for committing an offence.[250] The Police should advise suspects of their constitutional rights, their right to consult a lawyer, and their right to remain silent.

[250] Sec 98 of the Criminal Act of 1991.

It is clear that the right to be brought promptly before the competent judicial authority, which is guaranteed by the ICCPR, is not guaranteed in the CPA.[251] Sudanese law does not explicitly recognise the prohibition of the arbitrary arrest and detention. The duration of detention before bringing the detained person before a competent judicial authority does not meet the meaning of prompt. In practice, many detained persons are detained in unrecognised places for detention. The duration of pre-trial detention is not clear, as the law does not provide a particular time frame. In the National Security and Intelligence Act, the detention period which could be extended until four and a half months before presenting the detained person before the competent judicial authority constitutes ablatant violation of a detainee's rights. The right of the accused to meet his or her lawyer should always be granted regardless of the seriousness of the offence the accused is suspected of having committed. Notwithstanding whether the police investigation has been completed or not,[252] the police regularly fail to submit cases for review within the legal deadlines and the system of judicial supervision through police custody. The duration in case of detention of citizens for political offences is not adequate having regard to international standards.[253] The period taken in the handling of cases pending before the courts of a detained person and the requirements for obtaining legal help are a cause of concern.[254] Furthermore, the right to compensation for illegal detention is not fully adhered to as guaranteed according to international standards.

According to the CPA, the right to legal service is limited to the trial stage and not available at the pre-trial stage, and also limited to serious offences in terms of section 135 of the CPA. The law does not permit the detained person or his or her lawyer to attend the interrogation procedure or even to read the interrogation diary. The right of a suspect to access a lawyer should apply from the commencing of an interrogation,

[251] See arts 29 & 34 of the INC & arts 9 & 14 of the ICCPR.
[252] Adib (n 2 above) 127 .See *Dikran Haygounim* case (n 44 above) 208.
[253] Concluding observations on the periodic report of the *Republic of Sudan*, presented to the 35th Ordinary Session of the African Commission on Human and Peoples' Rights held in Banjul, The Gambia from 21 May to 4 June 2004.
[254] As above.

regardless of whether the person subjected to interrogation is detained or not. Section 135 of the CPA and the exclusion of an unequivocal right of access to a lawyer at the initial stage is not unintentional, but reveals the legislator's intention to limit this right to the pre-trial stage.[255] Advocates face complications in seeking to guarantee their clients' rights through the investigation. In addition, the detainees do not have the right to a translator according to the CPA because the right to a translator is only obtainable at the trial stage pursuant to section 137 of the CPA.

Under Sudanese law, decisions on bail applications are made on the basis of the applications and recommendations submitted by the prosecution authority. Moreover, there are no obvious standards to be considered to examine the grounds for justifications of denying a person release on bail. In addition, according to the CPA detained person or his or her lawyer may not be present when the decision on the renewal of detention is made, which means that the renewal is made in *absentia*.

It is evident that many Sudanese Acts violate essential pre-trial rights in particular the Emergency and Public Safety Act of 1997, the Khartoum Public Order Act of 1998, the Anti-Terrorism Act of 2001, and the Security Act of 2009.The legal protection of pre-trial rights is very weak in the Sudanese legal system.

There are other factors that negatively affect pre-trial rights, such as corruption, and the lack of resources and shortage of qualified staff. Corruption is one of the main weaknesses during the pre-trial stage. Numerous Sudanese laws need reforms. Various practices need to be reviewed and reformed to be on the similar level as international norms. The CPA and other Sudanese statutes should be amended to fill the gaps between Sudanese law and international standards.

[255] Adib (n 2 above) 127.

Chapter Four

The compatibility of the right to a fair trial under Sudanese law with international human rights law: The trial phase

This chapter seeks to critically examine the trial rights and practice in the Sudanese legal system. The standards and practice of trial rights in Sudan will be compared with international and regional standards as well as with Islamic law principles. The chapter will focus on specific trial rights namely: the right to access a court, the right to legal aid, the right to equality before the court, the right to adduce and challenge evidence, the right to a fair and public hearing, the right to a competent, independent and impartial tribunal, the right to be tried within a reasonable time and the right to legal representation. In addition, to focusing on the special courts in the Sudanese legal system, the chapter will also focus on the impediments that curtail these trial rights and review efforts in dealing with the challenges encountered by individuals as well as law enforcement agencies in protecting trial-rights in Sudan.

1. Right to access a court

The right to access a court means that 'no one must be hindered either by law, administrative procedures or material resources from addressing himself or herself to a court or tribunal for the purpose of vindicating his or her rights.'[1] This right is very significant for a fair trial. Everyone has an equal right to access courts. However, the right is not absolute, but subject to limitations under domestic laws and regulations.[2]

[1] *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* 258.

[2] There are procedural and practical restrictions that may bar effective access to a court. For example, obstacles in obtaining access, limitations on categories of litigant and legal standing, denial of legal aid, lack of enforcement and setting aside of final judgment.

The limitations, however, should be compatible with international standards such as those in the ICCPR and ACHPR.[3]

Under international human rights law, this right is guaranteed under UDHR,[4] and ICCPR which provides that '[a]ll persons shall be equal before the courts and tribunals.'[5] The requirement of equal treatment by the courts in criminal cases has many faces. The defence and the prosecution have an equal opportunity to prepare and present their case during the proceedings and the accused person is entitled to be treated equally without discrimination.[6] However, 'equal treatment in this context does not mean identical treatment: it means that where the objective facts are similar, the response of the judicial system should be similar. Equality would be violated if the court made its decision on discriminatory grounds.'[7] The guarantee is violated if certain individuals are barred from pursuing a case against other individuals 'because of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'[8]

The ICCPR encompasses the right to access courts in criminal and civil cases.[9] Access to administration of justice must be guaranteed in all cases to safeguard that no person is denied, in procedural terms, of his or her right to claim fairness.[10]

Under the African human rights system, the African Charter states in article 7(1) that '[e]very individual shall have the right to have his cause heard.' The African Commission

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[3] See K Reid *A practitioner's guide to the European Convention of Human Rights* (2004) 76.
[4] See arts 7 & 8 of the UDHR.
[5] Art 14(1) of the ICCPR. See also, art 7 of the UDHR which provides as follows: 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination'.
[6] Amnesty International: *Fair trial manual* Amnesty International Publications (1998) 84.
[7] Amnesty International (n 6 above) 85.
[8] *Ato del Avellanal v. Peru* Communication No. 202/1986 (202/1986) 28 October 1988, report of the HRC, (A/44/40), 1989, at 196 para 10.2 (limitation of the right to litigate matrimonial property before courts to the husband, thus excluding married women from bringing cases to court).
[9]Art 14 of the ICCPR.
[10] HRC, General Comment 32: Right to equality before courts and tribunals and to a fair trial (article 14 of the ICCPR) UN Doc. CCPR/C/GC/32, 23 August 2007, para 9.

interpreted this provision in *Zimbabwe Human Rights NGO Forum v* Zimbabwe[11] that article 7 of the African Charter encompasses the right to every person to access the appropriate judicial forms competent to have their cases heard and be granted sufficient relief.[12]

Under Islamic law, Qura'nic injunctions on justice incorporate the notion of equality and fairness.[13] For example, '[y]ou who believe! Be maintainers of justice, bearers of witness for God's sake, even though it be against your own selves, your near relatives, and whether it be against the rich or the poor',[14] 'you who believe! Be upright for God, bearers of witness with justice, and let not the hatred of a people swerve you to act inequitably. Act equitably, for that is nearer to piety',[15] and '….and when you judge between people judge with equity, certainly God counsels you excellently, and God hears and sees all things.'[16]

In addition, the *Qur'an* provides that 'if you judge, judge with justice between them. Verily, Allah loves those who act justly.'[17] Further, the *Qur'an* provides that '[c]ertainty, conjecture can be of no avail against the truth. Surely, Allah is All-knower of what they do'[18] and 'God commands [the doing of] justice and fairness…. and prohibits indecencies and injustice.'[19] The *Qur'an* provides furthermore:

> Mankind! Be mindful of your duty to your Lord who created you all from a single soul and from it created its mate and from the two of them spread out a multitude of men and women. Be careful of your duty toward God, through whom you claim [your rights from one another]…and God is ever-watchful over you all.[20]

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[11] Communication 245/2002.
[12] See *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 183.
[13] M Baderin *International human rights and Islamic law* (2003) 99.
[14] Surat Al-Maaida verse 135.
[15] Surat Al-An'aam verse 8.
[16] Surat Al-Maaida verse 58.
[17] Surat Al-Maaida verse 42.
[18] Surat Yunus verse 36.
[19] Surat An-Nahl verse 90.
[20] Surat Al-Maaida verse 1.

It appears from the verses above that *Shari'a* law guarantees the right to access courts by asserting and ensuring the right to equality and fairness for all individuals without any discrimination.

Under the Sudanese law, some post-independence constitutions theoretically guarantee the right to litigation including the right of access to court. For example, the Transitional Constitution of 1985 enshrined the right to adjudication,[21] and the Constitution of 1998 provides that 'all people are equal before the court of law.'[22] In addition, it states '[a]ll persons have a right to an effective remedy and no person may be subjected to criminal proceedings or deprived of the right to bring a claim at law, except in accordance with the law.'[23] The 1998 Constitution guarantees the protection of the constitutional right by annulling every law or order that is not in conformity with the Constitution and orders compensation for damage. However, 'the Arabic text of article 34 of the 1998 Constitution provides that the Constitutional Court shall exercise this jurisdiction *'Bil'ma'aroof'* which means 'benevolent pursuance' as opposed to binding judicial decision making.'[24]

The Interim National Constitution of 2005 (INC) provides '[t]he right to litigation shall be guaranteed for all persons; no person shall be denied the right to resort to justice.'[25] In defining the right to a fair trial, the Constitutional Court[26] concluded among other factors that the right to a fair trial is realised when a complainant is provided a chance to present his or her case together with all evidence, arguments and submissions.

There are impediments that curtail the right to litigation or the right to access courts in Sudan such as: immunity, limitations on access to courts by legislation, interference by executive, shortage of judges especially in Darfur's five states, lack of awareness of the

[21] Art 26.
[22] Art 21.
[23] Art 31.
[24] S Hussein 'Sudan: in the shadow of civil war and politicization of Islam' in An-Na'im A (ed) *Human rights under African constitutions* (2003) 367.
[25] Art 35.
[26] *Mohamed Yahia Adam v Sudan Government* (1999--2003) SCCLR 675.

Bill of Rights by IDPs and the restrictions on the right to access the Constitutional Court as it is the guardian of the rights and freedoms. In addition, some serious crimes are absent in the penal code or not in line with international standards.

1.1 Restricted legislation

The position of Sudanese courts regarding the legislation that precludes the courts from reviewing executive decisions is controversial.[27] In the famous case of *Lelett Ratilal Shah v Sudan Government,*[28] the Supreme Court held that any provision that excludes executive decisions from judicial review is unconstitutional and violates the right of access to courts.[29] In some cases, however, the courts did not uphold the right to access court and the right to litigation. In the case of *Tenants of Eastern Municipal Council Shops v Sudan Government,*[30] the Court held that the right to litigation is a legal and not a constitutional right, because the 1973 Constitution did not provide for the right of litigation or access to court.[31] In another 1992 case, the court reaffirmed the judgment

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[27] For example, sec 4 of the Public Premises Eviction Act of 1969 ousts the jurisdiction of the courts to review any order passed or act done by virtue of the Act.

[28] *Lelett Ratilal Shah v Sudan Government* (1998) SLJR 42.

[29] This rule has been re-affirmed recently by the Constitutional Court in many cases, for example, the Constitutional Court in *Mohamed Osman Shimat v Sudan Government*, *Elgarb Islamic Bank & Fordan International for Trading and Services co Ltd* 12/2001 (1999--2003) SCCLR 554--559, the Constitutional Court held that the right to litigation or access to court according to the law in art 31 of the INC was violated by the provisions of the Money Pledged for Banks Act of 1990. This decision was re-affirmed in the case of *Ahmed Abdelgalil Abu Zaid v Marhab co Ltd & Faisal Islamic Bank* 16/2001 (1999--2003) SCCLR 560--567. In the recent case, of *Abdalla Eltaib Osman v Mohamed Osman Eltaib* (civil cassation No. 433/2001) unreported, the dispute related to the ownership of land granted by virtue of the Investment Encouragement Act of 1981. Sec 559(6) of the Civil Transactions Act 1984 precludes the courts from hearing or determining any suit or proceedings against the government or registered owner as regards any matter relating to the ownership of any investment land granted by virtue of law. The Court held that this provision violates the right to litigation or access to court protected under art 31 of the Constitution of 1998. Quoted in A Khalil 'Guarantees for protection of human rights in national and international law' unpublished LLM thesis, University of Khartoum, 2004 77. See also, *Unity Bank Employees' Trade Union v Sudan Government* (1987) SLJR 117 where the Supreme Court declared sec 4 of the Eviction of Public Premises Act 1969 unconstitutional and, therefore, null and void.

[30] *Tenants of Eastern Municipal Council Shops v Sudan Government* (1974) 4 SJLR.

[31] *Tenants of Eastern Municipal Council Shops* case (n 30 above) 137. In the case, the tenants of some public buildings had been evacuated by an order issued by the landlord (the municipal council), by virtue of the Public Premises Eviction Act 1969. Sec 4 of the Act ousts the jurisdiction of the courts to review any order issued or act done by virtue of the Act. The tenants challenged the constitutionality of that section before the Supreme Court on the ground that it violated their right to litigation. However, the dissenting opinion was that the provision of the Constitution which guarantee the rule of law, the power of

of 1978,[32] on the basis of a circular issued by the Chief Justice[33] directing that no application for judicial review of decisions made under the Eviction of Public Premises Act of 1969 shall be allowed because the Transitional Constitution of 1985 incorporating the right to litigation had been suspended together with 1985 Constitution.[34]

In the case of *Mahmoud Sharani and others*[35] the applicants challenged the constitutionality of specific legislation such as the Income Tax Act of 1986,[36] the Sales Tax Act of 1980[37] and Regulations of Constitutional Court of 1998[38] on the basis that the legislation violates the INC.[39] The Constitutional Court dismissed this petition and held that no rights in these applications had been violated.

1.2 Impunity

As alluded to earlier,[40] in Sudan, impunity for officials is facilitated by immunity legislation. These include the National Security Forces Act of 2010,[41] the Police Act of 2008[42] and the Armed Forces Act 2007[43] which provide immunities for any acts committed in the course of official duties. The immunity shields officials from civil and criminal liability, unless the head of the armed, security and police forces approves such legal action.[44] In practice, immunity legislation has resulted in impunity for serious human rights violations.[45]

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the courts to determine all types of disputes and independence of the judiciary imply the existence of the right to litigation.

[32] *Omer Ahmed Mohamed & Others v Governor of Khartoum & Another* (1992) SLJR 322.

[33] Circular No. 3/1989 on 9 November 1989.

[34] Hussien (n 24 above) 368.

[35] *Mahmoud Sharani & Others v Sudan Government, Ministry of Justice & Ministry of Finance* CC/103/2007 (2011) SCCLR pp. 338--356.

[36] Secs 54--62.

[37] Sec 17.

[38] Amended in 2000.

[39] Art 35 & art 31 on equality before the law.

[40] See pages 51--52 & 82--84 above.

[41] Sec 52.

[42] Sec 45.

[43] Sec 34.

[44] An options paper prepared by REDRESS & KCHRED *Priorities for criminal law reform in Sudan: Substances and progress* January (2008) 8.

[45] As above.

According to the Police Act, trials against members of the Police are an internal affair and are not subject to any external judicial review. This system raises concerns about its conformity to the rule of law and runs against the principle of accountability.[46] The Police Act of 2008 is, therefore, incompatible with the (INC) and other international standards contained in the Bill of Rights as far as the right to litigation is concerned.[47]

Regarding members of the Sudanese Armed Forces, the 2007 Armed Forces Act[48] provides that officers and soldiers enjoy immunity for crimes committed in the discharge of their duties, unless the immunity is waived by the President of the Republic or his delegate.[49] Members of the police, security and armed forces should be subject to prosecution and civil suits for abuses of power without any immunity.[50]

For immunities in some Sudanese laws, there are defenders of immunity see the need for the existence of immunity as it helps some groups in carrying out their duties.[51] However enable the policeman to carry out his duties should not deprive individuals of their rights in the prosecution and the right to a fair trial.

In light of the prevailing immunity clauses which foster impunity among public office holders and officers, the African Commission, the HRC, other UN bodies, the AU High-Level Panel on Darfur and others have urged Sudan to eliminate immunities.[52] The Sudanese Constitutional Court has justified immunities by stressing their provisional

[46] REDRESS & KCHRED *Briefing note on section 45(1) of the draft police forces bill* published as part of the criminal law reform project in Sudan (2008) 4.
[47] See sec 45(1) of Police Act & arts 27(3) & 35 of INC.
[48] See sec 34.
[49] 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* issued by the Office of the High Commissioner for Human Rights on 28 November (2008) 41.
[50] Although there is evidence some soldiers are punished when they commit crimes, the number of soldiers brought before courts are significantly lower than the number of alleged perpetrators of human rights abuses.
[51] Interview with Dr. Ahmed Al Mufti director of the Khartoum Human Rights Centre, Khartoum 19 November 2014.
[52] For example, Concluding observations of the HRC: *Sudan* UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para 9(e), the Robben Island Guidelines, para.16, 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) & (d); 56--63, paras 215--238, 91, 92, & 336.

nature and the probability of judicial review. Nevertheless, immunities have regularly resulted in impunity in cases of serious human rights violations and where legal remedies are neither available nor effective.[53] Consequently, the state is unsuccessful in upholding its positive duty to preclude, examine and prosecute grave violations and deliver effective remedies to victims of human rights violations.[54]

The HRC has frequently found that immunity legislation is irreconcilable with the right to an effective remedy and the associated obligation to investigate and prosecute grave violations such as in the case of Sudan.[55] According to the HRC[56] it 'is particularly concerned at the immunity provided for in Sudanese law and the untransparent procedure for waiving immunity in the event of criminal proceedings against state agents.' Accordingly, the HRC urged Sudan to proceed to eliminate all immunity in the new legislation regulating the police, armed forces and national security forces.[57]

Immunity seems to be granted by the 1997 Emergency and Public Safety Protection Act which gives the Head of the state, the mayor, or anybody delegated by the mayor, obvious *carte blanche* powers to enter any buildings or search places and persons, prohibit organised movement of persons, and to apprehend persons suspected of participation in an offence in connection with the declaration of emergency.[58] It also provides for 'any other powers which the President of the Republic may deem

[53] Concluding observations of the HRC: *Sudan* UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, 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 3.
[54] REDRESS, CLRS & SHRM *Sudan law reform update* October-November (2010) 5.
[55] M Babiker 'The prosecution of international crimes under Sudan's criminal and military laws: Developments, gaps and limitations' in L Oette (ed) *Criminal law reform and transitional justice: Human rights perspectives for Sudan* (2011) 177.
[56] Concluding observations of the HRC: *Sudan* UN Doc. CCPR/C/CO/3/CRP.1, 26 July 2007, para 9.
[57] As above.
[58] Third periodic report of the United Nations High Commissioner for Human Rights on the human rights situation in the Sudan, issued by the Office of the High Commissioner for Human Rights in cooperation with the United Nations Mission in Sudan para 99.

necessary.'[59] Sudan has been encouraged to eliminate legal barriers to justice, for example, immunity provisions for government officials.[60]

The Special Rapporteur on the situation of human rights in the Sudan has raised concerns about impunity in Sudan.[61] According to the Special Rapporteur, allegations of violations of human rights are not investigated, and findings are not made public. The Special Rapporteur has pointed out several cases of impunity to the Government of Sudan.[62] However, no action appears to have been taken.[63] The Government of Sudan established investigation committees, but their findings were not made public and no legal proceeding was initiated against the perpetrators including with command responsibility and no compensation was provided to victims.[64]

Due to international pressure, the government of Sudan made efforts to combat impunity through investigation, prosecution of perpetrators and compensation, but the efforts are inadequate.[65] According to the Government of Sudan's submission to the Group of Experts in September 2007:[66]

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[59] As above.
[60] N 56 above, para 8.
[61] The HRC in its resolution 2005/82 established the mandate of the Special Rapporteur on the situation of human rights in the Sudan. Sima Samar was appointed as mandate-holder. The Special Rapporteur was requested to monitor the human rights situation in the Sudan and report to the Commission on Human Rights and the General Assembly. The Human Rights Council, in resolution 6/34, decided to extend the mandate of the Special Rapporteur for one year in accordance with Commission on Human Rights resolution 2005/82. In resolution 6/34, the Council further requested the Special Rapporteur to ensure effective follow-up and to foster the implementation of the remaining short- and medium-term recommendations identified in the first report of the group of experts mandated by the Human Rights Council in resolution 4/8 (the group of experts).
[62] Group of expert *Recommendation No. 3: To combat impunity* Quoted in the report prepared by the Special Rapporteur on the situation of human rights in 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. A/HRC/9/13/Add. 12 September 2008, para 9.
[63] The report of the Special Rapporteur on the situation of human rights in the Sudan, Sima Samar. A/HRC/9/13 2 September 2008, the report covers the period from January to July 2008, para 78.
[64] N 63 above, para 38.
[65] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004 Geneva, 25 January 2005 15. The Sudan government in its 2003 report to the African Commission stated that 'As a proof of the seriousness of the authorities in the handling of violations of human rights, let us mention the case of a law enforcement officer who was arraigned before the judge for exceeding his powers and misuse of force. He was sentenced to death and executed on 18/6/1995. In another case, the Government paid

> [p]olice immunity was crucial to the police carrying out their official duties. The government was in the process of revising the police code and the national security law, based on the new Constitution. New draft laws were under review. The government intends to revise laws according to the following considerations: the need to prosecute any person committing a crime without any impediment; the need to protect police officers from groundless accusations and the need to protect the morale of police forces in a context of insecurity.

Although the existence of immunity provisions does not automatically mean that protected officers are never tried, the numbers of impunity cases brought before the courts are significantly lower than the number of alleged perpetrators of human rights abuses.[67]

1.3 Shortage of judges and courts

Other factors that curtail the right of access to court are shortage of judges and courts in some states such as Darfur's five states.[68] The capacity and outreach of the judiciary are severely weakened by the extremely low numbers of existing courts and judges.[69] In South Darfur, for example, the Appeal Court is the highest court and consists of five judges.[70] With regard to the general courts, there are only four general courts in the South Darfur State. There are district courts in only six of the 11 localities. However,

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compensation to a citizen who was assaulted by a security officer.' Periodic Report of Sudan Pursuant to Article 62 of the African Charter on Human andPeoples' Rights It comprises the required reports up to April 2003, April 2003 p. 23.

[66] Concluding Observations of the HRC: *Sudan* UN Doc. CCPR/C/CO/3/CRP.1,26 July 2007, paras 9 & 16 & Group of Experts, final report, 91--92.

[67] For example, according to information provided to human rights organisations by the director of the legal department of the National Security and Intelligence Service, as of 25 August 2005, the court established to try national security officers had heard only 34 cases in three years. See Second periodic report of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Sudan, 27 January 2006 issued by the Office of the High Commissioner for Human Rights in co-operation with the United Nations Mission in Sudan, 32.

[68] See Darfur Regional Authority 2013-2019 *Developing Darfur: A recovery and reconstruction strategy* January 2013 76.

[69] As above.

[70] HRC, 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 A/HRC/9/13/Add.12 September 2008 90.

South Darfur Chief of Justice stated that judges are usually sent on missions or circuit to the areas that have no ordinary courts. This means that almost one-third of the South Darfur inhabitants have no access to the justice system for serious crimes. However, tribal leaders have made efforts to search for solutions for community problems through traditional and customary law.'[71]

One of the reasons for this shortage of judges and courts is a scarcity of resources. However, the right of access to court may not be made ineffective by economic obstacles.[72]

1.4 Interference by the executive

The Attorney General is the Minister of Justice, and he is part of the executive. The power of the Minister of Justice under the Criminal Procedure Act of 1991 (CPA) curtails the right of access to court.[73] Under the CPA, the Minister of Justice has the right to interfere in judicial proceedings and stay or dismiss any criminal proceedings.[74] The CPA states that:[75]

> [t]he Minister of Justice may at any time after the completion of inquiry and before passing of a preliminary judgment, take a grounded decision to stay the suit, and his decision shall be final and shall not be contested; the court shall thereby stay the proceedings and terminate the suit.

The above provision of the CPA contravenes the Basic Principles on the Independence of the Judiciary,[76] which provides '[t]here shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be

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[71] As above.
[72] N Jayawickrama *The judicial application of the human rights law: national, regional and international jurisprudence* 2002 588.
[73] Sec 58 of CPA.
[74] As above.
[75] Sec 58(1).
[76] Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

subjected to revision.'[77] It also violates the fair trial standards in the ICCPR[78] as well as the right to access court in the INC.[79] The first criticism of section 58 of the CPA is that the Minister of Justice may make a *nolle prosequi* or a stay of prosecution and not an independent prosecution authority. The Constitutional Court's decision on this issue not only violates Sudan's international human rights obligations to uphold the right to litigation, but also the INC,[80] which provides for remedies for challenging acts of national Ministers before the Constitutional Court in cases of violation of the Constitution, Bill of Rights, Comprehensive Peace Agreement and decentralised system of governance, or before courts of law or a competent authority on allegations based on other legal grounds.[81]

The rights to access courts seem to be undermined by a provision that no civil proceedings may be instituted against the state without the previous consent of the Attorney General.[82] In some instances, the access to court is impractical as the African Commission in *Sudan Human Rights Organisation and Another v Sudan*,[83] held that in cases where executive organs burn houses, bombard and perpetrate violence against the victims that made access national organs (including courts) impractical, violate article 7 of the African Charter.[84]

1.5 Lack of awareness of rights by Internally Displaced Persons (IDPs)

The most pressing requirement in Sudan with respect to access to justice lies in adopting the tools by which Sudan's large population of IDPs can avail themselves to access the justice system. Sudan has an estimated population of six million displaced

[77] Art 4.
[78] Art 14.
[79] Art 35. See also, ACJPS *The judiciary in Sudan: its role in the protection of human rights during the Comprehensive Peace Agreement Interim period (2005--2011)* 2012 11.
[80] Art 78.
[81] See for more details pp 194--202 of this thesis.
[82] *Pumbun & Others v Attorney General* Supreme Court of Tanzania 1993 2 LRC 317. Quoted in Jayawickrama (n 72 above) 490.
[83] Communication 279/03 (2009) AHRLR 153 (ACHPR 2009).
[84] As above para 185.

persons.[85] This represents the biggest number of IDPs in the world.[86] The IDPs live in the camps in a desperate socio-economic situation that creates stresses within the community that occasionally results in violence and other offences.[87] Access to court in IDPs camp cannot be synonymous with access to court enjoyed by a free person in normal society.[88] IDPs lack effective access to justice and have limited knowledge and understanding of human rights and rule of law doctrines. Law enforcement and rule of law institutions struggle to deliver facilities to these IDPs.[89]

A method guaranteeing the marginalised persons the right of access to court is apparent in India where anybody can carry the claim of a violation in the public interest. This would be a significant means in a system where many victims, for example, IDPs in Sudan lack awareness of their rights and access to courts. Public interest claims permit others to bring matters to the court's attention and empower the Court to fulfill its role as protector of the Constitution. In India, the Supreme Court embarked on an extraordinary and continued effort to safeguard the essential rights of deprived, marginalised and defenseless groups in the society by method of public interest litigation.[90] It has done so by opening the *locus standi* requirements for filing writ applications for violations of fundamental rights.[91] This approach has efficiently broadened the requirement of standing which is a prerequisite that litigation be carried out by an aggrieved person and allowed access to the courts by others on behalf of the aggrieved persons. Public interest litigation has permitted the Court to perform as a 'positive legislator'[92] and

[85] Khartoum state is home to an estimated two million IDPs. Some IDPs are persons who fled southern Sudan during the long civil war. Other IDPs arrived in Khartoum in recent years from Darfur. Significant IDP populations also exist in Eastern Sudan (Kassala State) and the Three Protocol Areas.
[86] UNDP *Outcome evaluation for the country cooperation framework 2002-2006/bridging programme 2007/08 for Sudan rule of law* Final report 13 January 2009 45.
[87] As above.
[88] See for example, *Sudan Human Rights Organisation & Another v Sudan* Communication 279/03 (2009) AHRLR 153 (ACHPR 2009) para 177.
[89] UNDP (n 86 above) 46.
[90] REDRESS, CLRS & SHRM *Arrested development: Sudan Constitutional Court, access to justice and effective protection of human rights* (2012) 26.
[91] See S Deva 'Constitutional Courts as positive legislators: The Indian experience' in Allan R. Brewer-Carias (ed) *Constitutional Courts as positive legislators: A comparative law study* Cambridge University Press (2011) 587--601.
[92] As above.

demonstrate a more noticeable role in the enhancement, protection and application of human rights even though its jurisprudence has not always been consistent and has encountered with resistance in some cases.[93] Sudan should stand to benefit by adopting Indian example.

1.6 Limited access to Constitutional Court

The Constitutional Court was established in 1998. Prior to that, cases containing constitutional issues were referred to the Circuit of Supreme Court Judges. The 1998 Constitutional Court Act provided the Constitutional Court authorities to look into constitutional issues and issues arising from judgments of the Supreme Court.[94] The powers given to the Constitutional Court resulted in tensions between the Constitutional and Supreme Courts, as the Supreme Court was effectively made subordinate to the Constitutional Court.[95] Despite the subsequent tension among the two Courts, many advocates saw some benefits in the system with respect to the defence of the rights of individuals accused of murder.[96]

Subsequently, human rights lawyers and NGOs have taken cases before the Constitutional Court, challenging the constitutionality of emergency legislation, immunity provisions in numerous laws and the imposition of the death penalty against children below18 years of age.[97] No judgments have been issued in any of these cases, and it

[93] N 90 above, 26.
[94] A Medani, 'A legacy of institutionalised repression: Criminal law and justice' in L Oette (ed) *Criminal law reform and transitional justice: Human rights perspectives for Sudan* (2011) 69.
[95] Advocates and litigants who get unfavourable decisions from the Supreme Court can then seek to have those decisions overruled, even though the claims do not border on the constitutionality of the decision in question.
[96] A Medani *Criminal law and justice in Sudan* (2010) 7.
[97] There are only few civil society organisations that have the capacity to take the lead in law reform initiatives. Many organisations, in particular outside of Khartoum, have focused on the provision of legal aid, monitoring and advocacy, such as women's rights. Most of these organisations have limited capacity and legal expertise with regard to specific aspects of criminal law and the process of legislative reform. However, there is some local experience with rights awareness campaigns and advocacy.

remains to be seen what impact a judgment of the Constitutional Court that declared a law or a certain provision to be unconstitutional would have on criminal law reform.[98]

However, the Constitutional Court has failed to perform as a constitutional guardian of rights and remedies provided for in the Bill of Rights and other laws.[99] In practice, there is nonexistence of cases that have resulted in recompense or other forms of reparation being given to victims of torture and other grave human rights violations. While compensation as one form of reparation can be demanded in the way of criminal proceedings, Sudanese criminal law does not recognise violations such as torture as defined in international law as a criminal offence. Immunities and lack of sufficient protection considerably restrict the prospect of effectively carrying a compensation claim as part of criminal proceedings. A victim of human rights violations may claim damages under civil law[100] but due to immunities and 'lack of investigations, there is virtually no practice of victims having effective access to justice and obtaining reparation.'[101]

Accessibility to an effective constitutional remedy before Sudan's Constitutional Court is hindered by numerous key factors, namely, narrow *locus standi*, fees, qualification of lawyers, and inaccessibility as it is located in the capital. An additional problema is limited awareness compounded by the requirement to prove standing, for example, having to prove that the litigant suffered harm. On the subject of indicating harm, the Court has interpreted the criterion narrowly and has summarily dismissed several complaints that would have merited a substantive assessment of the claim made.[102] In these cases, ensuring effective access could have been attained through an interpretation of harm that emphases on the interference with the right and the need for effective protection.[103]

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[98] REDRESS & KCHRED *Criminal law and human rights in Sudan: A baseline study* March 2008 19.
[99] ACJPS (n 79 above) 24.
[100] Art 153(1) Civil Transaction Act of 1984.
[101] REDRESS, ACJPS& FIDH *letter to Chairperson of the HRC* 109th session of the human rights committee- pre-sessional meeting on Sudan (August 2013) 6.
[102] For example, *Al-Sudani Newspaper v the Ministry of Justice & the Press and Publications Prosecution Bureau* MD/GD/46/2007.
[103] See ACJPS (n 79 above) 25.

Actual examples of how the Court has handled cases brought before it includes, the *Farouk Mohamed Ibrahim's* case, where the applicant complained about the torture he suffered while he was detained by the security forces and the subsequent lack of justice.[104] The applicant challenged the constitutionality of provisions in the CPA[105] arguing that they contradicted the constitutionally guaranteed right to litigation.[106] The applicant also alleged that the National Security Act 1999 violates the INC.[107] The Court held that immunity laws are procedural only and that victims may pursue legal remedies where immunity is unduly granted or not lifted.[108] As a general principle, fundamental rights should be interpreted in an open-minded way so as to safeguard their effective protection. The Court's dialectics seems to have been designed at creating the opposite effect. Moreover, the Court delivered no further clarification of its approach to interpretation in general, and how this would need to be applied in respect of specific rights. Instead, the Court's reasoning is formalistic, selective and devoid of any appreciation of the significance of the issues that arose.[109]

Another issue regarding the right of access to the Constitutional Court is the high costs.[110] This bars prospective litigants from bringing cases to court.[111] The lack of legal aid, except in limited high profile criminal cases and the provision permitting the Court to relinquish fees in case of bankruptcy is clearly insufficient as many potential litigants may not be technically solvent but still need the means to bring a case.[112] The preferred

[104] *Farouk Mohamed Ibrahim v Sudan Government & Legislative Authority* CC18/2007 (2011) SCCLR 365.
[105] Sec 38 provides as follows: '(1) No criminal suit shall be initiated in offences having *ta'zir* penalties, where the period of limitation has elapsed, commencing from the date of occurrence of the offence, namely:- (a) ten years, in any offence, the commission of which is punishable with death, or imprisonment for ten years, or more; (b) five years, in any offence, the commission of which is punishable with imprisonment for more than one year; (c) two years, in any other offence. (2) The running of the limitation period shall cease, whenever the criminal suit is initiated'.
[106] See sec 38 CPA & art 35 of INC.
[107] Sec 33(b) of the National Security Act 1999. See also, art 31 of the INC.
[108] REDRESS, CLRS & SHRM *Sudan law reform advocacy briefing* October 2013 2.
[109] ACJPS (n 79 above) 17.
[110] Which is the equivalent of $1,000.
[111] This applies in particular to members of marginalised groups, which are frequently the subject of human rights violations but may be least able to seek enforcement of their constitutional rights.
[112] ACJPS (n 79 above) 26.

solution would, therefore, be to waive fees completely as is the practice in many other countries.[113]

The requirement of the Constitutional Court Act that a constitutional suit can only be conducted by a lawyer with at least twenty years of experience acts as a further bar to access the Court.[114] While the rationale for ensuring the quality of submissions is sound, the requirement effectively means that a litigant needs to instruct a senior lawyer and that translates to increased costs, except in a few cases where such a lawyer agrees to take up the case *pro bono* basis.[115] Other Constitutional Courts and international human rights treaty bodies allow cases to be brought even without legal representation.

1.7 Non-inclusion of certain crimes in the penal laws

One of the impediments regarding the right to litigation or access to court is the non-inclusion of certain crimes in the criminal law. For example, the criminal law does not criminalise acts of torture in line with internationally recognised standards and carries inadequate punishments.[116] Sudanese criminal law also does not recognise the crime of forced disappearances, which states are bound to prosecute and punish under international law.[117] However, the criminal law (following an amendment in May 2009)[118] recognises the crime of genocide, crimes against humanity and war crimes and for the first time, the Armed Forces Act of 2007 recognises international crimes in the context of armed conflict.[119] However, the definition of international crimes in both Acts is partly at variance with international standards.[120] For example, genocide under Sudanese law

[113] As above.
[114] Sec 29.
[115] Anyone contemplating taking a case to the Constitutional Court, therefore, faces the prospect of having to pay high lawyers' fees, in addition to the court fees.
[116] N 44 above, 4.
[117] REDRESS *Impunity in Sudan* http://www.pclrs.org/english/impunity (accessed 10 Sep 2013).
[118] After this amendment, the criminal law recognises the crimes of genocide, crimes against humanity and war crimes. For the first time, it recognised international crimes in the context of armed conflict sections from 186 to 192.
[119] Secs 153--156.
[120] The offences of genocide, crimes against humanity and war crimes should cover all internationally recognised elements of the respective crimes. Sec188: The definition of genocide should be in line with

must be committed through murder and in circumstances of an extensive and orderly attack; these requirements do not exist under international law.[121] The non-inclusion of numerous war crimes in the Criminal Act may prevent access to court for charging certain crimes such as sexual slavery which is criminalised in international law. In addition, modes of criminal liability, such as command or superior responsibility, are not fully recognised.[122] In practice, there is an almost entire lack of cases that have resulted in compensation or other methods of reparation being awarded to victims of serious human rights violations.

In addition, according to the CPA, amnesty decrees may cover individuals who have committed international crimes, and, therefore, ban further actions against the beneficiaries of amnesty decrees[123] and in the context of the Darfur Peace Agreement equally contribute to impunity and should be abolished.[124] The provision of amnesty is contrary to the right to litigate and access to court in the Bill of Rights and the state's obligations under international law.[125] The African Commission recommends taking all

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the definition contained in the 1948 Genocide Convention, which has been generally recognised and incorporated in the statutes of international criminal tribunals. Sec 187: The crime against humanity of rape should be changed to cover all acts of penetration and to specify the forms of coercion and lack of consent. Sec 189: The following war crimes that are not included in the proposed amendment should be added to the section: (i) sexual slavery; (ii) making improper use of the flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious physical injury; (iii) the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all parts of the population of the occupied territory within or outside its territory.

[121] See S Horvitz *Sudan: Interaction between international and national judicial response to the mass atrocities in Darfur* April (2013) 18.

[122] N 117 above.

[123] Such as Presidential Decree No. 114.

[124] See sec 211 of CPA that provides that '(1) The Head of State shall, in otherwise than *hudud* offences, have the power of general pardon, with, or without conditions, of any cases of suspicion, or charge of offences, in which final judgement has not been passed. (2) The power of general pardon shall be exercised, by a decision of the Head of State, to be issued after consulting the Minister of Justice. (3) No criminal suit shall be instituted, for any suspicion, or charge which has been covered with a general pardon, the conditions of which have been satisfied'.

[125] N 117 above.

necessary and urgent measures to desist from adopting amnesty decrees for perpetrators of human rights abuses.[126]

The right to litigation and access to court enshrined in the Bill of Rights requires states to remove obstacles to access justice, including amnesty and immunity laws that may discourage the right to compensation and accountability for human rights violations.[127] Immunities and lack of adequate protection significantly restrict the prospect of successfully bringing a compensation claim as part of criminal proceedings. A victim of human rights violations may claim damages under civil law but due to immunities and lack of investigations there is virtually no practice of victims having effective access to justice and obtaining reparation.[128]

Regarding the Bill of Rights, the Constitutional Court has failed to act as a constitutional guardian of rights. Reparation provided for in statutory law has been mostly ineffective.[129] The lack of effective remedies to give effect to rights includes:[130] the lack of access to justice; the judiciary that is not entirely independent; the existence of emergency laws and legislation providing for immunity; amnesty; and the brief statutes of limitation that limit accountability.[131]

2. The right to legal aid

[126] *Sudan Human Rights Organisation & Another v Sudan* Communication 279/03 (2009) AHRLR 153 (ACHPR 2009) para 229(7).
[127] See art 35 of INC. See also, M. Babikir 'Criminal justice and human rights: an agenda for effective protection in Sudan's new constitution' REDRESS & KCHRED (2012) 11 www.redress.org (accessed 9 Sep 2013).
[128] N 101 above, 7. Sec 46 of the Criminal Act of 1991 provides as follows: 'The court shall, upon conviction of the accused, order the restitution of any property, or benefit obtained by the offender, and it may, on application by the victim or his relatives, order compensation for any injury resulting from the offence, in accordance with the provisions of the Civil Transactions and Procedure Acts'.
[129] See art 35 of INC. See in particular *Kamal Mohammed Saboon v Sudan Government* and *Farouq Mohamed Ibrahim Al Nour v Government of Sudan & Legislative Body* final order by Justice Abdallah Alamin Albashir President of the Constitutional Court, 6 November 2008.
[130] REDRESS, SHRM & CLRS Alternative report: *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) 3.
[131] Babikir (n 55 above) 20.

Legal aid is an important tool and plays a significant role in guaranteeing the right to a fair trial for accused persons. Legal aid is based on the premise that poverty should not hamper access to justice and equality before the law.[132]

The determination of whether the interests of justice require a nomination of a lawyer is based primarily 'on the seriousness of the offence, the issues in the matter, including the potential sentence and the complexity of the issues.'[133] The value of this right emanates from the fact that a fair trial requires equality between parties in a criminal suit.[134]

Granting of legal aid as a right under international law is guaranteed in the ICCPR,[135] the AMCHR,[136] the ECHR,[137] the Yugoslavia Statute,[138] the Rwanda Statute,[139] the ICC Statute,[140] the Basic Principles on the Role of Lawyers[141] and the Dakar Declaration on Fair Trial and Legal Aid in Africa.[142] This right is also recognised by the African Commission's Resolution on the Right to Fair Trial and Legal Aid in Africa.[143]

The ICCPR and the EHRC require the state to provide a counsel free of charge to the accused, upon the fulfillment of two conditions. The first condition is the interests of

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[132] S Saeed *Legal Aid Bill: Analytical study* (2010) 2.
[133] N 6 above 121.
[134] As above.
[135] Art 14(3)(d).
[136] Art 8(2)(e).
[137] Art 6(3)(c).
[138] Art 21(4)(d).
[139] Art 20(4)(d).
[140] Art 67(1)(d).
[141] Principle 3 of the Basic Principles on the Role of Lawyers which provides as follows: 'Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall co-operate in the organization and provision of services, facilities and other resources'.
[142] Paragraph 8 which provides as follows: 'Access to justice is a paramount element of the right to a fair trial. Most accused and aggrieved persons are unable to afford legal services due to the high cost of court and professional fees. It is the duty of governments to provide legal assistance to indigent persons in order to make the right to a fair trial more effective. The contribution of the judiciary, human rights NGOs and professional associations should be encouraged'.
[143] See art 5(h) of the African Commission's Resolution on the Right to Fair Trial and Legal Aid in Africa, which adopted in 26th ordinary session of the African Commission held in Kigali Rwanda from 1--15 November 1999.

justice that entail a counsel be appointed, and the second condition is the accused lack of sufficient funds to pay for a lawyer.[144] Giving meaningful content to the right to a fair trial also depends on the ability of the defence to challenge the evidence. Such a challenge will in turn depend on the financial resources of the accused, the availability of experts and skills.[145] Refusal of legal aid to an accused where one is required is a breach of the right to a fair trial.

The HRC has held that '[t]he interests of justice require that a counsel be appointed at all stages of the proceedings for people charged with crimes punishable by death, if the accused does not have the assistance of counsel of his choice.'[146] The HRC recognises that there are instances when the accused may not claim legal aid. An example of how the HRC had interpreted the importance of having counsel appointed happened in the case of a man who was charged with speeding and brought before a court at the same time for an unrelated offence for failing to provide information to an official registrar about a firm that he operated. The HRC held that 'the accused had failed to show that in his particular case the interests of justice would have required the assignment of a lawyer at the expense of the state.'[147]

The HRC on many occasions has been faced with cases in which legal aid counsel engaged to handle an appeal conceded at the hearing that there was no merit to such appeal without prior consultation with his client. The Committee has found in such instances that:

> [w]hile article 14(3)(d) does not entitle the accused to choose counsel provided by him free of charge, the court should ensure that the conduct of the case by the lawyer is not incompatible with the interest of justice. While it is not for the Committee to question counsel's professional judgment, the Committee considers that in capital cases, when counsel for the accused concedes that there is no merit in the appeal, the court should ascertain whether counsel has consulted with

[144] See art 14 (2)(d) of the ICCPR & art 6 (3)(c) of the ECHR.
[145] N 6 above, 76.
[146] *Henry & Douglas v Jamaica* (571/1994) 26 July 1996, UN Doc. CCPR/C/57/D/571/1994, para 9.2.
[147] *OF v Norway* (158/1983) 26 October 1984, 2 Sel. Dec. 44.

> the accused and informed him accordingly. If not, the court must ensure that the accused is so informed and given another opportunity to engage a new counsel.[148]

Similarly, the Inter-American Court has held that states must provide free counsel to a person who cannot afford legal fees and where counsel is necessary to ensure a fair hearing.[149]

The African Commission has urged state parties to the African Charter to publicise the availability of the recourse procedure and to provide the poor with legal aid.[150] The African Commission has subsequently stressed that the lack of legal aid in Africa impedes the bulk of African people from affirming their rights.

Regarding Islamic law, Baderin expressed the opinion that:[151]

> Many contemporary writers on Islamic law thus argue strongly that the right to engage counsel actually falls within the 'theory of protected interest' of the individual under Islamic law and must be fully ensured by the state.[152] Provision of free legal aid by the state, in accordance with ICCPR obligations, to those who cannot afford to pay for such services will be very much advantageous in that regard and will thus not be contrary to Islamic law.

Under Sudanese law, the Constitution of 1973 in article 68 guaranteed the principle of legal aid. The INC provides for legal aid in article 34(6) as follows: 'Any accused person has the right to defend himself/herself in person or through a lawyer of his/her own choice and to have legal aid assigned to him/her by the State where he/she is unable to

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[148] *Morrison v Jamaica* Communication No. 663/1995 (Views adopted on 3 November 1998) in UN doc. GAOR, A/54/40 (vol. II) p 155 para 8.6. See also, D Weissbrodt *The right to a fair trial under the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights* (2001) 116.
[149] Inter-American Court *Exceptions to the exhaustion of domestic remedies* advisory opinion, OC-11/90, 10 August 1990, OAS/Ser.L/V/III.23 Doc.12 rev. 1991, paras 25--28. N 6 above, 96.
[150] Resolution on the Right to Recourse and Fair Trial, 11th ordinary session of the African Commission on Human and Peoples' Rights, held Tunis Tunisia, from 2--9 March 1992.
[151] Baderin (n 13 above) 107.
[152] T Al-Alwani 'Judiciary and rights of the accused in Islamic criminal law' in T Mahmood *et al* (ed) *Criminal law in Islam and the Muslim world* (1996). 274--276; T Mahmood 'Criminal procedure at the *Shari'a* law as seen by modern scholars: A review' in T Mahmood *et al* (ed) *Criminal law in Islam and the Muslim world* (1996) 300.

defend himself/herself in serious offences.' The provision of the 1973 Constitution is better than that of the INC on the basis that the INC limits the right to legal aid to serious offences and pre-trial phase.[153]

The restrictions on the right to legal aid in the Constitution, CPA and Legal Aid Act, curtail the right to legal aid. The Constitution should not have restricted provisions on legal aid. It should be more direct and unambiguous and should place a duty on the state to guarantee legal aid for all individuals who require assistance and without restrictions that offend the principle of equality. [154]

The impediments that curtail the right to legal aid in Sudan include: restrictions in providing legal aid only at trial stage and not all the stages and limiting legal aid to serious crimes only.[155] In addition, the right can only be exercised upon request by the accused. Restricting the right to legal aid upon request from an accused person is narrowing the right to legal aid. This is in view of the fact that the illiteracy rate is very high, and the majority of areas in Sudan and IDP camps lack knowledge of their basic rights and the rights enshrined in the Bill of Rights. In practice, the Constitutional Court restricted the right to a lawyer or obtaining legal aid by a request from the accused person if he is insolvent or poor.[156] Furthermore, legal aid is provided through the Ministry of Justice, an institution under the supervision of the executive arm who may be a party to the suit. With respect to legal aid under Sudanese law, section 135(3) of the CPA of 1991 provides as follows:

> Where the accused is accused of an offence punishable with imprisonment, for the term of ten years, or more, amputation or death, is insolvent, the Ministry of Justice, upon the request of the accused, shall appoint a person to defend him, and the State shall bear all, or part of the expenses.

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[153] Saeed (n 132 above) 5.
[154] As above.
[155] 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* issued by the Office of the High Commissioner for Human Rights on 28 November 2008 38.
[156] *Rihmtallah Adam Madeni v Sudan Government & Others* CC 1/2001 (1999--2003) SCCLR 290--293.

Section 135(3) of the CPA of 1991 has been replaced pursuant to the amendment of 2009 which reduces the imprisonment to an offence punishable by imprisonment for seven years or more.

Legal aid should not be provided for only serious crimes, but should be granted in all crimes that are punishable, results in loss of freedom, attracts corporal punishment[157] or at least for crimes punishable with imprisonment for three years or more. For example, in the case of *Quaranta v Switzerland* the European Court[158] held that there was a violation of the ECHR when a man was deprived of free legal aid throughout a judicial investigation and trial on a drug charge.[159] The Court also held that where the possible sentence was three years imprisonment, legal aid should have been provided.[160]

The legal aid in Sudan is provided by the Department of Legal Aid in the Ministry of Justice. The headquarters is in Khartoum with branch offices in eight states.[161] The other nine states[162] which have no legal aid branch have registered advocates who represent the Department of Legal Aid.

To evaluate the performance of the Department of Legal Aid, it is important to set out the following statistics:[163]

[157] In Florida State in the USA, the law provides for legal aid only in cases punishable by death penalty. In *Gideon v Wainwright* 372 U.S. 335 (1963) the accused was sentenced to five years imprisonment, and he appealed to the US High Court that held that preventing an accused person from his right to a lawyer violated his right and was unconstitutional. The Court overruled the judgment and punishment and ordered a re-trial of the case. http://supreme.justia.com/cases/federal/us/372/335/case.html (accessed 10 April 2014).
[158] *Quaranta v Switzerland* 12744/87, 24 May 1991, 205 Ser.A 17.
[159] See art 6(3)(c) of ECHR.
[160] See N Steytler *Constitutional criminal procedure: A commentary on the Constitution of the Republic of South Africa* (1998) 71--75.
[161] Kasala, Red Sea, Blue Nile, North Darfur, South Darfur, East Darfur, West Darfur and Central Darfur.
[162] Gazira, White Nile, Gadarif, Sinnar, Shamaliyya, Nahr Elneil, North Kordofan, South kordofan and West Kordofan.
[163] Interview with Mr. Al-Sayim, Head of the Legal Aid Department, Sudan, Khartoum 5 and 6 June 2013.

A total of 321 criminal cases were handled in 2012. 202 dealt with by legal advisors from the Department of Legal Aid and 119 by advocates. 161 civil suits were handled by advisors from Department of Legal Aid. 21 family cases were handled by 21 advisors and nine constitutional cases by 9 advisors.

The total number of criminal cases dealt with in 2011 was 251, 156 by legal advisors from the Department of Legal aid and 95 by advocates. Of the 86 civil suits, 81 were handled by advisors from the Department of Legal aid and five by advocates. 18 family cases were dealt with by advisors and nine constitutional cases by nine advisors.

In 2010, 288 criminal cases were received. 192 handled by legal advisors from the Department of Legal aid and 96 by advocates. The civil suits were 74 in total with 69 of the 74 cases handled by advisors from the Department of Legal aid and five by advocates. Of the 12 family cases, ten were dealt with by advisors and two by advocates. In addition, ten constitutional cases were handled by 9 advisors.

A total of 271 criminal cases were dealt with in 2009. 179 handled by legal advisors from the Department of Legal aid and 92 by advocates. Civil suits were 69, with 57 handled by advisors from the Department of Legal aid and 12 by advocates. Advisors handled all of the eight family and five constitutional cases.

The total number of criminal cases from January to June 2013 was 122. 73 handled by advisors from the Department of Legal aid and 49 by advocates. Civil suits were 69. 57 handled by advisors from Department of Legal Aid and 12 by advocates. There were 13 family cases, 11 dealt with by advisors from Legal aid Department and two by advocates. All three constitutional cases were handled by advisors from the Legal aid Department.

The Department of Legal Aid is a part of the Ministry of Justice which is a branch of the executive arm of government.[164] In cases where the state is a party to a suit, representing an accused person by a state institution leads to conflict of interest. Legal aid in criminal cases should be provided by advocates and not advisors from the Ministry of Justice, because according to the CPA the prosecutors are attorneys from Ministry of Justice, and they are representative of the complainant in the court.

Furthermore, the Legal Aid Department has remained understaffed having only twelve legal advisors.[165] The Department of Legal Aid has taken only a small fraction of the total cases in Sudan requiring free legal representation.[166] The Department has been operating mainly for criminal defendants because of a limited number of lawyers.

When the court considers a request for legal aid, it should consider that insufficient means does not mean poverty and the burden of proof should not be high. Furthermore, in the interest of justice, the court should identify the seriousness of the charges and the penalty including crimes attracting corporal punishments.[167]

2.1 The role of legal aid clinics

The University of Khartoum has a solid history of providing legal aid, and has delivered assistance and representation for those most in need for several years until 1992 when withdrawal of outside support led to a lack of legal aid undertakings. Since July 2005, however, staff and students at the Faculty of Law have been determined to revive the University's legal aid practice through the establishment of a Legal Aid Clinic.[168]

The Faculty of Law of the University of Khartoum can play a fundamental role in upholding access to justice through legal learning, a legal assistance clinic and legal

[164] Previously, the Admission of Advocates Committee was the body providing legal aid, according to 1973 Constitution and the Advocacy Act 1983 (secs 39, 40, 41).
[165] UNDP (n 86 above) 46.
[166] As above.
[167] Steytler (n 160 above) 75.
[168] UNDP (n 86 above) 49.

knowledge programmes.[169] The library of the Faculty of Law holds a huge collection of textbooks, but most of the laws and law reports are outdated. The access to computerised legal research amenities and resources lack at the Faculty of Law.[170] The Faculty of Law now offers a diploma and masters degree in international human rights, but this requires further capacity building. The law library is in need of capacity support.[171] Further, the Legal aid clinic in the Faculty of Law needs financial funding to play an improved role in strengthening the right to a fair trial at the domestic level.

2.2. Other projects of legal aid

In order to strengthen the right to legal aid, the United Nations Development Programme (UNDP) runs a rule of law project to support legal aid and awareness raising. The UNDP has established six Justice Confidence Centres (JCC), which are run by professional lawyers. The JCC has provided legal counselling services to over 600 IDPs on civil, family, labour and criminal cases. The percentage of cases brought before the courts[172] indicates that the JCCs have significantly aided the IDP community in accessing justice.[173]

The UNDP rule of law project in Darfur has attained legal successes that have substantially advanced access to justice in Darfur. For example, cases and disputes successfully facilitated by UNDP paralegals[174] include legacy, child exploitation, internal violence, ethnic tensions in camps and alleged infanticide. UNDP lawyers rendered representation to clients and effectively resolved disputes.[175] UNDP rule of law offices are involved in cases of pursuing and follow up to varying steps, however, some UNDP

[169] The faculty offers a diploma and masters degree in Human Rights law and is in the process of establishing a Human Rights Centre and introducing a Legal Practice Course and Legal Clinic Education.
[170] UNDP (n 86 above) 49.
[171] UNDP (n 86 above) 66.
[172] About 84 cases.
[173] Between 2005 and 2007 in the following cases: murder, rape, assault, theft, arbitrary arrest/detention, land disputes, forced marriage, domestic violence and divorce and maintenance. See n 85 above, 47.
[174] Between 2005 and 2007.
[175] UNDP (n 86 above) 60.

rule of law officers have advanced highly detailed cases by creating databases for their places.[176]

The legal aid framework handled many cases in Darfur, South Kordofan and Khartoum. In 2007 for example:

> [t]he legal aid network in Darfur handled over 4000 cases including paralegal mediations. Lawyers achieved notable successes including convictions of ex-government officials. In South Kordofan, the JCCs received 79 cases in 2007 and resolved many of those cases. In Khartoum, approximately 664 IDPs benefited from legal counseling in 2007. There were 229 cases handled by UNDP legal aid lawyers, 85 of those cases were pursued in court. Many of these were successfully resolved.[177]

The UNDP has of late attained remarkable legal success in Darfur regarding a manuscript recognised as 'Form 8' that has been used as an obstacle to women reporting occurrences of rape and receiving medical care [178]

The cases that have been handled by the UNDP in Darfur have had a greater impact on the right to legal aid when compared to the cases handled by the Department of Legal aid in Sudan as a whole.

3. The right to equality before the law

Everyone is entitled to equality before the law.[179] The right to equality before the law means that 'laws must not be discriminatory and that judges and officials must not act in a discriminatory fashion in enforcing the law.'[180] The right to equal protection of the law

[176] UNDP (n 86 above) 60--61.
[177] UNDP (n 86 above) 67.
[178] As above.
[179] Under the international human rights law, this right is guaranteed in many conventions, arts 7 & 10 of the UDHR, arts 2(1), 2(3) & 26 of the ICCPR, arts 2 & 3 of the ACHPR, arts 1, 8(2) & 24 of the AMCHR, art 14 of the ECHR, arts 2 & 15 of the CEDAW, arts 2, 5 & 7 of the Convention Against Racism, art 21(1) of the Yugoslavia Statute, arts 20(1) of the Rwanda Statute& 67(1) of the ICC Statute.
[180] N 6 above, 84.

bans discrimination in law or practice. Nevertheless, this does not create all violations of treatment discriminatory, only those violations not created on reasonable and objective principles can be termed discriminatory.[181]

The HRC has stated that the guarantee of equality in the ICCPR[182] requires states to 'ensure the equal rights of men and women to all civil and political rights' protected by the ICCPR.[183]

Under Islamic law, equality is a crucial principle. The *Shari'a* specifies that all persons are created equal.[184] The *Qur'an* states as follows:

> O Dawud (David)! Verily, we have placed you as a successor on the earth, so judge you between men in truth (and justice) and follow not your desire – for it will mislead you from the Path of Allah. Verily, those who wander astray from the Path of Allah (shall) have a severe torment, because they forgot the Day of Reckoning.[185]

Also, the Prophet Mohamed said as follows:

> O People be aware: your God is One, No Arab has any superiority over a non-Arab and no non-Arab any superiority over an Arab, and no white one has any superiority over a black one nor any black one over a white one, except on the basis of piety. The most honourable among you in the Sight of God is the most pious and righteous.[186]

Islam gives justice an eminent situation. The *Qur'an* urges Muslims to retain the values of natural justice. The *Qur'an* commands Muslims to keep the principles of justice even with their enemies.[187] Believers are, therefore, strictly urged to do justice even to one's detriment and in favour of one's adversary.[188]

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[181] As above.
[182] Art 14(1).
[183] N 6 above, 84.
[184] Baderin (n 13 above) 163.
[185] Surat Sad verse 26.
[186] Baderin (n 13 above) 163.
[187] See Baderin (n 13 above) 100.
[188] As above.

Litigants are to be treated on an equal footing, regardless of their social status. When this divine ordinance is thoroughly implemented, there will be no place for prejudice or persecution and no room for segregation or oppression. When the judge is independent, his or her judgment will be fair.

The prophet of Islam in his utterance made it clear that equality before the law is one of the basic ingredients of fair adjudication. It is relevant to evoke the case of the *Makhzumiyya,* which a woman who committed an act of theft and the *Quraish* clan who were very anxious about her fate. Osama Ibn Zaid who was requested to communicate on her behalf before the Prophet pleaded him not to amputate the woman's hand because she was of an honorable family and her family would be dishonoured. Prophet Mohamed questioned Osama why he dared to intervene to suspend a punishment enacted by Allah. According to the Prophet, the authority of the children of Israel was demolished because when the noblest stole they pardoned him and when the weak or humble amongst them stole they executed the penalty on him. According to the Prophet, 'By him in whose hand the life of Mohamed is, if Fatima the daughter of Mohamed steals I shall cut off her hand.' The case of the *Makhzumiyya* woman reveals the significance located in terms of the justice metered out by Islam. In an illustration of the right to equality before the law, the second Caliph Omer Ibn Khatab once had a lawsuit against a Jew and both of them went to the *Gadi* (Judge) who on seeing Omer stood up as a sign of respect for Omer. Omer considered such act an unpardonable weakness on the part of the *Gadi* that he dismissed him at once.[189] Further, the second Caliph Omer Ibn Al-Khatab said to Abu Musa when he appointed him as a judge in Iraq 'you should treat your people in equal way in your justice and council, so that noble could not seek to engrave the weak man, so that the weak men disappointed from your rule.'[190] In the basis of these examples it is obvious that *Shari'a* law guarantees the right to equality before the law.

[189] See M Ibn Rushd Al-Qurtabi *Bidayat al-Mujtahid wa Nihayah al-Mugtashid* (Arabic) 1988 472.
[190] M Ibn Al-Qayim Al-Guziya *I'laam Al-Muwageen a'n Rub Al-A'lameen* part 1 (Arabic) 86 http://www.waqfeya.com/book.php?bid=1470 (accessed 20 March 2014).

Justice in Islamic law is concerned about absolute equality. Justice in Islam should be for Muslim and Non-Muslim because the principle of justice in Islam is a human right, irrespective of nationality or religion. The Cairo Declaration on human rights[191] also guaranteed the right to equality before the law and court.[192]

Under Sudanese law, the Self-Government Statute,[193] the Transitional Constitution of 1956[194] and the Transitional Constitution of 1964[195] provide for equality before the law. The 1973 Constitution guarantees the right to equality.[196] The 1998 Constitution provides 'all people are equal before the court of law.'[197] This article restricts the scope of equality. It seems from the provision that a discrimination against individuals by officials or state organs other than a court is permitted.[198] The INC enshrines the right to equality as follows: 'All persons are equal before the law and are entitled without discrimination, as to race, colour, sex, language, religious creed, political opinion, or ethnic origin, to the equal protection of the law.'[199]

The HRC in General Comment 32 stated as follows:

> The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as procedural means to safeguard the rule of law. Article 14 of the Covenant aims at ensuring the proper administration of justice, and to this end guarantees a series of specific rights.[200]

[191] Adopted by the Organisation of Islamic Conference in Cairo in 1990.
[192] Art 19(a) provides as follows: 'All individuals are equal before the law, without distinction between rulers and ruled'.
[193] Art 5(1).
[194] Art 4(1).
[195] Art 4(1).
[196] Art 38.
[197] Art 21.
[198] A Khalil 'Guarantees for protection of human rights in national and international law' unpublished LLM thesis, University of Khartoum, 2004 46.
[199] Art 31.
[200] HRC Comment No. 32 (n 10 above) para 2.

According to the HRC, the general guarantee of equality before courts and tribunals applies regardless of the nature of proceedings before such bodies.[201] The HRC notes that individuals are entitled to a fair and public trial by a competent, independent and impartial court established by law, if they confront any criminal charges or if their rights and duties are determined in a suit at law.[202]

One of the main elements of the right to equality before the courts is the right to equality of arms.[203] The right to adequate time and facilities for the preparation of a defence is an important aspect of the principle of equality of arms. The elements of equality of arms includes an opportunity to receive and respond to submissions, an opportunity to present or give evidence, an equal status of witnesses, procedural equalities and lack of legislative interference.[204] This means that the similar procedural rights are to be delivered to all the parties, unless distinctions are based on law and can be justified on objective and reasonable grounds**,** not amounting to an actual disadvantage or other unfairness to the defendant.'[205]

Lack of equality of arms is the most prevalent when an accused is unrepresented.[206] In the constitutional case of *Farouk*,[207] the applicant claimed that section 32(b) of the Security Act was contrary to article 31 of the Constitution which guarantees equality before the law.

The Sudanese legal system has legislation that runs contrary to the principle of equality and curtails the right to equality before the courts.[208]

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[201] HRC Comment No. 32 (n 10 above) para 3.
[202] As above.
[203] As above.
[204] See Reid (n 3 above) 100--103
[205] *Dudko v Australia* Communication No. 1347/2005 para. 74.
[206] Steytler (n 160 above) 74.
[207] *Farouk Mohamed Ibrahim* case (n 104 above) 365.
[208] See for example, the Armed Forces Act 2007, the Police Act 2008, & the Security Forces Act 2010.

Some examples of violations of this right include refusal to grant an adjournment to enable an accused person to obtain legal representation; prosecuting or hearing a matter relating to detention or remand and bail in the absence of the defendant or his legal representative.[209] Sudanese law does not require that the accused person or his or her lawyer be present in Court for a bail hearing. Ordinarily, the decisions of the court in these matters are made without the accused's attendance and without legal representation. Thus, the accused is denied access to his case file in the police station, court, and registry and is unable to prepare an adequate defence.

The ICCPR declares that all persons shall be equal before the courts and tribunals.[210] This right requires that the prosecution and defence be treated equally in criminal and civil proceedings. The Constitutional Court in the *Baaboud trading agency's* case[211] held that any transaction that deals with any party to it in contradiction of the law is a violation of the constitutional right enshrined in article 31 of the Constitution. The court cannot act in a way which gives the prosecution an advantage over the defence. Equality of arms includes allowing men and women to seek redress before the court.

Equality before courts and tribunals also require that similar cases are dealt with in a similar fashion. The African Commission in *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi,*[212] found a violation of the right to equal treatment as one of the main rights to a fair trial, because the Court of Appeal in Burundi declined to postpone the proceeding demanded by the accused person in the absence of his advocate, despite the fact it had accepted an adjournment requested by the prosecutor in an earlier session.[213] However, in exceptional criminal procedures, specially

[209] See Jayawickrama (n 72 above) 505.
[210] Art 14(1).
[211] *Baaboud Trading Agency v Sudan Government & Faisal Islamic* Bank 27/2001 (1999--2003) SCCLR 579-589.
[212] *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v Burundi* Communication No. 231/99.
[213] See as above paras 27--29.

constituted courts or tribunals must apply an objective and reasonable criteria to justify any distinction.[214]

4. The right to adduce and challenge evidence

This section focuses on a witness protection, calling, examining and questioning witnesses and the evidence obtained through illegal means. In addition, the rights to adequate time to facilitate and prepare a defence and trial without undue delay will be discussed.

Under international human rights law, the right to adduce and challenge evidence is guaranteed by the ICCPR,[215] the ECHR,[216] the ACHPR,[217] the AMCHR,[218] and the Principles and Guidelines on the right to a fair trial and legal assistance.[219]

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[214] See concluding observations of the HRC: *United Kingdom of Great Britain and Northern Ireland* CCPR/CO/73/UK (2001) para 18

[215] Art 14(3) provides as follows: '(a) To be informed promptly and in detail in a language which he understands of thenature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. (c) To be tried without undue delay. (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing, to be informed if he does not have legal assistance of his right and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it. (e) To examine, or to have examined, the witness against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witness against him. (f) To have the free assistance of an interpreter if he/she cannot understand or speak the language used in court'.

[216] Art 6(3)(d).

[217] Art 7(1)(c).

[218] Art (8)(2)(f).

[219] Paragraph 6 provides for '(ii) The accused's right to examine witnesses may be limited to those witnesses whose testimony is relevant and likely to assist in ascertaining the truth. (iii) The accused has the right to be present during the testimony of a witness. This right may be limited only in exceptional circumstances such as when a witness reasonably fears reprisal by the defendant, when the accused engages in a course of conduct seriously disruptive of the proceedings, or when the accused repeatedly fails to appear for trivial reasons and after having been duly notified. (iv) If the defendant is excluded or if the presence of the defendant cannot be ensured, the defendant's counsel shall always have the right to be present to preserve the defendant's right to examine the witness. (v) If national law does not permit the accused to examine witnesses during pre-trial investigations, the defendant shall have the opportunity, personally or through defence counsel, to cross-examine the witness at trial. However, the right of a defendant to cross-examine witnesses personally may be limited in respect of victims of sexual violence and child witnesses, taking into consideration the defendant's right to a fair trial. (vi) The testimony of anonymous witnesses during the trial will be allowed only in exceptional circumstances, taking into consideration the nature and the circumstances of the offence and the protection of the security of the witness and if it is determined to be in the interests of justice. (g) Evidence obtained by illegal means

Under Islamic law, the second Caliph Omer, was quoted to have advised some judges by saying 'if an adversary whose eye had been blinded by another comes to you do not rule until the party attends for perhaps the latter had been blinded in both eyes.'[220] It appears that judge should provide an opportunity to adduce and challenge evidence and do not rule for the one before similarly heard from the other. Further, the second Caliph reportedly said 'a man would not be secure from incriminating himself if you made him hungry, frightened him or confined him.'[221] The testimony is only valid if made voluntarily before authorized court. In addition, there was a *hadith* reported that the Caliph Othman Ibn Affan endeavored to litigate a Jewish subject for repossession of a suit of armour, but his case failed due to lack of competent witnesses.[222] Therefore, *Shari'a* law guarantees the right to adduce and challenge evidence, and evidence should be produced in the presence the accused at a public hearing.

According to the majority of Islamic jurists, torture is strictly forbidden, and the results of torture cannot be used as evidence. The Prophet warned that 'God shall torture on the Day of Recompense, those who inflict torture on people in life.'[223] Therefore, Prophet Mohammed forbade torture in administration of justice.[224] Modern authors, however, unanimously hold the opinion that torture is forbidden. This view is also found in important documents such as the draft of the Islamic Constitution[225] or the Cairo Declaration on Human Rights in Islam.[226] In Islamic law, confessions and witnesses are

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constituting a serious violation of internationally protected human rights shall not be used as evidence against the accused or against any other person in any proceeding, except in the prosecution of the perpetrators of the violations'.

[220] A Awad 'The rights of the accused under Islamic criminal procedure' in M Bassiouni (ed.) *The Islamic criminal justice system* 1982 97.

[221] M Lau *The independence of judges under Islamic law, international law and the new Afghan Constitution* www.zaoerv.de (accessed 8 January 2012).

[222] As above.

[223] There are only a small number of Islamic jurists, mostly Hanafi jurists, the most famous of them Ibn Abdin, who allowed beating of the accused in order to get a confession of guilt if he was already known as an evil man. Some other jurists, for example, Ibn Hazm, did not permit torture as such, but they allowed the use of the results of torture as evidence, except in *hudud* crimes.

[224] See A Elmorr 'Human rights in the constitutional systems of Egypt and other Islamic countries: International and comparative studies' in: K Boyle & A Sherif (eds) *Human rights and democracy: The role of the Supreme Constitutional Court of Egypt* (1997) London/The Hague/Boston.

[225] Published by the Islamic Research Academy of al-Azhar University in 1979 (art 33).

[226] Art 20.

the most important means of evidence and sometimes the only means of evidence that are admitted.

4.1 Right to call and examine witnesses

A fundamental component of the standard of equality of arms and the right of defence is the right of the accused to call and question witnesses. This right is 'designed to guarantee the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses which are available to the prosecution.'[227] In principle, all the evidence should be produced in the presence of the accused at a public hearing. The accused should be given a chance to contest and question a witness who will testify against him or her. The right to call a witness includes the right to cross-examination.[228]

The right to call and examine witnesses guarantees that 'the defence has an opportunity to question witnesses who will give evidence on behalf of the accused and to challenge evidence against the accused.'[229] The questioning of witnesses 'by both the prosecution and the defence provides the court with an opportunity to hear evidence and challenges to that evidence.'[230] At common law, the court may refuse to allow the accused to call a witness where the witness cannot tender relevant evidence.[231] The right to compel witnesses for the defence is broadly regarded as an essential part of the right to adduce evidence.[232]

Article 14(3)(e) of the ICCPR guarantees the right of accused persons to examine, or have examined, the prosecution's witnesses and to obtain the presence and examination of witnesses on their behalf under the similar conditions as the prosecution's witnesses. As an application of the principle of equality of arms, this

[227] HRC General Comment 13: Administration of justice (article 14 of the ICCPR) adopted 13 April 1984, HRC/GEN/1/Rev.9, para12.
[228] Steytler (n 160 above) 250.
[229] N 6 above 129.
[230] As above.
[231] N Steytler (n 160 above) 250.
[232] As above.

safeguard is significant for guaranteeing an effective defence by the accused and their counsel, and therefore provides the accused with similar legal powers of compelling the presence of witnesses and examining or cross-examining any witnesses accessible to the prosecution. It does not, however, provide an unrestricted right to obtain the presence of any witness demanded by the accused or their counsel. It gives the right to call relevant witnesses for the defence, and the opportunity to question and challenge the prosecution's witnesses at any phase of the proceedings. Within these boundaries, and subject to the restrictions on the use of statements, the admissibility of confessions and other evidence obtained in violation of article 7 should be determined by the domestic legislatures of state parties.[233] Current legislation in Sudan does not provide effective protection of victims and witnesses and this has been an issue of recurring concern.[234]

The right to call witnesses or examine the prosecution's witnesses means that all of the evidence must be created in the presence of the accused at a public trial, so that the evidence itself and the dependability and of a witness can be adduced. However, there are exemptions to this standard. However, such exemptions must not violate the rights of the accused.[235]

In the Supreme Court criminal case of *Al-Sir Muhammad Al Sanussi*,[236] the Court held that four witnesses or a confession was required in order to prove rape as expressly stipulated in the 1983 Penal Code.[237] In another Supreme Court case,[238] the Court considered circumstantial evidence in the case of rape of a child.[239] The legal reasoning of the judges in these cases illustrates the uncertainty about the legal nature of the

[233] HRC General Comment 32 (n 10 above) para 39.
[234] Group of Experts, final report, 71--72.
[235] See n 6 above, 130.
[236] *Sudan Government v Al-Sir Muhammad Al Sanussi* No. 55/1985 (1985) SCCLR.
[237] Secs 316 & 317.
[238] *Sudan Government v Musa'ab Mustafa Ahmed* 545/2000 2000 SLJR.
[239] Justice Abdelaziz held that sexual intercourse with a child constitutes rape, which is not subject to the *hadud* evidentiary rules (Sec 62 of the Evidence Act of 1994). He did not expound on whether the same reasoning applies to non-consensual sexual intercourse between adults. Justice Abdallah Alfadil Eissa stressed that a perpetrator of rape should be punished for adultery where he is married.

crime of rape and the applicable evidentiary rules. The use of the phrase 'by way of adultery, or sodomy' in section 149(1) of the Criminal Act appears to imply that rape is a form of adultery. Even if the terms 'adultery' and 'sodomy' in section 149(1) referred only to the act of sexual intercourse, the punishment stipulated in section 149(3) is clearly based on the crime of adultery. The Supreme Court has not clarified the legal nature of rape in the trial of *Musa'ab Mustafa Ahmed* or other cases. It is possible, or even likely, that courts will apply the *hudud* evidentiary rules in future rape cases.[240]

Other international standards are wider, eliminating not only statements elicited as a consequence of torture, but also those elicited as an outcome of other cruel, inhuman or degrading treatment. These standards apply not only to statements prepared by the accused persons, but also to statements prepared by any witness.[241] Furthermore, these international standards also consider the testimony of an anonymous witness unconstitutional.[242] The Inter-American Commission welcomed the decision of the Colombian Constitutional Court which held that a verdict permitting convictions to be based on testimony provided by anonymous witnesses was unconstitutional.[243] The Commission stated that notwithstanding this reform, the use of testimony from an anonymous witness is contrary to due process.[244]

In Sudan, there is no legislation that provides for effective protection of victims and witnesses.[245] The lack of protection of victims and witnesses, against reprisals when coming forward to report a crime or to seek a remedy has contributed to impunity.[246] There is no adequate legislation guaranteeing the freedom to advocate human rights, to exercise legitimate human rights activities and to be protected against threats,

[240] REDRESS & KCHRED *Time for change reforming Sudan's legislation on rape and sexual violence* (2008) 33.
[241] N 6 above, 108.
[242] N 6 above, 130--131.
[243] Inter-American Commission *Second Report on the Situation of Human Rights in Colombia* OEA/Ser.L/V/II.84, doc. 39 rev.1993, at 96, 98 and 249.
[244] Annual Report of the Inter-American Commission, 1996, OEA/Ser.L/V/II.95, doc.7 rev. 1997, at 658 and 736.
[245] The only provision is sec 4(e) of the CPA which stipulates that victims should not be subject to any injury or ill-treatment.
[246] N 44 above, 9.

harassment or other attacks. Human rights defenders have been repeatedly subjected to threats, harassment and torture, a practice that violates their rights and undermines their work.[247]

4.2 Witness protection as part of trial stage

In Africa, sophisticated witness protection programmes are still the exception rather than the norm and are limited to just a few countries such as South Africa, Kenya, and Uganda, including the international criminal tribunals or courts operating in some African countries. Accordingly, there is a need for more countries in Africa to adopt specific witness protection legislation and programmes in order to provide effective protection. Lessons can be learnt from the experiences of the ICC, International Criminal Tribunal for Rwanda and the Special Court of Sierra Leone.[248] Inadequate resources and competing needs creates a problem in that witness protection programmes may experience funding gaps. In practice, this threatens the integrity of such programmes.[249]

Sudan could draw guidance from Kenya where a revised Witness Protection Act was adopted in 2012, establishing a Witness Protection Agency and Witness Protection Programme that caters for different forms of protection provided by the police and the judiciary.[250] These include temporary residence in a safe house, providing testimony via video link, resettlement of a witness in an undisclosed location and sensitive investigatory relocation and identity change. The primary objectives of the Witness Protection Programme are to protect the physical security of the witnesses in giving

[247] See n 117 above. Rai-Alshaab journalists face the death penalty or life imprisonment and are denied the right to a fair trial. Kamal Aljizoli (advocate of the accused persons), said his team had withdrawn because they could not effectively defend their clients after four witnesses presented to the court were rejected by the prosecution and judges, leaving their hands tied. See Sudan Human Rights Monitor Report (Dec 2009–May 2010).

[248] IHRDA *Access to justice for victims of systemic crimes in Africa: Challenges and opportunities* Kololi, the Gambia: 13-14 April 2012 Summary of Proceedings 5 April 2013 15.

[249] As above.

[250] Witness Protection Act http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2079 (accessed 9 January 2014).

testimony and develop protective practices at each stage of the criminal justice procedure.

Sudan should ensure that human rights defenders have full and unhampered access to witnesses and victims of human rights abuses, that witnesses and victims are not subjected to any violence, retaliations or harassment due to their collaboration with human rights monitors and that all essential and practicable methods are taken to safeguard witnesses and victims against violence, retaliations and harassment by third parties.[251] No measures have been taken to protect witnesses and victims against violence, retaliations and harassment by third parties.[252]

In many African countries, however, implementing a witness protection programme has a number of challenges such as: lack of capacity and integrity in the justice system; the diversity of individual and state criminality; widespread corruption which can result in compromising protection officers and limited state budgets that may automatically exclude certain protection measures, such as relocating witnesses and their families.
Under the INC, courts have the responsibility of upholding constitutional rights of accused persons when their human rights are violated.[253]

4.3 Right of adequate time to prepare defence

In realising the right to sufficient time and access to adequate facilities to prepare a defence, the adequacy of the time will depend on the circumstances of each case. In its General Comment No. 32, the HRC stated that what constitutes 'adequate time' depends on the circumstances of each case. Adequate facilities according to the Committee must include access to documents and other evidence which the accused requires to prepare his case, along with the opportunity to engage and communicate

[251] Human Rights Council, 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 A/HRC/9/13/Add.1/Corr.1 19 September 2008 para 32.
[252] N 251 above, para 33.
[253] Explained in chapter 2 of this thesis p 33 & pp 37--40 and chapter 4 of this thesis pp 126--135.

with counsel.[254] The right to access adequate facilities also imposes a positive duty on the state to provide an accused with such facilities, which includes permitting an accused access to the results of police investigation.[255]

Islamic *Shari'a* permits the prosecutor 'if the evidence is not available' or the judge to take the accused person's testimony under oath. This procedure is based on the Islamic principle where 'evidence is required from the claimant and oath is conferred upon the defendant'[256] such a procedure should not prejudice the right to defence of the accused person.[257] To enhance this right the court should guarantee the prohibition of a delay of the trial, protection of witnesses, and an appointment of a translator if necessary.[258]

The fact that the accused has to be tried without undue delay does not mean that the accused should not be given sufficient time to prepare his or her defence or preclude proper investigation. The Constitutional Court in the case of *Sulaiha*[259] held that the failure of the opponent to bring his witnesses before the court cannot be an impediment in issuing a judgment in the case as long as he is not prevented from a fair trial. In the case of *Abdelrahman,*[260] the applicant alleged that he was deprived of his right to a fair trial because the court did not hear his witnesses, prevented him from submitting the medical certificates regarding his mental evaluation and the court did not allow him to choose his lawyer. The Constitutional court rejected the application because the court heard two of his witnesses and discussed the medical reports proving that he had drunk wine and abused drugs. Further, the lower court provided him with a legal advisor from the Department of Legal Aid. From African jurisprudence, for example, in Nigeria, '[t]he

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[254] See D Weissbrodt *The right to a fair trial under the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights* (2001) 130.
[255] See Steytler (n 160 above) 176--177.
[256] The Appeal Court in Kasala state decided that in case of evidence in *hudud* or *quisas* if the plaintiff request an oath from the accused the court may order the accused to oath as a substitute of evidence in *Sudan Government v Mohamed Ali Elsanosi & Other* SLJR 1986 pp 221--224. In the CPA sec 4(d) this principle will be applied only in non-*hudud* offence which relevant to the other part right.
[257] See M Mahmoud *Sudan law and international human rights norms: Comparative study* (2002) 374.
[258] As above.
[259] *Sulaiha Abdelmuntalib Abass v Magdi Mohamed Hussain & Sudan Government* 31/12/2002 CC 13/2000 (1999--2003) pp 284--287.
[260] *Abdelrahman Khalid Abdelrahman v Sudan Government & Others* Case No. 6/2000 JCC 243-246.

prosecution is always reluctant to share information with defence lawyers and in some cases there have been allegations of the prosecution suppressing information favourable to the accused.'[261]

4.4 Evidence obtained through illegal means

The Sudanese Evidence Act 1994 (Evidence Act) states that the evidence obtained from an invalid inspection may lead to a conviction. Therefore, 'reasonable evidence obtained by unlawful ways is not deniable if the court is satisfied with the appropriateness of evidence in objective terms.'[262] The Act does not elucidate what 'reasonable evidence'is and therefore allows judges to apply it with an unfettered discretion. The purpose of disallowing use of unlawful evidence is the indirect vindication of the right that was violated. The admissibility of unlawful evidence would render an accused's trial unfair.[263] The court will conduct a trial within a trial where there is a likelihood of abuse of power, violation of the rights of the accused during arrest or where the accused is tortured. Where such abuses or violations are discovered, the Court will take steps to protect the accused or the arrested person and direct that those responsible be punished.[264]

Practice indicates that many accused persons have been compelled to confess guilt. When these persons appear before courts, they retract their confession and the courts tend to ignore these retractions.[265] This violation is facilitated by the fact that the

[261] L Chenwi *Towards the abolition of the death penalty in Africa: A human rights perspective* (2007) 298.
[262] Mahmoud (n 257 above) 369.
[263] See Steytler (n 160 above) 84--85.
[264] M Bassiouni & Z Motala *The protection of human rights in African criminal proceedings* (1995) 7.
[265] The Working Group on Arbitrary Detention, mandated by the UN Human Rights Council to investigate allegations of arbitrary detention around the globe, issued a legal opinion in November 2008 in which it raised serious questions about the fairness of the trial of the accused persons belonging to the Fur tribe of the Darfur region of Sudan, accused of having committed the murder of newspaper editor MT Ahmed. In its opinion, the working group stated, 'No judicial system, and in particular, the judicial system of a country that ratified the International Covenant on Civil and Political Rights on 18 March 1986, can consider as valid a confession obtained under torture and revoked before a court, and a sentence based on such confession, the Working Group stated in its opinion'. A statement was also issued later on 19 April 2009 on the execution of the defendants who were found guilty of having committed the murder. The defendants were held in detention for up to four months without contact with the outside world and still

Evidence Act of 1994 does not prohibit evidence obtained through illegal or unlawful means.[266] The Evidence Act provides that '[w]ithout prejudice to the provisions on the inadmissible evidence, evidence shall not be rejected merely because it has been obtained by unlawful means whenever the Court is satisfied with the genuineness of its substance.'[267] Nevertheless, the Court might disregard the evidence if it infringes the doctrines of *Shari'a* law, justice or public order.[268] This example indicates that Sudanese laws prioritise adherence to *Shari'a* law and public order over the application of international human rights standards. However, international human rights law dictates that the use of evidence and confessions obtained by torture is unlawful and should be explicitly forbidden by domestic law.[269]

Sudanese courts do uphold their constitutional responsibility and investigate accusations of torture and other human rights violations that do not amount to torture, such as inhuman and degrading treatment and prolonged detention without judicial oversight. These violations are regularly documented in Sudan.[270] However, convictions in many cases rely to some extent on alleged forced confessions, sometimes leading to

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bore visible signs of torture when they appeared in court. The Statement was issued by the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Ms. Manuela Carmena Castrillo, the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Philip Alston, the Special Rapporteur on the independence of judges and lawyers, Mr. Leandro Despouy, the Special Rapporteur on the situation of human rights in the Sudan, Dr. Sima Samar, and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak. See statement *Five United Nations human rights experts strongly condemn the execution of nine men following an unfair trial in Sudan* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9245&LangID=E (accessed 6 January 2013).

[266] Sec 10(1) (Evidence obtained by unlawful means).

[267] Sec 10(2), however, provides that 'court may, whenever it deems it appropriate to achieve justice, not institute conviction by virtue of the evidence mentioned in sub-section (1) unless it is supported by further evidence'.

[268] Sec 9(1) (Rejection of evidence).

[269] See *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* 283, Chapter 7, (the Right to a Fair Trial: Part II, From Trial to Final Judgement), Publications of the Office of the High Commissioner for Human Rights, UN, New York and Geneva, 2003.

[270] There are many documented cases in which the accused persons claimed that they were tortured and ill-treated during prolonged detention and that their confessions were extracted while they were being tortured. See Amnesty International Report *Agents of fear: The national security service in Sudan* (2010). Sudan's criminal courts routinely fail to order investigations into defendants' claims before the courts that they were tortured in order to extract their confession. The courts often refuse to grant independent medical examinations as requested by the defendants' lawyers. See also, ACJPS (n 77 above) 20.

death sentences.[271] National courts and the Constitutional Court must uphold human rights guaranteed in the Constitution otherwise they *de facto* violate the Constitution.

In the case of evidence of the confession of guilt made during investigations, the law requires the court to take special precautions before convicting a person on the basis of such alleged confession, especially when the confession is retracted before the Court. The Regulations of Anti-Terrorism Act of 2001 empower the Courts to convict on the basis of such alleged confessions, without investigating the circumstances under which they had been made, or whether the accused understood their consequences. Allegations by some accused that their statements were taken after being tortured were blatantly rejected by the trial courts.[272]

The HRC has stated that although confessions obtained in violation of article 7 of ICCPR are not explicitly prescribed by the law of Sudan; such confessions have been used in some investigations and have culminated in death judgments.[273] The HRC has emphasised that 'judges should have authority to consider any allegations of violations of the rights of the accused during any stage of the prosecution.'[274] Similarly, prosecutors should refuse evidence that has been obtained by recourse to unlawful methods.[275] Both judges and prosecutors in Sudan should pay attention to any sign of

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[271] ACJPS (n 79 above) 20.

[272] For example, ten lawyers submitted a petition to the Constitutional Court in the case of *Kamal Mohammed Saboon v Sudan Government* claiming the unconstitutionality of all the proceedings relating to the trials of the Justice and Equality Movement suspects, which denied the accused persons a fair trial in accordance with the law, the Constitution and the international human rights instruments, ratified by Sudan.The judges in all the proceedings denied the allegations of unfair trials. One of the judges said the defendants were tried in a speedy manner because they all confessed to the allegations against them. Doubt was cast on this testimony when human rights organisations accessed one of the police files showing that the defendants did not confess. See also, second periodic report of the United Nations High Commissioner for Human Rights on the human rights situation in Sudan, 27 January 2006 issued by the Office of the High Commissioner for Human Rights in cooperation with the United Nations Mission in Sudan.

[273] Concluding observations of HRC: *Sudan* consideration of report submitted by state parties under article 40 of the ICCPR, 19th Session Geneva 9--27 July 2007.

[274] HRC General Comment No. 13 (n 227 above) para 15.

[275] Guideline 16 of the Guidelines on the Role of Prosecutors. See also, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* 283.

unlawfully obtained confessions. However, the courts often refuse to grant independent medical examinations as requested by the defendants' lawyers.

There are methods of duress which do not constitute torture, but continue to be forbidden as a means of obtaining evidence and discredit any evidence so obtained. The HRC has extended the ban on the use of evidence obtained under duress by asserting that 'the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.'[276] The HRC has stated also that: '[t]he law should require that evidence provided by any form of compulsion is wholly unacceptable.'[277] According to the Committee, '[c]onfessions obtained under duress should be systematically excluded from judicial proceedings.'[278]

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment forbids taking advantage of the position of detainees to force them to testify or confess such as using violence, intimidation or means of interrogation which impairs their capacity of decision or judgment.[279] It also specifies that non-compliance with these doctrines in obtaining evidence should be taken into account in determining the acceptability of such evidence.[280]

Fortunately, the Constitutional Court agreed with this interpretation and intervened to reduce convictions of murder by the Supreme Court to culpable homicide not amounting to murder by applying the exception in Criminal law of 1991.[281] In contrast to its

[276] HRC General Comment 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) Adopted at the Forty-fourth Session of the Human Rights Committee, on 10 March 1992 para 12.
[277] HRC General Comment 13 (n 227 above) para 14.
[278] Concluding observations of the HRC: *Georgia* UN Doc: CCPR/C/79/Add.75 at para26 (5 May 1997).
[279] Principle 21 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment General Assembly Resolution 43/173 (9 December 1988).
[280] Principle 27 of the Body of Principles.
[281] Sec 131 of Criminal law provides that '(1) 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. (2) Notwithstanding the provision of section 130(1), culpable homicide shall be deemed to be semi-intentional in any of the following cases: (a) where a public servant,

predecessor, the new Act of 2005 has omitted the unequivocal provision in the old Act that the Court could review the constitutionality of decisions of the Supreme Court.[282] It is submitted that the Court should continue to exercise this jurisdiction as a constitutional jurisdiction.[283]

5. The right to a fair hearing

The right to a fair hearing lies at the heart of the concept of a fair trial. It is reiterated by a number of other rights, such as the right to be presumed innocent, the right to be tried within a reasonable time, the right to prepare his or her defence, the right to defend oneself in person or through a counsel, the right to call and examine witnesses and the right to protection from retroactive criminal laws.

The procedural safeguards therein prescribed must be observed including the right to a fair hearing by an impartial and independent court, the right to be presumed innocent, the minimum guarantee for the defence, and the right to appeal. These rights are applicable in addition to the specific rights to seek forgiveness or commutation of the judgment. [284]

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or a person charged with public service, exceeds, in good-faith the limits of the power authorised thereto, believing that his act which has caused the death, is necessary for the performance of his duty; (b) where the offender commits culpable homicide by exceeding, in good-faith, the limits prescribed by law for the exercise of the right of self-defence; (c) where the offender commits culpable homicide under the influence of compulsion of threat of death; (d) where the offender commits culpable homicide in the case of necessity, for the protection of himself or any other, from death; (e) where the offender commits culpable homicide with the consent of the victim; (f) where the offender, during loss of self-control, by reason of sudden grave provocation, causes the death of a person, who gave the provocation, or any other person by mistake; (g) where the offender exaggerates, or exceeds the limits of the power authorised thereto in the lawful act, and death occurs, as a result; (h) where the offender commits culpable homicide, without premeditation, during a sudden fight, and without his having taken undue advantage, or acted in a cruel, or unusual manner; (i) where the offender commits culpable homicide, under the influence of mental, psychological or nervous disturbance, which manifestly affects his ability to control his acts. (3) Whoever commits the offence of semi-intentional homicide shall be punished, with imprisonment, for a term, not exceeding five years, without prejudice to the right of *Diya* (blood money)'.

[282] Medani (n 96 above) 10.

[283] As above.

[284] See Weissbrodt (n 254 above) 133--138.

In this part, the study will focus on specific aspects of fair hearing such as the right to public hearing and holding court in *camera*, the right to be tried within a reasonable time, the right to be present before the court and trials in *absentia*, and the right to an interpreter.

Under international human rights law, the right to a fair and public hearing is guaranteed in the UDHR,[285] the ICCPR,[286] the ECHR,[287] and the AMCHR.[288] The ACHPR makes no reference to an accused person or to a fair trial but only states in article 7(1) '[e]very individual shall have the right to have his caused heard.' The right is also guaranteed in the Yugoslavia Statute,[289] the Rwanda Statute[290] and the ICC Statute.[291]

The international standards governing the conduct of trials make it obvious that the rights precisely enumerated are minimum safeguards. The adherence to each of these safeguards does not, in all cases and situations guarantee that a hearing has been fair.[292] The right to a fair trial is wider than the sum of the individual guarantees and depends on the whole conduct of the trial.[293] The European Court recently stated that the right to the fair administration of justice suggests that methods which are limiting the rights of the defence must be cautiously and strictly limited.[294]

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[285] Arts (10) & (11).
[286] Art 14(1) provides 'all persons shall be (a) equal before the courts and tribunals;(b) be entitled to a fair and public hearing by competent, independent and impartial tribunal established by law; (c) the press and public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society or when the interest of private lives of parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice, but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concerns matrimonial disputes or the guardianship of children'.
[287] Art 6(1)(3).
[288] Art 8.
[289] Art 20(1).
[290] Art 19(1).
[291] Arts 64(2) & 67(1).
[292] N 6 above 131.
[293] HRC General Comment 13 (n 227 above) para 5.
[294] *Van Mechelen & Others v The Netherlands* (55/1996/674/861-864) 23 April 1997 para 54 & 58.

The Universal Islamic Declaration of Human Rights in article 5(b) provides 'no person shall be adjudged guilty except after a fair trial and after reasonable opportunity for a defence has been provided to him.' In *Shari'a* law, the *Qur'an* recognises the right to a fair hearing and attributes it to the time of Prophet Adam's creation where Adam was allowed to eat the plenteous food available in the garden except the fruit of one tree that he was not allowed to touch or eat. After being deceived by the devil, Adam and his wife ate the fruit of the tree they were forbidden to eat. By doing so, they committed a great sin and violated the command of Allah.[295] The *Qur'an* establishes the right of defence in its narration, that even when Adam violated God's order in the Garden of Eden, he was given the opportunity of defence, although apparently he had none.[296] God usually gives sinners an opportunity to present their defence, if any, before they are punished.[297] This is how the concept of fair hearing in Islamic law became an article of faith, a solemn command from the creator, a natural right of mankind, a spiritual privilege and above all, a religious duty.[298]

One of the fundamental principles of a fair trial is the guarantee of defence for the defendant as expressed in a number of detailed provisions. In Islamic law, defence is not discussed as a theoretical question. However, there are different traditions about the behaviour of the Prophet which has led to the understanding that the defendant has to be informed about the charges against him or her. For example, when the Prophet granted Ali governorship of Yemen, he said to him as follows: 'O Ali, people will appeal to you for justice. If two adversaries come to you, do not rule for the one, before you have similarly heard from the other. It is more proper for justice to become evident to you and for you to know what is right.'[299] Further, Calif Omer is known to have advised some judges by saying 'If an adversary whose eye had been blinded by another comes to you, do not rule until the other party attends, perhaps the latter had been blinded in

[295] See Surat Al-A'raaf verses 22--24.
[296] See Surat Al-A'raaf verses 22--24. See Baderin (n 13 above) 105.
[297] See Surat As-Saaffaat verse 22, Surat Al-Mulk verses 8--11 and Surat Al-Qiyaama verses 13-15.
[298] See Baderin (n 13 above) 105--106.
[299] M Ibn Rushd Al-Qurtubi *Bidayah Al-Mujtahid wa Nihayah Al-Mugtasid* (1988) 472.

both eyes.'[300] On the basis of these examples, it may be averred that *Shari'a* law provides for the right to a fair hearing.

The INC provides for the right to fair hearing in article 34(3) as follows: 'In all civil and criminal proceedings, 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.'[301] In addition, article 34(5) provides '[a]ny person shall be entitled to be tried in his or her presence in any criminal charge without undue delay; the law shall regulate trial in *absentia*.'

Justice must not only be done, but must be seen to be done by the public.[302] The purpose is to protect the accused from secret trials and enhance public confidence in the administration of justice. This is because public trial gives room for public scrutiny and the public can judge whether judicial officers are reacting in an independent manner, are impartial, rational or arbitrary in arriving at their decisions. The public also ascertains the competence and commitment of the prosecution, and whether the truth is established at the trial.[303]

5.1 Right to public hearing

One of the main components of the right to a fair hearing is the right to public hearing. Court hearings and judgments must be public, with the exception in narrowly defined situations.[304] The right to a public hearing means that not only the parties in the case, but also the general public, have the right to be present. A public hearing means it is

[300] Awad (n 220 above) 97.
[301] See also, the Constitution of 1973, in art 64 provided for the right of an accused to a prompt and fair trial. The 1998 Constitution in art 32 provided 'and has the right to a speedy and just trial and the right to defend himself'.
[302] See European Court of Human Rights *Delcourt Case* 17 January 1970, 11 Ser. A 17, para 3. Quoted in n 6 above 88.
[303] Steytler (n 160 above) 303.
[304] HRC General Comment 13 (n 227 above) para 6.

exposed to the public while the press and public can be excluded from the hearing where the substance is exceptionally sensitive.[305]

The right to a fair hearing embraces a concept of substantive fairness broader than the minimum requirements. Publicity of hearing is a significant safeguard in the interests of the person and of the society on the whole. Whether or not a trial has been held in public is a question that must be determined objectively on a case by case basis.

An example of an unfair trial was alluded to by the HRC which held a broad violation of the right to a fair hearing in the communication of eight political rivals of President Mobutu Sese Seko of the previous Zaire,[306] who were condemned to long prison terms as a result of a lack of procedural safeguards. The accused persons, who had all previously been expatriated or positioned under house detention in 1981, were again detained and consequently tried in a state security court on charges of conspiracy to *coup* the Sese Seko's regime.[307] The accused persons were not summoned to court, and three of the accused had not been heard during pre-trial stages. The accused persons and their families were forcibly relocated from their homes under the 'administrative banning measure.' The HRC found amongst other things that they had been subjected to arbitrary detention and deprived of a fair and public trial on account of their views.[308]

Limiting access to the public on the ground of security is not supported by international law. This does not grant states an unrestricted discretion to define what makes the matter of national security. According to specialists in international law, national security and human rights: 'A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its

[305] See art 14(1) of the ICCPR, art 6 of ECHR & art 1(3)(e)&(f) of the African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.
[306] *Mpandanjila & Others v Zaire* (138/1983) 26 March 1986, 2 Sel. Dec. 164
[307] N 6 above, 97.
[308] As above.

capacity to respond to the threat or use of force, whether from an external source, such as a military threat, or an internal source, such as incitement to overthrow the government.'[309]

In Sudan, the restriction is evident in section 133 of the CPA which provides that a trial shall be publicly conducted. Regardless of this provision in the CPA, the courts may prevent the public in general or any person in particular from attending the session if it is necessary for the nature of the proceedings or order of the court. Although the section restricts the judge's authority by the necessary procedure it still allows the judge to ignore the principle of public sessions. As alluded to earlier,[310] the law did not specify the exceptions for court to be held in *camera*, unlike what happens in other countries[311] or what has been specified in ICCPR. The law gives a judge broad powers that could result in the court using the exceptional powers as a general rule to exclude the public or particular individuals.

According to section 52(5) of the Security Act of 2010, members of the security forces and their collaborators brought for trial before an ordinary court for acts relating to the performance of official job are to be tried in *camera*.[312] According to this section the court in *camera* was determined by the Act as a *carte blanche* and not a court which may determine pursuant to the exceptions stipulated in international law. The Act allows the trial of persons in *camera*, contrary to the detailed provisions of the ICCPR, which Sudan has ratified and has become part and parcel of the INC by virtue of its article 27(3).[313]

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[309] The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, October 1995, adopted at a meeting convened by art 19, the International Centre against Censorship, and the Centre for Applied Legal Studies of the University of Witwatersrand, South Africa. See n 6 above, 100.
[310] See chapter 2 of this thesis 48.
[311] For example, England and South Africa.
[312] Sec 52(5) provides 'There shall be a secret trial before an ordinary court of any member during service or after the termination thereof as to such act as may have been done thereby in connection with his official work, unless the court decides otherwise'. See also, Hussein (n 24 above) 372.
[313] See Medani (n 94 above) 77--78.

5.2 Right to be tried within reasonable time

Criminal proceedings must be begun and finalised within a reasonable time. This condition means that, balanced against the right of the accused to sufficient time and facilities to prepare the defence, the proceedings must start and final judgment must be rendered, without unnecessary delay and within a reasonable period.[314] A trial within a reasonable period has therefore, been interpreted to mean a trial without unnecessary and undesirable delays.[315]

The right of the accused to be tried without undue delay is also designed to ensure that the deprivation of liberty serves the interests of justice and does not last longer than necessary in the circumstances of the specific case. What is reasonable has to be evaluated in the circumstances of each case.[316] This safeguard relates not only to the period between the formal charging of the accused and the period by which a trial should commence, but also until the ultimate sentence on appeal is given.[317]

In terms of ensuring an expeditious trial, the HRC has stated that '[t]his guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgment be rendered; all stages must take place 'without undue delay'. To make this right effective, a procedure must be available in order to ensure that the trial will proceed 'without undue delay' in the first instance and on

[314] N 6 above, 137.
[315] See art 6 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.
[316] Taking into account the complexity of the case, the conduct of the accused and the manner in which the matter was dealt with by the administrative and judicial authorities. In cases where the accused is denied bail by the court, the accused must be tried as expeditiously as possible. See communication No. 818/1998 *Sextus v Trinidad and Tobago* para 7.2 regarding a delay of 22 months between the charging of the accused with a crime carrying the death penalty and the beginning of the trial without specific circumstances justifying the delay. In communication No. 537/1993 *Kelly v Jamaica* para 5.11, an 18 months delay between charges and beginning of the trial did not violate art 14(3)(c). See also, communication No. 676/1996 *Yasseen and Thomas v Guyana* para 7.11 (delay of two years between a decision by the Court of Appeal and the beginning of a retrial) and communication No. 938/2000 *Siewpersaud, Sukhram, & Persaud v Trinidad v Tobago* para 6.2 (total duration of criminal proceedings of almost five years in the absence of any explanation from the State party justifying the delay).
[317] Communications No. 1089/2002 *Rouse v Philippines* para 7.4; No. 1085/2002 *Taright, Touadi, Remli & Yousfi v Algeria* para 8.5.

appeal.'[318] The right to be tried without undue delay cannot be violated by the excuse of difficult economic situation.[319]

In Sudan, according to security law, a detainee may be detained for four and half months at the pre-trial stage. This constitutes an undue delay and is inconsistent with the international standards on trial within a reasonable time.[320] The African Commission in the case *Annette Pagnoulle v Cameroon*[321] held that a delay of two years without a hearing or proposed trial date constitutes a violation of the condition in Article 7(1)(d) of the African Charter to be tried within a reasonable time. In another case, *Alhassan Abubakar v Ghana*,[322] it held that detention of a person for 7 years without carrying him to trial constituted a violation of the 'reasonable time' standard specified in the ACHPR.

In its concluding observations on the third periodic report of the Sudan in 2007, the HRC stated as follows:

> The Committee expresses concern at the permitted legal duration of detention in police custody (garde à vue), which can be prolonged to as much as six months and, in practice, beyond. It also notes with concern that in actual fact the right of the detainee to have access to a lawyer, a doctor and family members, and to be tried within a reasonable time, is often not respected. (arts. 7 and 9 of the Covenant)[323]

5.3 Right to be present at trial

The right to be present at trial is a fundamental part of the right to defend one's self. Everybody charged with a criminal offence has the right to be present at his or her trial so that he or she can hear and challenge the prosecution's case and present a defence.

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[318] HRC General Comment 13 (n 227 above) para 10.
[319] See Communication no. 390/1990 *Lubutu v Zambia* UN Doc GAOR A/51/40 vol II p14.
[320] See chapter 3 of this thesis 92--94.
[321] *Annette Pagnoulle (on behalf of Abdoulaye Mezou) v Cameroon* (39/90) 10th Annual Report of the African Commission 1996-1997, ACHPR/RPT/10th.
[322] *Alhassan Abubakar v Ghana* (103/93) 10th Annual Report of the African Commission 1996--1997, ACHPR/RPT/10th.
[323] Concluding observations of the HRC: *Sudan* CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para 21.

The right to be present at trial imposes obligations on the authorities to inform the accused and defence lawyer inadequate time, of the time and place of the proceedings, to request the attendance of the accused and not to inappropriately preclude the accused from the trial.

This is reiterated in the ICCPR,[324] the Yugoslavia Statute,[325] the Rwanda Statute[326] and the ICC Statute.[327] The presence of the accused is a major component of a fair trial. The failure to comply with this rule might result in setting aside of the proceedings. Even though the right to be present at trial is not explicitly stated in the European Convention, the European Court has specified that the object and purpose of Article 6 of the Convention means that an individual charged with a criminal offence is authorised to take part in the trial hearing.[328] Article 8(2)(d) of the American Convention safeguards the right of the accused to defend him or herself in person and the right to be present at trial is intrinsic in this right. The Inter-American Commission condemned a trial that progressed when the accused was obstructed from attending court hearings.[329]

In Sudan, the right to be present in the court is guaranteed in article 134(5) of the INC which provides '[a]ny person shall be entitled to be tried in his or her presence in any criminal charge without undue delay; the law shall regulate trial in *absentia.*' According to this provision, a trial in *absentia* is regulated by law. The law regulates the trial in *absentia* is the CPA.[330]

[324] Art 14(3)(d).
[325] Art 21(4)(d).
[326] Art 20(4)(d).
[327] Art 67(1)(d).
[328] *Colozza & Rubinat v Italy* 9024/80, 12 February 1985, 89 Ser. A.14, para 27.
[329] Report on the Situation of Human Rights in Panama, OEA/Ser.L/V/II.44, doc. 38, rev. 1, 1978.
[330] Art 134 provides as follows: '(1) An accused shall be tried in his presence, and shall not be tried, in *absentia*, save in the following cases: (a) his being accused of any of the offences against the State; (b) the court deciding exempting him from the appearance, on condition that he shall admit, in writing, that he is guilty, or an advocate, or agent appears, on his behalf; (c) the court deeming that proceeding with the procedure, in the absence of the accused does not prejudice the defence case in any way. (2) in all the cases, provided for in sub-section (1), summons shall be served by the way, provided for in this Act'.

Article 14 of the ICCPR, provides that the accused shall be tried in his or her presence. Proceedings in the absence of the accused might in some circumstances be allowed in the interest of the appropriate administration of justice, such as, when accused persons, although informed of the proceedings in advance, decline to use their right to be present. Subsequently, such trials are only harmonious with article 14(3)(d) if the essential measures are taken to summon accused persons in a timely manner and to notify them previously about the time and place of their trial and demand their presence.[331] According to this provision trial in *absentia* does not purport to permit trials to proceed in *absentia*.

In the case of *Complex of Elshaikh Taha Elmahal v Ruler of Khartoum State*, [332] the applicant was not present before the revision circle in the Supreme Court and was not heard. The Constitutional Court reversed the decision of the Supreme Court on the ground that it was contrary to article 34(3) of the INC. This judgment is consistent with international standards.[333] The position has been bolstered by the Constitutional Court in the case of *Abuobaadida*[334] in which the court held that the conviction of an accused person without giving him the opportunity to present his defence and without hearing from him is a violation of his constitutional and natural right. In other Constitutional Court cases such as *Grain,* the *Abuobaadida* has been confirmed.[335] In another case of *Eltaib and others,*[336] the Constitutional Court held that the Supreme Court did not safeguard the applicant's right to fair hearing because he was not summoned. The conviction was made without hearing from the defendant, and this is a violation of articles 31 and 32 of the Constitution. In the famous case of *Asma Mahmoud Mohamed Taha v Sudan Government,*[337] the Supreme Court stressed that 'the right to be heard before condemnation is an eternal principle adhered to by human societies as a sacred

[331] *Mbenge v Zaire* Communications No. 16/1977para 14.1; *Maleki v Italy* No. 699/1996 para 9.3.
[332] *Complex of Elshaikh Taha Elmahal v Ruler of Khartoum State* CC 26/2006 dated 5/July 2007.
[333] The ICCPR applicable by virtue of article 27(3) of the Bill of Rights requires that such hearings must be by a 'competent, independent and impartial tribunal established by law'.
[334] *Abuobaadida Ali Alawad v Sudan Government* Case No. 12/2000 JCC 279--283.
[335] *Yassin Hamid Grain v Sudan Government* 3/2001 JCC 294 -298.
[336] *Eltaib Mohamed Elzubair, Mahmoud M. elzubair & Ammir M. Elzubair v Sudan Government* 58/2001 759--763.
[337] *Asma Mahmoud Mohamed Taha v Sudan Government* (1986) SLJR 163.

principle of natural law that, to be binding, does not need to be reinforced by express provisions of law.' This progressive judgment emphasises the point that the right to fair hearing should be enforced even though when there is no specific provision in the law which guarantees it, because it is a natural right.

5.4 Right to an interpreter

One important element to guarantee the right to fair hearing is the right to an interpreter.[338] The right to have the free aid of an interpreter if the accused cannot comprehend or talk the language of the court as provided for in ICCPR[339] is a component of the doctrines of fairness and equality of arms in criminal proceedings.[340] This right arises at all phases of the verbal proceedings. It applies to foreigners as well as nationals. The importance of the right to the free assistance of an interpreter is particularly clear in cases where ignorance of the court's language used could constitute a serious obstacle to the right of defence and fair hearing. In Sudan, the right to interpretation is given only at trial stage.

The HRC has stated that this right is 'of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence.'[341]

In a summary trial, the proceedings tend to be of a limited duration and usually do not last more than 30 minutes, with no right to an interpreter when needed. The Criminal Procedure Act provides for summary trials in cases of lesser punishments that do not

[338] The right to an interpreter guaranteed in ICCPR art 14(3)(f), ECHR art 6(3)(e), AMCHR art 8 (2)(a), CRC art 40(2)(b)(vi). There are some elements to the right such as: The accused should be in actual need of an interpreter and the interpretation should be of a high standard which means that it must be continuous, precise, impartial, competent and contemporaneous.
[339] Art 14(3(f).
[340] *Guesdon v France* Communication No. 219/1986 para 10.2.
[341] HRC General Comment 13 (n 227 above) para 13.

respect the full rights of defence and fair hearing.[342] Defendants have limited awareness of the law and have no legal support, and may also be worried to minimise the community fallout of publicised legal proceedings over charges of 'indecent' behaviour. As a result, their willingness and ability to defend themselves is critically undermined and many defendants, following conviction, waive their right to appeal in order to put the experience behind them as quickly as possible.[343]

6. The right to legal representation

Everyone charged with a criminal offence has the right to protect him or herself against the charges. Denial of access to a lawyer may seriously prejudice the fairness of the trial.[344] The right to legal representation entails three distinct rights:[345] the right to be represented by lawyer of choice, right to legal aid and right to self-representation. Under international human rights law, this right is guaranteed by the UDHR[346] and the ICCPR.[347] The ACHPR[348] limits the right to 'defence of his choice' and does not make any reference to legal aid. The right is also guaranteed in the AMCHR,[349] the ECHR,[350] the Yugoslavia Statute,[351] the Rwanda statute,[352] the ICC Statute,[353] the Basic Principles on the Role of Lawyers[354] and Beijing Rules.[355]

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[342] Summary trial provisions secs 174--178 of the CPA of 1991; sec 175 'offences which may be summarily tried', sec 176 'procedure in summary trial', sec 177 'particulars recorded in summarily trial' and sec 178 'summary procedure transferred to non-summary'.
[343] REDRESS, PCLRS & SHRM *No more cracking of the whip: Time to end corporal punishment in Sudan* (2012) 17.
[344] Steytler (n 160 above) 75.
[345] Steytler (n 160 above) 71-72.
[346] Art 11(1).
[347] Art 14(3)(d).
[348] Art 7(1)(c).
[349] Art 8(2)(d).
[350] Art 6(3)(c).
[351] Art 21(4)(d).
[352] Art 20(4)(d).
[353] Art 67(1)(d).
[354] Principle 1 provides as follows: 'All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings'.
[355] Art 7(1) & 15(1).

Under Islamic law, the provision of legal counsel to a defendant as it exists today did not exist during the time of the Prophet and the period when the most important developments of Islamic law took place. However, modern authors hold the opinion that the general principles of *Shari'a* do not deny the accused the right to be assisted by counsel. The following statement by Prophet Mohammed in the *Sunna* is interpreted today as a basis for the right to legal counsel:

> Since I am only human, like all of you, I might, when litigants come before me to decide between them, rule in favour of the more eloquent of them. If I should thereby transfer to him what is rightfully his brother's I warn him to take not that which is not his, or I shall reserve for him a piece of hell.[356]

This proverb suggests that the judge may be misled by a clever and fluent litigant and, therefore, may judge mistakenly. Now it is understood as a basis for permitting the accused that is not able to defend himself or herself adequately to seek the help of a lawyer who has more knowledge in questions of law than himself or herself and is more experienced in presenting the situation of the accused to the court. It is regarded as a matter of equality of arms.[357]

Under the Sudanese law, The INC in article 34(6) provides as follows:[358] 'Any accused person has the right to defend himself or herself in person or through a lawyer of his or her own choice and to have legal aid assigned to him or her by the State where he or she is unable to defend himself or herself in serious offences.' The right of the accused to legal consultation is contained in section 135(2) of the CPA that provides as follows: 'The court may permit any person to plead before it, where it deems him qualified therefor.' Such a decision or permission by the court would obviously violate the right to defence.[359] Any limitation on an accused's choice of a lawyer would prima facie be

[356] M Lau (n 221 above).
[357] As above.
[358] See also art 63 of the 1973 Constitution provides for the right to legal representation including to freely choose a lawyer. The Constitution of 1998 does not provide for this right.
[359] The CPA of 1991 rephrased sec 193 of the CPA of 1983, which provided as follows: 'the court shall decide whether the lawyer would defend the accused or not'.

unconstitutional.[360] The African Commission in *Amnesty International and Others v Sudan*[361] held that providing a court the authority to veto the choice of counsel of defendant is unacceptable of the right to freely choose one's counsel under the article 7(1)(C) of the ACHPR.[362]

The right to be represented by a lawyer of one's choice may be limited, if the lawyer is not acting within the restrictions of professional ethics, is the subject of criminal proceedings or refuses to follow court proceedings. Lawyers should be capable of giving advice and representing individuals charged with a criminal offence consistent with recognised professional ethics without restrictions, influence, pressure or undue interference from the state.[363]

The HRC found that the right to defence by a counsel of choice had been violated, where a military court provided that an accused could only choose counsel from two chosen attorneys.[364] Also, the HRC held that this right was violated as the accused was given only a list of military lawyers from which to select and when the accused was compelled to accept chosen military counsel, regardless of the fact that a civilian attorney was keen to represent him.[365] For example, in the *Estrella* case,[366] the applicant, Estrella, was detained and brought before a military court in Uruguay and was forced to select his defence counsel from two lawyers officially appointed by the military. The HRC found that Estrella did not effectively have a choice when forced to pick from lawyers pre-selected by the military. Further, the Committee held that the accused had not benefited from an adequate defence in accordance with article 14(3)(d) of the ICCPR.

[360] See N Steytler (n 160 above) 74--75.
[361] Communications 48/90-50/91-52/91-89/93(2000) AHRLR 297 (ACHPR 1999) paras 64--66.
[362] As above.
[363] HRC General Comment 32 (n 10 above) para 43.
[364] *Estrella v Uruguay* (74/1980) 29 March 1983, 2 Sel. Dec. 93, at 95
[365] *Burgosv Uruguay* (R.12/52)29 July 1981, Report of the HRC, (A/36/40) 1981 at 176; *Acosta v.Uruguay* (110/1981) 29 March 1984, 2 Sel. Dec. 148. Quoted in N 6 above 120.
[366] *Estrella* case (n 364 above).

A court cannot assign a lawyer for the accused when a counsel of his own choice is available.[367] Where representation is provided, a person must be qualified to represent and defend the accused.[368] In *Vasilskis v Uruguay* the Court appointed a colonel who was not a lawyer as defence counsel for the applicant. The HRC found that the applicant did not have adequate legal assistance and that the appointment of an unqualified counsel violated the applicant's rights under article 14(3)(b)(d).

Furthermore, an accused does not have the unrestricted right to choose assigned counsel, principally if the state is disbursing the costs. Nevertheless, in death penalty cases the HRC has specified that the court should provide preference to employing counsel selected by the accused, including for the appeal, even if it necessitates a postponement of the hearing.[369]

The accused has the right to communicate with his or her counsel in circumstances that provide full respect for the privacy of their communications. Lawyers should be capable of counsel and represent their clients in line with their established professional criteria without any restrictions, influence, pressures or undue interference from the state.[370] Confidentiality of communication between the accused and his or her lawyer is also protected under the general right to privacy of correspondence.[371] The right to prepare a defence includes the right to private communication with counsel.[372] For example, in *Kelly v Jamaica*, a murder suspect who had told the arresting officers that he wanted to speak to his lawyer was ignored and could not receive legal representation for five days. The HRC held that this procedure violated the accused's right to communicate with counsel of his choice as protected by article 14(3)(b) of the ICCPR.[373]

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[367] D Weissbrodt (n 254 above) 116.
[368] *Vasilskis v Uruguay* Communication No. 8/1980 UN Doc. A/38/40 at 173 (1983).
[369] See *Pinto v Trinidad & Tobago* (232/1987) 20 July 1990, Report of the HRC (A/45/40) Vol. II, 1990, at 73 Quoted in (n 6 above) 121
[370] See *Jayawickrama* (n 72 above) 554.
[371] N Steytler (n 160 above) 73.
[372] D Weissbrodt (n 254 above) 122.
[373] In *Kelly v Jamaica* Communication No. 230/1988 UN Doc. CCPR/c/537/1993 (1996).

The right to communicate with counsel requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and talk with their clients in circumstances that completely respect the confidentiality of their communications.[374] An accused should appoint his defence counsel as soon as he or she is informed of the trial date. The circumstances of the accused in this case, where they came from and where they were kept in detention, and the way they were treated provided no adequate opportunity to appoint, or even meet defence lawyers before trial. Requests by lawyers to meet defendants before the trial were rejected by the trial courts. Some of the defence counsel withdrew from the first trial after their application to meet defendants was rejected. The court proceeded with the trial accepting volunteer lawyers from the Ministry of Justice to represent the defendants in spite of the defendants' objections.[375] In the case of *Kamal Mohammed Saboon v Sudan Government*, lawyers claimed the unconstitutionality of Court proceedings alleging amongst others that the defendants did not have a defence counsel of their choice.[376]

Article 14(3(d) of the ICCPR guarantees the right to have legal aid assigned to accused persons at any time if the interests of justice so necessitate, and without reimbursement by them in any such case if they do not have enough resources to pay for it. The seriousness of the crime is significant in determining whether counsel should be allocated 'in the interest of justice.'[377] The existence of some objective chance of success at the appeal stage must also be considered.[378] In cases relating capital punishment, it is automatic that the accused should be efficiently aided by a lawyer at all phases of the proceedings.[379] Counsel provided by the competent authorities on the basis of this provision must be effective in the representation of the accused.

[374] *Khomidova v Tajikistan* Communications No. 1117/2002 para 6.4; *Siragev v Uzbekistan* No. 907/2000 para 6.3; *Gridin v Russian Federation* No. 770/1997 para 8.5.
[375] Some of the defence counsel withdrew from the first trial after their request to meet defendants was rejected. The court proceeded with trial accepting lawyer volunteers from the Ministry of Justice to represent the defendant despite the defendants' objections. See A Medani *(*n 83 above) 20.
[376] A Medani (n 96 above) 20.
[377] *Lindon v Australia* Communication No. 646/1995 para 6.5.
[378] *Z.P. v Canada* Communication No. 341/1988 para 5.4.
[379] *Aliboeva v Tajikistan* Communications 985/2001, para 6.4; *Saidova v Tajikistan* No. 781/1997 para 6.8, *Aliev v Ukraine* No. 554/1993 para 7.3, *LaVende v Trinidad and Tobago* No. 964/2001 para 58.

Contrasting in the case of privately retained lawyers,[380] flagrant misbehaviour or incompetence, as, the withdrawal of an appeal without consultation in the death penalty case,[381] or non-appearance during the hearing of a witness [382] may make the state involved provided that it was obvious to the judge that the lawyer's behaviour was irreconcilable with the interests of justice.[383] There is also an abuse of this provision if the court or other pertinent authorities hamper appointed lawyers from satisfying their task effectively.[384]

The HRC has observed that cases involving death sentences clearly require counsel, in the interest of justice.[385] The legal counsel must be willing and able to defend the accused, and the counsel must be changed if the accused so requests.[386] The HRC in the *Wright's* case re-affirmed that legal assistance should be made accessible to an accused who is charged with a capital offence.[387] This applies not only to the trial and relevant appeals, but also to any initial hearings involving the case.

When legal representation is provided, the lawyer must advocate in favour of the accused. This provision also requires the existence of conditions giving full respect for the confidentiality of the communication between the accused and his or her counsel. Where an accused has the right to a lawyer, authorities may not try an individual without informing his or her lawyer of the proceeding in time to allow for adequate preparation for the defence.[388] However, the Constitutional Court in the case of *Rahmttalla*[389] held

[380] *H.C. v Jamaica* Communication No. 383/1989 para 6.3.
[381] *Kelly v Jamaica* Communication No. 253/1987 para 9.5.
[382] *Hendricks v Guyana* Communication No. 838/1998 para. 6.4. For the case of an absence of an author's legal representative during the hearing of a witness in a preliminary hearing see *Brown v Jamaica*Communication No. 775/1997 para 6.6.
[383] *Taylor v Jamaica* No. 913/2000 para 6.2, *Chan v Guyana* No. 980/2001 para 6.2, *Hussain v Mauritius* Communications No. 705/1996 para 6.3. See also, art 14(3)(d) of the ICCPR.
[384] *Arutyunyan v Uzbekistan* Communication No. 917/2000 para 6.3.
[385] *Robinson La Vende v Trinidad and Tobago* Communication No. 554/1993, UN.Doc. CCPR/c/61/D/554/ 1993 (1997); *Robinson v Jamaica* Communication No. 223/1987 UN Doc.A/44/40 at 241 (1989); *Collins v Jamaica* Communication No. 250/1987 UN Doc. A/45/40, Vol 2 at 85 (1990).
[386] D Weissbrodt (n 254 above) 116.
[387] *Wright v Jamaica* Communication No. 459/1991UN.Doc.CCPR/c/OP/1 at 44 (1994).
[388] D Weissbrodt (n 254 above) 124.
[389] *Rahmttalla Adam Madani v Sudan Government & Others* 1/2001 SCCJR 290--293.

that the accused's right to an advocate or a lawyer as legal assistance can only be exercised upon request by the accused according to the CPA. An example of how seriously the matter of legal representation has been taken at times by higher courts in Sudan is demonstrated in the case of *Sabah.*[390] The applicant had been deprived of his right to defence counsel and the Constitutional Court repealed the lower Court's decision on the basis that the applicant was deprived of his right to defence counsel.

7. The right to a competent, independent and impartial court

International law guarantees that everyone facing a criminal charge has the right to trial by a competent, independent and impartial tribunal established by law.[391] The HRC has stated that it 'is an absolute right that should not be subject to any exception.'[392] The right to trial by an independent and impartial tribunal is basic to all human rights. The right to a competent, independent, impartial judiciary may not be derogated even during a state of emergency, because it requires that 'justice must not only be done, but must be seen to be done.'[393] The goal of this obligation in criminal cases is to safeguard that trials are not conducted by courts set up to determine only a specific case. One of the core aims of the right is for cases not to be heard or decided by political institutions or by administrative authorities that may show bias.[394] The concept of independence of the

[390] *Sabah Alkhair Haj Taha v Osman Yaghoub Salih & Sudan Government* Case No. 12/1999 SCCJR 157--161.
[391] Under international human rights law, this right is guaranteed by art 10 of the UDHR, art 14(1) of the ICCPR, arts 7(1) & 26 of the ACHPR, art 8(1) & 27(2) of the AMCHR, art 6(1) of the ECHR, principles 1, 2, 3, 4, 5, 10, 11, 18, 19 & 20 of the Basic Principles on the Independence of the Judiciary (The resolution Adopted by the 7th UN congress on the prevention of crime and the treatment of offenders 1985 and endorsed by UN General Assembly resolutions 40/32 of 29/11/1985 and 40/146 of December 1985), Principles and Guidelines on the Right to a Fair Trial and Legal Assistance, and Basic Principles on the Role of Lawyers (Adopted by the 8th UN congress on the prevention of crime and the treatment of offenders 1990). It is also, recognised in Resolution on the Right to a Fair Trial and Legal Assistance in Africa (The resolution was adopted at the 26th Ordinary Session held in November 1999. The resolution formally adopted the Dakar Declaration on the Right to a Fair Trial in Africa), Resolution on the Respect and the Strengthening of the Independence of the Judiciary (Adopted in the 19th Ordinary Session, 1996).
[392] *González del Río v Peru* (263/1987) 28 October 1992, Report of the HRC, vol. II, (A/48/40), 1993, 20.
[393] See European Court of Human Rights *Delcourt Case* 17 January 1970, 11 Ser. A 17, para 3. Quoted in N 6 above, 88.
[394] N Steytler (n 160 above) 193.

judiciary means that the judiciary must be independent of the executive and legislative branches.

The objective of having a competent, independent and impartial court is to ensure that a person is tried by a court that is not biased in any way and to uphold the integrity of the judicial system by precluding any concerns of bias.[395] Guaranteeing the independence and impartiality of courts strengthens the confidence of persons and the public in the administration of justice.[396]

Impartiality for a judge means that a judge must not harbour preconceptions about the case before them and must not act in a way that promotes the interest of one of the parties.[397] Impartiality has two features, firstly, judges must not allow their judgment to be unfair as a result of personal bias or prejudice, nor harbour preconceptions about a particular case before them, nor act in methods that inadequately promote the interests of one of the parties to the disadvantage of the other.[398] Furthermore, the tribunal must also seem to a reasonable observer to be impartial. For instance, a trial significantly affected by the involvement of a judge, who under national statutes should have been disqualified, cannot commonly be considered to be impartial.[399]

Competent means that all persons should be tried in competent courts with jurisdiction established by law.[400] Independence refers to the independence of the courts from the executive, the legislative and other parties.[401] As far as independence is concerned, there are three conditions for independence of the judiciary, these being security of tenure, financial security and institutional independence.[402] The words ‘established by

[395] See Jayawickrama (n 72 above) 518--523.
[396] Jayawickrama (n 72 above) 515.
[397] Jayawickrama (n 72 above) 519--520.
[398] *Karttunen v Finland* Communication No. 387/1989 para 7.2.
[399] HRC General Comment 32 (n 10 above) para 21.
[400] N Jayawickrama (n 72 above) 514.
[401] Jayawickrama (n 72 above) 514--515.
[402] Jayawickrama (n 72 above) 515--516.

law' seek to ensure that the court is regulated by an Act of Parliament and does not depend on the discretion of the executive.[403]

Under Islamic law, *Shari'a* directs judges to preside over matters with justice and neutrality.[404] It also guarantees independence of the judiciary.[405] The independence of the judge is a part of his or her faith. According to the Prophet Mohamed, 'if the judge assists injustice he will be subject to punishment from God.'[406] According to the *Qur'an*, 'when you judge between people judge with justice and equity Verily, Allah loves those who act justly.'[407] The *Qur'an* provides further that '[c]ertainty, conjecture can be of no avail against the truth. Surely, Allah is All-knower of what they do.'[408] The Universal Islamic Declaration of Human Rights provides 'no person shall be adjudged guilty of an offence and made liable to punishment except after proof of his guilt before an independent judicial tribunal.'[409]

In addition, fourth Caliph Ali Ibn Abi-Talib written a memo to one of his governors elucidated the concept of independence of judiciary in Islam as follows:

> Select for your Chief Judge one from the people who by far is the best among them; one who is not obsessed with domestic worries; one who cannot be intimidated; one who does not err too often; one who does not turn back from the right path once he finds it; one who is not self centred or avaricious; one who will not decide before knowing full facts; one who will weigh with care every attendant doubt and pronounce a clear verdict after taking everything into full consideration; one who will not grow restive over the arguments of advocates; one who will examine with patience every new disclosure of facts; one who will be strictly impartial in his decision; one whom flattery cannot mislead; one who does not exult over his position. But it is not easy to find such men. Once you have selected the right man for the office, pay him handsomely enough to let him live in comfort and in keeping with his position, enough to keep him above temptations. Give him

[403] Jayawickrama (n 72 above) 485.
[404] Surat Al-Nisaa verse 58, Surat Al-Maaidama verses 42 & 48 & Surat An-Nahl verse 90.
[405] Surat An-Nissa verses 105 & 58, Surat Al-Maaida verses 42 & Surat An-Nahl verse 90.
[406] M Salama 'General principles of criminal evidence in Islamic jurisprudence' in M Bassiouni (ed) *Islamic criminal justice* (1982) 114.
[407] Surat Al-Maaida verse 42.
[408] Surat Yunus verse 36.
[409] Art 5(a).

> a position in your court so high that none can even dream of coveting it, and so high that neither backbiting nor intrigue can touch him.[410]

The Supreme Court of Pakistan observed in the case of *Al-Jehad Trust v Federation of Pakistan*[411] that 'upon the advent of Islam, judicial functions were separated from the executive functions at its very initial phase. Justice in Islam seeks to achieve a higher standard of absolute justice or absolute fairness.'[412] In Islam, justice has its own meaning. It is likened to a sacred trust, the responsibility enforced upon man, to be discharged most genuinely and fairly. Justice is by God, and Muslims must stand firm for justice though it might be harmful to their own interest.[413] In Islam, 'justice is a virtue in which there is neither transgression nor tyranny nor wrong nor sin.'[414] In sum, to do justice is to undo the injustice. It is 'far more difficult to separate religion from governance in the Islamic world.'[415]

In the exercise of their function of a *gadi* (judge) as a religious duty, *gadi* was obliged to follow certain basic principles of procedure. The most important was to consider all people equally and to act impartially. The *gadi* was supposed to listen carefully to the evidence given by witnesses, to encourage compromise between parties as long as the agreement did not violate principles of Islam or was otherwise illegal, and to give judgment. *Gadi* was not bound by previous judgments and no rule of binding precedent emerged in Islamic law.[416]

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[410] Publication Justice in Islam http://martinfrost.ws/htmlfiles/islam_justice.html (accessed 14 April 2014).
[411] *Al-Jehad Trust v Federation of Pakistan* PLD 1996 SC 324 at 424.
[412] Lau (n 221 above). See also *Al-Jihad Trust v Federation of Pakaistan* CSS Forums http://www.cssforum.com.pk/css-optional-subjects/group-f/constitutional-law/44327-al-jihad-trust-vs federation-pakaistan.html (accessed 8 April 2014).
[413] See M Ladin *The Protocol on the rights of women in Africa and the Islamic perspective on gender equality and justice* A paper presented at a seminar organised by Solitary for Africa Women's Right (SOAWR) during the African Union summit 2006. http://dawodu.com/ladan4.htm (accessed 19 March 2014).
[414] As above.
[415] M Khalil 'Islam and the challenges of modernity' *5 Georgetown Journal of International affairs* 97 (2004) 3.
[416] M Lau (n 221 above).

Under Sudanese law, the Self-Government Statute provides for the independence of the judiciary.[417] It makes the judiciary the guardian of its rules and gives it jurisdiction to hear and decide any matter involving the interpretation of the Statute or the enforcement of the rights and freedoms guaranteed by the Statute.[418] Sudan's INC provides that '[i]n all civil and criminal proceedings, 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.'[419]

The INC contains some issues of the independence of judiciary. The Constitution states that '[t]he National Judiciary shall be independent of the Legislature and the Executive, with the necessary financial and administrative independence.'[420] The National Judiciary shall have judicial capability to adjudge on disputes and render sentences in conformity with the law.[421] Appointment of judges in Sudan is governed by the INC.[422] Further, the INC deals with issues of discipline of justices or judges.[423]

The judiciary plays a significant role, and there is a need for the courts to undertake and efficiently exercise their supposed role in protecting and promoting human rights. The Constitution stipulates judicial authorities and vests courts with greater control over the

[417] Art 9.
[418] Hussien (n 24 above).376.
[419] See art 34(3) of INC. See also, art 9 of the Transitional Constitutions of 1956 & 1964 that both guarantee the independence of the judiciary.
[420] Art 123(2) of INC.
[421] Art 128 '(1) All justices and judges are independent in the performance of their duties and have full judicial competence with respect to their functions, and they shall not be influenced in their judgments. (2) Justices and judges shall uphold the Constitution and the rule of law and shall administer justice diligently, impartially and without fear or favour. (3) Tenure of office of Justices and Judges shall not be affected by their judgments'.
[422] Art 130(1) provides 'having regard to competence, integrity and credibility, the Chief Justice of the Republic of the Sudan, his/her deputies, justices and judges shall be appointed by the President of the Republic', in accordance with art 58(2)(c) herein, where applicable, and upon the recommendation of the National Judicial Service Commission. (2) The law shall determine the terms of service, discipline and immunities of Justices and Judges.
[423] Art 131 provides, '(1) Discipline of justices and judges shall be exercised by the Chief Justice in accordance with the law. (2) Justices and judges may only be removed by order of the President of the Republic for gross misconduct, incompetence and incapacity in accordance with the law and upon recommendation of the Chief Justice and with approval of the National Judicial Service Commission'.

whole procedure of administration of criminal justice from detention to post-trial phase.[424]

The Constitution has created a concrete basis for a judiciary based on the supremacy of the law and the independence of the judiciary.[425] The judiciary is led by the National Judicial Service Commission,[426] chaired by the Chief Justice and composed of senior judges and other leading legal experts. The High Judicial Council recommends the appointment of judges, their promotions and their relocations. However, the Chief Justice is appointed by the President of the Republic according to article 58(2)(c) of the INC. Judges are accountable to the Council, which also has the power of dismissal. The law of the judiciary[427] guarantees the financial autonomy of the judiciary. The number of judges and their salaries are determined by the Act.[428] Judges enjoy immunity and must not be put under stress in performing their responsibilities. The Constitution obliges them to conform to the law and to apply the standard of the supremacy of the law.[429] The Constitution further requires all public institutions to enforce the decisions of the judiciary.[430]

However, the National Judicial Service Commission has not played an active role in enhancing the independence of the judicial system.[431] Some of the criticisms include: the Commission consists of members of political party members,[432] lacks focus on

[424] REDRESS, CLRS & SHRM *Sudan law reform update* January–March 2012 4.
[425] Advisory Council on Human Rights *Periodic Report of Sudan* Pursuant to art 62 of the African Charter on Human and Peoples' Rights 4--5.
[426] Art 129 of the INC provides for the establishment of a National Judicial Service Commission to undertake 'the overall management of the National Judiciary' whose composition and functions are to be determined by law'.
[427] Of the year 1406 of the Islamic calendar.
[428] The Judiciary Act of 1406 (Islamic Calender).
[429] Art 119(4) of the INC.
[430] Advisory Council on Human Rights Periodic Report of Sudan Pursuant to art 62 of the African Charter on Human and Peoples' Rights 15.
[431] See A Medani (n 96 above) 24--25 & ACJPS (n 78 above) 7--8.
[432] Reflecting the power-sharing formula between the two ruling parties, the National Congress Party (NCP) and the Sudan People's Liberation Movement (SPLM), rather than an independent commission responsible for the establishment and functioning of an independent judicial system. Once Southern Sudan seceded from Sudan, the composition of the Commission came to be dominated by NCP members and its appointees. It is constituted of 14 members: the Chief Justice (Chairperson), the

protection from interference from executive authority; the Commission mainly makes recommendations and does not take decisions.[433] In addition, the Commission does not act as a real supervisory body over the judiciary as the Chief Justice is the head of the Supreme Court and also the head of the Commission and is in a position to set the agenda of the Commission.[434]

Despite the fact that the independence of the judiciary is guaranteed in the INC,[435] there are concerns about how well the independence of judges is guaranteed in Sudanese law and practice.[436] In addition, the judiciary is mostly subservient to the President or the security forces, particularly in cases of crimes against the state.[437]

There are many impediments that curtail the right to a competent, independent and impartial court in Sudan. These include institutional constraints that have affected the judiciary's independence, in addition to the resistance or refusal of the executive branches of government to implement the sentences of the courts and the interference of the executive in the administration of justice. Another problem is that judges do not have powers to oversee the work of the National Intelligence and Security Services (NISS). Moreover, the search, arrest and detention are not subject to judicial review. The judiciary cannot adjudicate over the police and armed forces because they can only be tried by special courts. Another challenge is that the appointment of judges is based on considerations other than legal qualifications,[438] composition of revision circle, tenure

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Chairman of the Supreme Court of Southern Sudan, Deputies of the Chief Justice, all four of whom are appointed by the Executive, The National Minister of Justice (NCP), The Minister of Finance (NCP), The Legal Affairs Director of Southern Sudan (SPLM), Chairperson of the Legal Committee of the National Council (NCP), Chairman of the Legal Committee of the Council of States (NCP), Chairperson of the Legal Committee of South Sudan Legislative Council (SPLM), in addition to the Dean of the Khartoum University Faculty of Law, two members representing the two Bar Associations in the North and South, and three persons of relevant experience appointed by the President of the country.

[433] See the National Judicial Service Commission Act of 2005, secs 6(1) & 9.

[434] A Medani (n 94 above) 86.

[435] Arts 123 & 128 of INC.

[436] N 44 above 14.

[437] S Parmer *An overview of the Sudanese legal system and legal research* 10.

[438] Few non-Muslims or women occupied judicial positions and that judges could be subjected to pressure by a supervisory authority dominated by the government. See Concluding Observations of the HRC: Sudan, *UN Doc.CCPR/C/79/Add.85*, 19 November 1997, para.21.

of office of Constitutional Court justice, specific laws impeding the independence of judiciary and discrimination against women in appointments.

Until 1969, the procedures for the appointment, remuneration and retirement of judges all insulated the judiciary from outside interference.[439] Since 1969, however, the government has created institutional constraints that have affected the judiciary's independence.[440] The present regime introduced a similar law[441] also restraining the authority of the judiciary.[442]

Judges lack authority when applying the law and some judgments rendered by judges cannot be enforced due to the impunity of the security forces, police and the army whose personnel, properties and assets are immune from judicial decisions.[443]

The effectiveness of judicial control is further undermined by political interference in the administration of justice. Executive interference is problematic, because it often results in prolonged arbitrary detention. Detainees who were sent to prison by civilian officials or military commanders without access to court or prosecutors are invisible to the justice system[444] and as a result detainees may languish in jail for an indefinite time.[445]

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[439] S Hussien (n 24 above*)* 378.

[440] Under Numieri regime for example, the judiciary was subject to the will of the government and the legislature passed laws that gave the president new powers in the appointment and removal of the judges. According to Judiciary Act of 1983, judges may be dismissed on the ground of interest of services secs (63--67).

[441] For example, according to Constitutional Decree No 2 of 1989 a judge could be dismissed for no reason whatsoever art 2(6). This decree empowered the president to dismiss any employee and judges were actually dismissed on the basis of this decree. Although the decree was repealed in 1998, the laws embodying the power to dismiss on the ground of public interest of the service are still in effect. According to the Public Service Pension Act of 1992 sec 18(1)(c) judges may be terminated at any time on the ground of public interest.

[442] Hussien (n 24 above) 378.

[443] See 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* issued by the Office of the High Commissioner for Human Rights on 28 November 2008 39.

[444] Especially since a number of prisons fail to maintain an accurate detainee register.

[445] 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* issued by the Office of the High Commissioner for Human Rights on 28 November 2008 39.

In Sudan, a declaration of a state of emergency is not subject to judicial review, which is considered the most effective guarantee. The same principle was applied in Zambia under the 27 years of semi-state of emergency.[446] The emergency law has since been scrapped after Zambia became a democracy in 1991. In Sudan, even in the period of the third democracy, the courts were reluctant to implement such a rule.[447] The Supreme Court held that the reasons for which the state of emergency may be declared are closely connected to political matters and are, therefore, subject to political and not judicial review. However, a dissenting opinion argued that the existence of the reasons which justify the declaration of an emergency is subject to objective tests that can be ascertained by courts and not subject to the discretion of the executive.[448]

Some existing laws are impeding the judiciary's independence. Examples of such laws are: the CPA,[449] the Civil Procedure Act of 1983 (Amendment of 2004),[450] the Armed Forces Act of 2007,[451] and the Police Act of 2008.[452]

Interference in the independence of the judiciary can be seen in the fact that the Minister of Justice, may at any time after completion of the inquiry and before passing of a preliminary judgment, take a decision and stay the court proceedings or terminate the

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[446] See Zambian Supreme Court case in the matter of Nkaka Chisanga Puta and in the Matter of the Constitution of Zambia Act No. 27 of 1973 and in the Matter of the Preservation of Public Security Act 106 of the Revised Edition of the Laws of Zambia, 1981/HN/1981, then High Court Judge subsequently Chief Justice Ernest Sakala presiding held, inter alia, 'Determination as to whether the detention was reasonably justifiable is a privilege of the detaining authority (President)'. In this case, a Zambian lawyer had been detained by the President during Zambia's one-party system when Zambia was under a semi-state of emergency for 27 years on grounds of state security. At the time, courts had no jurisdiction to review the detention for one year from detention and in this case would not entertain application by detainee seeking to determine it was reasonably justifiable. The Court held it had no jurisdiction because this was a privilege of the president who was detaining authority! Another case with similar ruling is that of 'Re Alice Lenshina Mulenga, HCZ/ZLR/1973, in which Mrs Mulenga leader of a Church which did not recognise government and urged its followers to not vote or take part in government affairs was detained on the president's orders as threat to national security. When she tried to challenge her detention and seek judicial review, Judge Cullinan J held that he had no jurisdiction to entertain the application to review the detention as he was barred from doing so within one year of the detention.

[447] *Khalid Mohamed Khair v Sudan Government* (1987) SLJR 404.

[448] Khalil (n 198 above) 84.

[449] Secs 58 & 129.

[450] Sec 243.

[451] Sec 35.

[452] Sec 39(3).

suit. The Minister's decision is final and cannot be contested.[453] This raises a serious question related to separation of powers and whether the Sudan judiciary is strictly protected from interventions by the executive authority.[454]

However, the retired Chief Justice Dafalla Al-Hag Yousif Madani denied ever receiving one instruction from form Presidents Nimeri or Al-Bashir. He said non-interference in judiciary has become 'a culture' of government and government officials.[455]

Sudan is similar to the common law criminal justice system and does not create an obvious distinction between criminal justice and executive state administration. The relationship between the Minister of Justice and the head of public prosecution division is one of internal hierarchic executive control. With the aim of curtailing undue executive influence on criminal prosecutions, most states which pursue the Westminster criminal justice system depart from varying degrees of 'functional independence' for prosecutors.[456] As a fundamental principle, the public prosecutors offices should be isolated from political interference.[457] As could be seen from the practice of numerous jurisdictions, that *nolle prosequi* might be the subject of misuse or very frequently exercised to suit the political interest of the ruling government.[458] In several jurisdictions, guiding principles have been promulgated to guarantee uniformity and to reflect transparency in the decision-making course. However, as cases of assisted suicide in the UK have verified, the court would not be uncertain to go to another level in suitable cases and enforce a legal obligation on the Director of Public Prosecutors (DPP) to elucidate his guidance in doubtful conditions in order to allow the public affected by the

[453] According to sec 58 of the CPA. See also, chapter 4 of this thesis 129--130.
[454] ACJPS (n 79 above) 2.
[455] Prof Michelo Hansungule discussion held in the house of Dafalla Al-haj Yousif Madani retired Chief Justice Khartoum 9 August 2014.
[456] Loammi Wolf 'The DA-Zuma judgment: An administrative criminal-law cocktail?' 7 March 2011 *Mail & Guardian.* http://www.thoughtleader.co.za/loammiwolf/2011/03/07/the-judgment-on-the-zuma-nolle-prosequi-an-administrative-criminal-law-cocktail (accessed 15 April 2014).
[457] Former chief justice of Zambia Mathew Ngulube in National Constitutional Conference http://www.times.co.zm/news.cgi?category=4&id=1244699474 (accessed 5 May 2014).
[458] See chapter 2 pp 44, 45, 47 & 49 and chapter 4 pp 138--139.

law in question to predict how and in what conditions the prosecutor will or will not exercise his discretion to prosecute.[459]

However, the issue of *nolle prosequi* is controversial. The system of Westminster is also contrary to the model of the continental system in which the office of the state prosecutors was separated from the judiciary and executive.

The allocation of discretionary power to the Minister of Justice and not to the independent Director of Public Prosecutor blurs the boundaries between State organs that are responsible for implementing criminal law and administrative law respectively.'[460] For example, in the Mauritius case of *Jeewan Mohit v the DPP*,[461] the court stated that 'the office of the DPP should be established as a separate office distinct from that of the Attorney General's office',[462] since the Attorney General is a member of the political executive. In addition, the Law Reform Commission[463] said 'this cohabitation as falling foul of the Constitution.'[464] Moreover, in the English case of R v DPP[465] the House of Lords determined that the DPP had an obligation to elucidate his

[459] 11th Head of prosecuting agenda conference *Challenges in crime in the 21st century* Grand Copthorne Waterfront Hotel, Singapore 20-22 March 2012 http://dpp.gov.mu/English/Documents/publication/hopac.pdf (accessed 4 May 2014).
[460] N 456 above.
[461] In the case of *Mohit v DPP* (Privy Council Appeal No 31 of 2005) the appellant, a private citizen, expressed concerns at what he has called the rising tide of crimes and the breakdown of law and order in Mauritius. In October 2001, he initiated a private prosecution against the leader of prosecution charging him with harbouring a criminal based on the statement of one Mohammad Bissessur who had confessed being involved in a series of serious crimes. In his statement Bissessur had stated that at one stage fearing for life he was given money by the leader of opposition to leave Mauritius. The case was set aside on the ground of jurisdiction. He initiated another private prosecution but this was short lived since the DPP entered a *nolle prosequi* without giving reasons. He was undeterred and entered two successive private prosecutions which suffered the same fate. He then applied to the Supreme Court for a judicial review of the decision of the DPP and he was not successful. The case eventually reached the Privy Council.
[462] N 459 above.
[463] In its issue paper *The Office of the DPP and the constitutional requirement for its operational autonomy.* See n 459 above.
[464] N 459 above.
[465] Diane Pretty suffered from a degenerative disease that was rendering her increasingly debilitated. She sought confirmation from the DPP that that if her husband were to assist her to commit suicide by accompanying her to the Swiss clinic, he would not be prosecuted under section 2(1) of the UK Suicide Act. The Director refused to commit himself to any non-prosecution. See n 459 above.

policy when prosecuting accused persons concerning crimes under section 2(1) of the Suicide Act and to publicise the basics tending towards or against prosecution.[466]

In Westminster jurisdictions, the character of the discretionary authority is given for in legislation or as in the instance of Mauritius in the Constitution itself with a safeguard of autonomy to the DPP in the use of his or her powers.[467]

In South Africa, the National Prosecuting Authority is an independent body,[468] and the Attorney General may issue *nolle prosequi*.[469] In Mauritius, the Constitution guarantees the independence of the DPP.[470] However, in Sudan, the Minister of Justice pursuant to section 58 of the CPA has an authority to make a *nolle prosequi* or a stay of prosecution and not an independent prosecution authority.[471] The Minister of Justice acts as the Minister of Justice and the Public Prosecutor simultaneously. The Minister of Justice is part of the executive authority and appointed by the executive.

Section 58 of the CPA is not compatible with the INC. According to article 123(2) of the INC, the judiciary should be independent of the legislative and executive authorities and article 123(3) of the INC states that '[t]he National Judiciary shall have judicial competence to adjudicate on disputes and render judgments in accordance with the

[466] N 459 above.
[467] As above.
[468] See sec 179(1)(2) of the Constitution of th South, 1996.
[469] See sec 6(b) of the Criminal Procedure Act of 1977.
[470] Sec 72(6) provide as follows: 'In the exercise of the powers conferred upon him by this section, the Director of Public Prosecutions shall not be subject to the direction or control of any person or authority'.The Office was first established in the 1964 Constitution, as part of the second stage of constitutional developments in Mauritius (as spelled out in the Text of Agreed Final Communiqué of the Mauritius Constitutional Review Conference of 1961). Mauritius Legislative Council, sessional paper no. 5 of 1961 Constitutional Development in Mauritius. It was agreed at that conference that should provision be made for the post of Attorney-General to be filled by a Minister, who would not be a public officer, 'it would be necessary to create a new official post of Director of Public Prosecutions who would be solely responsible in his discretion for the initiation, conduct and discontinuance of prosecutions and would in this respect be independent of the Attorney-General'.With provision being made for the post of Attorney-General to be filled by a Minister, it was felt necessary to create a new official post of the Director of Public Prosecutions who would be responsible for and would exercise control over the conduct of prosecutions, and would in this respect be independent of the office of the Attorney-General. See n 458 above.
[471] However, the entry of *nolle prosequi* is not an acquittal and principle of double jeopardy therefore, does not apply. The defendants may later be re-indicted on the same charge.

law.' Further, according to article 133(1) of the INC which states that '[t]he public attorneys and the State legal advisors shall be under the National Minister of Justice to advise the State, represent it in public prosecution, litigation and adjudication, and conduct pre-trial proceedings. They shall recommend law reform, strive to protect public and private rights, advise on legal matters and render legal aid. The extent of the powers of the judiciary and the prosecutors are obviously stipulated in the INC, and the prosecutors may, consequently, not infringe the independence of the judiciary by entering a *nolle prosequi* at the trial phase. This could create a non-judicial acquittal, which institutes a prohibited form of exercise of power. Article 133(1) of the INC explicitly states that the scope of the discretionary power to prosecute is limited to 'pre-trial proceedings.' Thus, it is not up to the prosecutors, to determine whether the evidence would be adequate for a criminal conviction through the trial, which is the jurisdiction of the judiciary. Furthermore, according to article 133(1) a prosecutor may not impinge upon the scope of judicial powers. Former chief justice of Zambia, Mathew Ngulube, stated that '[p]rosecution should enter a *nolle prosequi* before closing the prosecution because sometimes it was entered because the prosecution had realised that they would lose a case.'[472]

Regarding the issue of who is authorised to issue a *nolle prosequi,* section 58(3) of the CPA (3) states that '[t]he Minister of Justice, or whoever may represent him, may require perusal of the record of trial, to consider exercise thereby, of his power to stay the criminal suit, and the court shall thereupon stay proceeding with the trial, pending the issue of the decision of the Minister of Justice.' Comparing to other national constitutions, for example, section 72(5) of the MauritiusConstitution provides that '[t]he powers conferred upon the Director of Public Prosecutions by subsection (3)(b) and 3(c) shall be vested in him to the exclusion of any other person or authority.' To minimise the misuse of the discretionary power concerning *nolle prosequi,* the DPP should alone exercise the power.[473] Other jurisdictions require that the DPP should not issue a *nolle*

[472] N 457 above.
[473] As above.

prosequi unless with the approval of the court.[474] However, some scholars describe the attempts by court to cage the powers of the DPP on the *nolle prosequi* has been ruled as being against the Constitution.[475]

Concerning the issue of judicial review regarding the *nolle* prosequi, until the 1980s, the opinion was that the prosecutorial discretion was not for review. This view of absolute power is confirmed in such cases like *State (Killian) v Attorney General,*[476] *Judge v DPP,*[477] and *Savage v DPP.*[478] That position has changed in *State (McCormack) v Curran.*[479] The Supreme Court varied with the High Court opinion, and held that the DPP's decision could, in specific conditions, be subject to re-examination.[480] This decision was approved and followed in *H v Director of Public Prosecutions.*[481]

In the Mauritius case of *Jeewan Mohit v DPP,* a judicial review of the DPP decision to stay criminal proceeding is offered.[482] The Court held that the DPP powers must be exercised within constitutional limits, and an alleged exercise of power could be

[474] Clause 271(4) of the Mung'omba draft Constitution. See n 458 above.
[475] N 457 above.
[476] [1957] 92 ILTR 182.
[477] [1984] ILRM 224.
[478] [1982] ILRM 385.
[479] [1987] ILRM 225.
[480] The Supreme Court expressed those limited circumstances as expressed by a judge in the following terms: 'In regard to the DPP I reject also the submission that he has only got a discretion as to whether to prosecute or not to prosecute in any particular case related exclusively to the probative value of the evidence laid before him. Again, I am satisfied that there are many other factors which may be appropriate and proper for him to take into consideration. I do not consider that it would be wise or helpful to seek to list them in any exclusive way. If, of course, it can be demonstrated that he reaches a decision *mala fide* or influenced by an improper motive or improper policy then his decision would be reviewable by a court. To that extent I reject the contention again made on behalf of this respondent that his decisions were not as a matter of public policy ever reviewable by a court. In the instant case, however, I am satisfied that no *prima facie* case of *mala fides* has been made out against either of the respondents with regard to this matter. Secondly, I am satisfied that the facts appearing from the affidavit and documents do not exclude the reasonable possibility of a proper and valid decision by the DPP not to prosecute the appellant within this jurisdiction and that being so he cannot be called upon to explain his decision or to give the reasons for it nor the sources of the information upon which it was based'. Finlay C.J, 237.
[481] [1994] 2 I.L.R.M. 285.where the Court rejected the applicant's appeal on the basis that no *prima facie* case of *male fides* had been made out against the respondent and the facts of the case did not exclude the reasonable possibility of a proper and valid decision of the respondent not to prosecute the persons named by the applicant.
[482] N 459 above.

reviewable if it was prepared for example, in excess of the DPP's constitutional or statutory grants of power; in conflict with the provisions of the Constitution; exercising of power bad faith or in misuse of the procedure of the court in which it was established or where the DPP has fettered his or her discretion in terms of rigid policy.[483] In Nigeria, according to the case of *the State v S. O. Ilori,*[484] the Supreme Court held that the *nolle prosequi* is not subject to a judicial review.

Under Sudanese law, these powers have generated some debates among judges and within the legal profession. It has been argued that the Attorney General or Minister of Justice's decisions are quasi-judicial according to CPA,[485] while others argue that his decisions are administrative and subject to judicial review, and can be characterised as decisions taken by the executive authority.[486]

The Sudanese courts decisions regarding the *nolle prosequi* were various, conflicting and contradictory. Is the order granted of an administrative, judicial or quasi-judicial nature? Is the power of the Minister of Justice an absolute or discretionary power? For example in the case of *Sudan government v Zahra Adam Omer and others,*[487] the Supreme Court held that an order of *nolle prosequi* by the Attorney General is a quasi-judicial order, and, therefore, subject to review by the court on writ of certiorari.

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[483] The Supreme Court of Mauritius relying on a decision of the High Court of Australia *Maxwell v R* held that as in the *Maxwell* case that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute. A similar decision was reached by the Hong Kong Court of Appeal earlier in the case of *Keung Siu Wah v Attorney General*. In reply to the DPP's contentions, their Lordships in the Privy Council referred to the case of *Matalulu v DPP* and quoted with approval the following passage: '[i]t is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. This approach subsumes concerns about separation of powers'.

[484] *The State v S.O. Ilori & Ors* S.C. 42/1982. http://www.nigerialaw.org/The%20State%20v%20S.O.%20Ilori%20&%20Ors.htm (accessed 7 May 2014).

[485] ACJPS (n 78 above) 11.

[486] As above.

[487] *Sudan government v Zahra Adam Omer & Others* SLJR 1965.

However, in other case of *Sudan Government v Ahmed Ismail Musa,*[488] the Supreme Court held that an order of *nolle prosequi* by the Attorney General is administrative and not subject to review by courts.

In Sudan, the Minister of Justice submitted a petition to the Constitutional Court[489] about the nature of decisions issued by the Minister regarding the proceedings of criminal suits, mainly, the power to stay a criminal suit.[490] The focal question in this case was whether the Minister's powers can be considered as being judicial or administrative. The Constitutional Court ruled that the decisions of the Minister in relation to the pre-trial procedures are unchallengeable before any court or before the Constitutional Court, unless the decision somehow violates a constitutional right.[491] The Constitutional Court's decision is in contravention with section 58 of the CPA that stipulates 'grounded decision', which means the Minister of Justice's decision to stay criminal proceedings is subject to judicial review to scrutinise the 'grounded decision.' Although the Court ruled that the Minister's decisions are unchallengeable, it did not address the issue regarding the nature of the Minister's decisions (whether they are judicial or administrative), a question that is crucial to the correct application of article 78 of the INC.[492] Furthermore, the court's decision did not address the question of what other means of challenge can be taken by those adversely affected by the decisions of the Minister in the pre-trial proceedings.[493]

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[488] *Sudan Government v Ahmed Ismail Musa* SLJR 1980.
[489] In 2009, the Minister of Justice Abdelbasit Sabdrat submitted an application concerning art 133 of the INC, which provides as follows: 'Minister of Justice represents state in public prosecution, litigation and adjudication, and conduct pre-trial proceedings. He is the chief legal advisor of the national government and is the prosecuting authority at the national and northern states level' and sec 58 of the CPA namely the power of the Minister of Justice to stay a suit'.
[490] Sec 58 of the CPA.
[491] Constitutional Court decision *Powers of the Minister of Justice during pre-trial proceedings* 13 June 2010.
[492] Art 78 of the INC provides as follows: 'Any person aggrieved by an act of the National Council of Ministers or a national minister may contest such act: (a) before the Constitutional Court, if the alleged act involves a violation of this Constitution, the Bill of Rights, the decentralised system of government, or the Comprehensive Peace Agreement, (b) before the competent authority or court of law if the allegation is based on other legal grounds'.
[493] See chapter 2 p 38.

The independence of the judiciary requires it to ensure exclusive jurisdiction over all matters of a judicial nature. This means that a court judgment may not be changed by a non-judicial authority to the disadvantage of one of the parties, except for subjects concerning alleviation, the commutation of judgments and amnesties. The independence of the judiciary also demands that the officials in charge of the administration of justice are totally independent of those in charge of prosecutions.[494] Section 58 of the CPA of 1991 violates principle 4 of the Basic Principles on the Independence of the Judiciary, which provides as follows: 'There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision.' It also violates the fair trial standards delineated in article 14 of the ICCPR as well as the right of access to court provided for in article 35 of the INC, because a stay of the criminal case precludes access to court.[495]

Interference in the independence of the judiciary by the Minister of Justice regarding *nolle prosequi* could be solved to safeguard the independence of the judiciary as follows: the discretionary power to issue an order of *nolle prosequi* should be given to the independent Director of Public Prosecutions. Concerning the appointment of the DPP, an individual will not be eligible to be or act as DPP unless he is qualified for appointment as a Supreme Court Judge. Further, the appointment should not be left to the executive alone, but should be subject to the approval of parliament.[496] Furthermore, his or her security of tenure, earnings and conditions of service should be the same as the Judges of the Supreme Court, the Director General of Police, and the Constitutional Court justices.[497]

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[494] Guideline 10 of the Guidelines on the Role of Prosecutors. See also, OHCHR *Human rights in the administration of justice: A manual on human rights for judges, prosecutors and* lawyers Chapter 4 113--158. See also, A Jacobsen (ed) *Human rights monitoring: A field mission manual* Maritinus Nijhoff Publishers (2008) 189.
[495] ACJPS (n 79 above) 11.
[496] Mauritius Legislative Assembly, sessional paper no. 6 of 1965 – report of the Mauritius Constitutional Conference (September 1965), Annex D, para. 27.
[497] N 496 above, para. 42.

Another example of the interference of the executive can be seen in the case of *Kamal Saboon*.[498] The Chief Justice and the Minister of Justice formulated rules and procedures according to the Anti-Terrorism Act of 2001 for trial courts in obvious violation of the principles of the independence of the judiciary. These rules reduced the period of appeals to the appeal courts from two weeks to one week and reduced confirmation of a sentence from two stages (Court of Appeal and the Supreme Court) as stipulated by CPA to that of the Special Court of Appeal as provided by Anti-terrorism Act.[499]

Regarding impartiality of the judiciary, the *Balal Naser Idris* case[500] raises issues of the constitutionality of a revision conducted under the authority of section 188(A) of the CPA.[501] The applicant submitted an application to declare section 188(A)(2) of the CPA unconstitutional, because the revision included at least two judges among those who took part in the decision subject to revision. The provision of section 188(A) contravenes the African standards which preclude a judge who participated in a lower stage to decide at a higher stage.[502] In the case, the Court went on to state that this included judges who were prejudiced and expected to defend the previous decision they had made. In this way, there will be no justice and fairness. The HRC has stated that impartiality 'implies that judges must not harbour preconceptions about the matter put before them and that they must not act in ways that promote the interests of one of the parties.'[503] In this regard , the Supreme Court of Zimbabwe has held that 'a broad and creative interpretation of a fair trial embraces not only the impartiality of the court, but also the absolute impartiality of the prosecutor whose function forms an indispensable

[498] *Kamal Mohamed Saboon v Government of the Sudan* Constitutional Court 60/2008.
[499] See Medani (n 94 above) 79--81.
[500] *Balal Naser Idris v Heirs of Deceased Bader El-Din Hamed Balah* CC 61/2006 SCCLR 2011 78--98.
[501] Sec 188(A) provides that: '(1)The Chief Justice may constitute a circuit of five judges of the Supreme Court, to revise any judgment passed thereby , where it transpires, to him, that such judgment may involve a contravention of the Islamic *Shari'a* Ordinances, or mistake in law, the application or construction thereof. The decision of the circuit shall be passed by the majority of members. (2) The revision circuit shall be constituted of judges, the majority of whom have not participated in passing the judgment, which is the subject of revision'.
[502] Art 5(d)(iv) of the African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.
[503] *Karttunen v Finland* (387/1989) 23 October 1992, report of the HRC, vol. II, (A/48/40), 1993, 120 para 7.2.

part of the judicial process and whose conduct reflects impartiality or otherwise of the court.'[504]

With the aim of guaranteeing the independence and competence of the judiciary, there are international standards concerning the appointment of judges and their conditions of service. Several of these standards are articulated in the Basic Principles on the Independence of the Judiciary, which require that judges be selected on the basis of their legal training, experience and proper qualification.[505] The promotion of judges should be based on impartial elements such as capacity, integrity and experience.[506] States must provide sufficient funds to facilitate the judiciary to perform its functions and to safeguard suitable earnings and pensions for judges. [507] Finally, so as to guarantee their independence and impartiality, the status of judges, comprising their tenure of office, their independence, security, sufficient remuneration and conditions of service, social security and the age of retirement should be adequately secured by law.[508]

In Sudan, judges are not guaranteed tenure for life as is the case in the USA and other jurisdictions or until age of retirement as in the UK. The Constitutional Court judges' terms in Sudan are restricted to five years subject to one renewal for the same period. If judges do not remain compliant, their term may not be renewed.[509]

Judicial independence extends to independence in financial matters. Accordingly, the National Judicial Service Commission Act provides that the Commission shall have its own independent budget. The Commission Act provides '[t]he Commission shall have an independent budget, to be approved by a decision of the President of the Republic, upon recommendation of the Commission.'[510] Further, the National Judicial Service Commission Regulations of 2006 provide that the Commission shall issue its

[504] Jayawickrama (n 72 above) 502.
[505] Basic Principles on the Independence of the Judiciary, principle 10.
[506] N 505 above, principle 13.
[507] N 505 above, principles 7 & 11.
[508] HRC Genral Comment 32 (n 10 above) para 19.
[509] Khalil (n 198 above) 69.
[510] Sec 8.

recommendations with the budget proposal presented to it by the Secretary-General. The Act also provides that one of the powers of the Secretary General of the Commission is to prepare proposals of the annual budget of the Commission.[511] It further provides[512] that '[t]he Commission shall have an independent budget, to be prepared by the Secretary-General, in accordance with the financial regulations, and submit the same to the Commission, before the end of every financial year, to make recommendations with respect thereto, and submit it to the President of the Republic for approval.'[513] Pursuant to principle 7 of the Basic Principles on the independence of the Judiciary which provides that '[i]t is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions', the judiciary must be granted adequate funds to appropriately implement its mandate and not be exposed to outside pressure and exploitation.[514] However, when it extends to financial matters independence may not always be present.[515]

Observers alleged that:

> [j]udges and prosecutors are often seen as serving the interests of Sudan's executive power rather than the public interest. The police and the judiciary, in particular, have lost credibility following mass purges carried out by the current regime and justified in the name of the public interest. In these purges, which started immediately after the military *coup* on June 30, 1989, qualified judges and police officers who were not affiliated with the ruling party were dismissed *en masse*. The positions were then filled with those loyal to the new regime and were thus entrusted to put the interests of the party before the interests of justice. These biased appointments contributed to the prevalence of institutional violence and an unprecedented amount of abuses committed by agents of Sudan's justice system.[516]

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[511] Sec 14.
[512] Sec 17(1).
[513] ACJPS (n 79 above) 16.
[514] *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* 121.
[515] In principle the three branches of government independent of each other, in some respects dependent on each other, for instance with respect to the appropriation of resources. See *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* 121.
[516] ACJPS *Report on pre-trial justice in Sudan* (January 2012) 2.

Although, the national court system in Sudan is formally functional and has jurisdiction over human rights crimes perpetrated in Darfur, however:

> [t]hese courts have been unable to resolve human rights abuses there. There is an acute shortage of judges and other judicial staff. Although there have been a few exceptional cases of domestic courts charging state officials in cases involving conflict-related crimes, the justice system as a whole is unable or unwilling to pursue justice or prevent attacks. This is compounded by a general lack of independence and resources, an ill-equipped police force and legislation that protects state officials from criminal prosecution.[517]

The lack of judges has also contributed to the problem of prolonged detention.

Although Article 27(3) of the INC provides that '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', domestic courts infrequently consider the implementation of international human rights instruments ratified by Sudan. Case law and practice indicate that judges rarely rely on the Bill of Rights or consider it as part of judicial reasoning or decisions.[518]

7.1 Special courts

The creation of extraordinary courts is also in direct conflict with the right to a competent, impartial and independent court as well as the principle of equality before the law.[519] Frequently, the trials in special courts offer less guarantees of a fair trial than the ordinary courts. In this section, analysis of the fairness of proceedings in a special or extraordinary court will generally focus on whether the court is established by law, whether the authority of the court infringes the safeguards of non-discrimination and

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[517] Human Rights Council fourth session of the provisional agenda Implementation of General Assembly resolution 60/251 March 2006 entitled 'Human Rights Council' Report of the High-Level Mission on the situation of human rights in Darfur pursuant to Human Rights Council decision S-4/101, para 46.
[518] See Constitutional Court cases *Al Hag Yousif Al Haj v Izalledin Ahmed Mohamed & Government of the Sudan* Constitutional Court 2006/46 (dismissing case on the ground that the Bill of Rights of the INC 2005 is not part of the Constitution; *Kamal Mohamed Saboon* case (n 491 above); *Babiker Mohamed Al Hassan v University of Khartoum Council & Government of the Sudan* Constitutional Court 2006/57 & *Masarat for Media Production Ltd v National Security & Intelligence* Constitutional Court 2008/73.
[519] See Steytler (n 160 above) 193--194.

equality, whether the judges are autonomous of the executive and other authorities in determining cases, whether the judges are competent and impartial and whether the processes in such courts comply with the minimum procedural safeguards of a fair trial set out in international standards.[520]

Under the international human rights law, the HRC has stated that 'quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice.'[521] The HRC has made it clear that the provisions of the ICCPR apply to trials in all courts, whether ordinary or special.[522]

The UN Working Group on Arbitrary Detention has stated as follows:

> One of the most serious causes of arbitrary detention is the existence of special courts, military or otherwise, regardless of what they are called. Even if such courts are not in themselves prohibited by the International Covenant on Civil and Political Rights, the Working Group has nonetheless found by experience that virtually none of them respect the guarantees of the right to a fair trial enshrined in the Universal Declaration of Human Rights and the said Covenant.[523]

The HRC has expressed concern about anti-terrorist laws in France which grant jurisdiction to a centralised court with prosecutors who have exceptional authorities of apprehend and search and which permit detention in police custody for 96 hours.[524] Under these laws, the accused does not have the similar rights as in the ordinary courts. Moreover, the accused has no right to consult with a lawyer throughout the first 72 hours of confinement in police custody and no right of appeal to review a decision of the special court.[525]

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[520] N 6 above 171.
[521] HRC General Comment 13 (n 227 above) para 4.
[522] Art 14. See also, as above.
[523] Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1996/40, at para 107 p 26.
[524] Twice the normal period.
[525] Concluding observations of the HRC: *France* UN Doc. CCPR/C/79/Add.80, 4 August 1997 para 23.

As noted by the UN Special Rapporteur on the Independence of Judges and Lawyers: '[s]ome of the most serious problems recorded, which have given rise to numerous complaints, concern the trial of civilians before military courts.'[526]

The African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa unequivocally state that:[527]

> a) The only purpose of military courts shall be to determine offences of a purely military nature committed by military personnel. b) While exercising this function, military courts are required to respect fair trial standards enunciated in the African Charter and in these guidelines. c) Military courts should not in any circumstances whatsoever have jurisdiction over civilians. Similarly, special tribunals should not try offences which fall within the jurisdiction of regular courts.

Islamic jurisprudence does not know of or recognise special courts. The *Qur'an* states: 'but no, by your Lord, they can have no faith, until they make you judge in all disputes between them, and find in themselves no resistance against your decisions and accept (them) with full submission.'[528] The expression 'between them' is vital, for it means that it is explicitly talking about judging between the matters of the people. This verse indicates that it is mandatory for all the Muslims in the community, governmental and international levels to transfer any dissimilarities or ideas that ascend among them to the laws of Allah, and to submit to Him and admit His laws. In addition, the *Qur'an* states that 'mankind! We have created you from a male and a female, and made you into nations and tribes, that you may know one another. Verily, the most honourable of you with Allah is that (believer) who has *Al-Tagwa* (he is one of the *Al-Muttaqun)*. Verily, Allah is All-Knowing, Well-Acquainted (with all things).'[529] In *Shari'a* law, there cannot be one law for the governor and one for the public; one for the dominant and one for the feeble; one for the wealthy and one for the needy. Government authorities enjoy no special privileges and no discrimination.

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[526] Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. A/HRC/4/25, 18 January 2007, para 29.
[527] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2001.
[528] Surat An-Nisaa verse 65.
[529] Surat Al-Hugurat verse 13.

In Sudan, special or extraordinary courts or tribunals have been set up in Sudan to try certain offences, without following all the procedures of the ordinary court system. Various governments in Sudan have established systems of special courts parallel to the judiciary, bestowed with jurisdiction over issues that have been snatched from the jurisdiction of ordinary courts.[530] Apart from the democratic period of 1986 to 1989, special courts have remained an important aspect of the justice system in Sudan.[531] Examples of these special courts include Public Order Courts, Military Courts, Security Court, Terrorism Courts, and Police Courts. Various prominent cases that involved human rights abuses were considered in extraordinary courts.[532] The system of special courts violates fundamental legal doctrines such as equality before the law as all individuals are not treated equally in special courts.

As alluded to earlier, the review of the impartiality and justice of proceedings in a special court will generally place emphasis on the establishment and the jurisdiction of the court. Generally, the court should be established by law and its jurisdiction should guarantee the rights of non-discrimination and equality. Moreover, the judges should be competent, independent, and impartial. Furthermore, the procedures in such courts should comply with the minimum procedural safeguards of a fair trial stipulated in international standards.[533]

The Chief Justice has the power to create special courts and authorise them particular thematic jurisdiction. Article 127 of the INC also allows for legislation to create additional domestic courts as may be necessary.[534] It states 'Other national courts shall be established by law as deemed necessary.'

The best example of the special courts system manifests in the implementation of the Anti-Terrorism Act of 2000. Under this Act, cases of alleged terrorism are not subject to

[530] Hussien (n 24 above) 379.
[531] Hussien (n 24 above) 371.
[532] See *Kamal Mohamed Saboon* case (n 498 above). See also, Medani (n 93 above) 79--81.
[533] N 6 above, 170--171.
[534] N 6 above 5.

trial before ordinary courts, but are subject to the exclusive jurisdiction of special courts established by the Chief Justice. The rules of procedure of these courts are established by the Chief Justice in consultation with the Minister of Justice. The Minister of Justice is a member of the executive whose participation in the establishment of trial courts is an obvious violation of the principles of the independence of the judiciary and separation of powers. The Act further enables the Chief Justice to establish a 'Special Court of Appeal', in blatant violation of the provisions of the CPA of 1991 under which there is a standing Court of Appeal.[535]

In 1989, revolutionary security courts were established.[536] A presiding judge and two others were to be chosen by the president of the command council.[537] The Emergency and Protection of Public Safety Act of 1997 empowers the President to establish private courts and to determine the jurisdiction of such courts and the investigation procedures to be followed by such courts.[538] There is no limit on this. According to section 6(1), the mandate of the special courts shall prevail in cases of contradiction with the due process prescribed by the CPA.[539]

The Khartoum Public Order Act of 1998 is administered by special public order courts and enforced by a special police force. Public order courts do not abide by the due process of law or respect the right of an accused person to defend himself or herself. They pursue the application of swift procedures even in cases of serious accusations that may end up with a long imprisonment or an immediately carried out judgment of whipping that makes lodging an appeal inefficient.[540]

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[535] ACJPS (n 79 above) 15.
[536] Act No. 27/1989 issued on 6 July 1989.
[537] The Act gave the president of the command council or any person authorised by him, military governor and the governor of Khartoum the power to form special courts. These courts consist of three army officers or other individuals of competence and trustworthiness. Appeals lie to the revolutionary security High Court but only against sentences of death and imprisonment for more than 30 years. Hussien (n 24 above) 373.
[538] Sec 6.
[539] Medani (n 94 above) 84. See also, Hussein (n 24 above) 370.
[540] Hussein (n 24 above) 373.

In a rare seminal decision in Sudanese jurisprudence, the Supreme Court in case of *Nasr Abdelrahman*[541] has held that the subjection of civilians to military courts undermines the principle of separation of powers and violates the right to equality before the courts and is, therefore, contrary to the purpose and the spirit of the Constitution.

In a recent case, which reversed previous gains, the Constitutional Court held that civilians may be tried before military courts, and there will be no violation of any constitutional right.[542] The constitutionality of such trials before the special courts was upheld by Sudan's Constitutional Court.[543] This practice raises concern that proceedings for certain offences before military courts will facilitate subjecting a large number of civilians to trials before special courts where their right to a fair trial may not be guaranteed. However, at the same time, under the special courts system, the judiciary is precluded from examining cases involving officials from the police, army and national security.

A number of individuals had been tried before special courts in proceedings that did not comply with fair trial standards such as accepting evidence alleged to have been extracted under torture.[544] These courts have in several cases imposed the death penalty, thereby violating the right to life of the convicted.[545]

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[541] *Nasr Abdelrahman Mohamed v the Legislative Authority* (1974) SLJR 74.
[542] *Henery Puma v Sudan Government* (1999) SCCLR (1999--2003) 82.
[543] In 2009. See *Kamal Mohammed Saboon* case (n 498 above), discussed further in Medani (n 93 above) 79-82. See further ACJPS (n 79 above) 13–20.
[544] See Medani (n 94 above) 67--88.
[545] For example, in August 2012, some accused persons were accused of stealing $450,000 US dollars & 250,000 Sudanese pounds (approximately $56,700 US dollars). The officer of Khartoum Bank in Niyala reported the case to the Northern Nyala Police Station. The police issued warrants of arrest against the accused persons, three of them were minors. The four accused persons were charged under secs 144 (intimidation) & 168 (armed robbery) of the 1991 Sudanese Criminal Act. On 9 October, the Prosecutor of Nyala referred the case to the Nyala Special Court. The four accused persons were sentenced to prison terms. The minors were sentenced to one year of care and reform measures or juvenile welfare while the fourth was sentenced to death. ACJPS *Sudan Human Rights Monitor* October 2012–February 2013 19--20. See also, Concluding observations of the HRC: *Sudan* UN Doc. CCPR/C/SDN/CO/3/CRP.1 26 July 2007 para.25.

In *Amnesty International and Others v Sudan*, the ACHPR has found such tribunals to be in violation of article 7(1)(d) of the African Charter by reason of their composition and on the basis that the government's dismissal of judges opposed to the formation of these courts deprives courts of the personnel qualified to ensure judicial impartially, thus denying individuals the right to have their case heard by such body.[546] The African Commission concluded in a similar case of *Law Office of Ghazi Suleiman v Sudan*, where it decided that military courts which were mainly composed of active servicemen lacked impartiality.[547] The African Commission[548] has ruled that Egypt had breached a set of rights under the ACHPR, including the right to a fair trial and the independence of the judiciary noting that '[t]ribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.'[549] This rationale applies in equal measure to moves that broaden the jurisdiction of existing military courts over civilians.

Sudan's parliament adopted an amendment to Sudan's Armed Forces Act, 2007.[550] The amendment raises serious concerns about the law's compatibility with Sudan's INC and international human rights standards binding on Sudan. It envisages subjecting civilians to the jurisdiction of military courts with respect to a large number of wide and ambiguously worded offences, which risks violating a series of rights.[551] The amendment stipulates that every person who commits or is suspected of committing any act undermining the security of the state is subject to the jurisdiction of Sudan's military courts.[552] This applies to individuals irrespective of their military status or linking

[546] Chenwi (n 261 above) 301.
[547] See *Law Office of Ghazi Suleiman v Sudan* African Commission on Human and Peoples' Rights, Communications 222/98 & 229/99 (2003), paras 64--66. See also, *Media Rights Agenda v Nigeria* African Commission on Human and Peoples' Rights, Communication No. 224/98 (2000).
[548] *Egyptian Initiative for Personal Rights & Interights v Arab Republic of Egypt* 334/06 (2011).
[549] As above, para 204. See also, principle 5 of the Basic Principles on the Independence of the Judiciary, UN Doc. A/CONF.121/22/Rev.1 at 59 (1985).
[550] Adopted 2 July 2013.
[551] REDRESS, CLRS & SHRM *Sudan: Amendment of Armed Forces Act runs counter to international standards and risks fostering further human rights violations*(2013) 1.
[552] Sec 4 of the Armed Forces Act of 2007 amendment of 2013.

with Sudan's armed forces. The offences for which persons may under the amendment be brought before military courts covers 16 offences.[553]

The amendment of the Armed Forces Act of 2013 is incompatible with Sudan's Constitution and ICCPR and ACHPR obligations, because the INC stipulates that international treaties binding on Sudan are an integral part of Sudan's Bill of Rights.[554] According to the ICCPR and the ACHPR, the use of military courts to try civilians conflicts with the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.[555] It also violates the ICCPR[556] as this measure is not 'necessary and justified by objective and serious reasons and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.'[557]

The subjection of civilians to military tribunals takes place in a context where defence rights and custodial safeguards against torture and ill-treatment are undermined. UN treaty and Charter bodies have, therefore, expressed concern over the use of military or special courts in situations where detainees are exposed to conditions in which their rights are not guaranteed, particularly under security legislation and anti-terrorism legislation.[558] Subjecting civilians to the jurisdiction of military courts risks the violation of

[553] Under Part V (Offences against the State), Part VI (Offences relating to Disciplined Forces) and Part VII (Sedition) of the Criminal Act of 1991, including offences such as 'undermining the constitutional system' (sec 50) and 'publication of false news' (sec 66). It also creates a number of new offences subject to the jurisdiction of the military courts, namely: '(A) Formation of an armed organisation under any name to wage military war against the state through either gathering individuals or training them or collecting arms or military hardware, or incitement to do so. (B) Any attacks by arms or any warfare means against units or camps of the armed forces or other regular forces, or incitement to do so. (C) Taking up arms or any other warfare means to commit an act that threatens stability and security of the country, or endangering its independence and unity'. In addition, the amendment envisages changes to a series of provisions of the Armed Forces Act. See n 544 above, 2.
[554] Art 27(3) of the INC.
[555] Art 7 ACHPR.
[556] Art 14.
[557] N 551 above, 3.
[558] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc.A/63/223 (6 August 2008) paras 23 &28.

various rights.[559] The HRC has called for the removal of military court jurisdiction over civilians. It stated that '[i]n some countries, such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights.'[560] The objection of the HRC to trying civilians in military courts is very clear. For example, the HRC called on Lebanon to transfer the jurisdiction of military courts in all trials concerning civilians to the ordinary courts.[561] In the case of *Incal v Turkey,* the European Court of Human Rights found that even the presence of one military judge on the bench of three judges in the National Security Court resulted in a breach of the right to a fair trial under article 6 of the European Convention on Human Rights.[562] Similarly, the Inter-American Commission has stated that 'placing civilians under the jurisdiction of the military courts is contrary to articles 8 and 25 of the Inter-American Convention and that the military courts are special and purely functional courts designed to maintain discipline in the military and police and ought, therefore, to apply exclusively to those forces.'[563] In places such as the US, where the US Military Commissions[564] are in operation, these have been the subject of criticism by international bodies for their failure to comply with international standards.[565]

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[559] Including freedom of expression, right to liberty and security, freedom from torture and ill-treatment, the right to a fair trial & the right to life.

[560] HRC General Comment 13 (n 227 above) para. 4.

[561] N 6 above, 175.

[562] *Incal v Turkey* (2000) 29 EHRR 449, paras 65--73.

[563] Annual Report of the Inter-American Commission, 1993, OEA/Ser.L/V/II.85 doc.9 rev.1994, at 507, (Peru). See (n 6 above) 176.

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

[565] See Human Rights Watch *Jordan: End Protester Trials in State Security Courts* http://www.hrw.org/news/2012/11/30/jordanendprotestertrialsstatesecuritycourts (accessed 30 November 2012) ICJ Submission to the Universal Periodic Review of Syria, United Nations Human Rights Council 12th Session of the Working Group on the Universal Periodic Review (October 2011) http://lib.ohchr.org/HRBodies/UPR/Documents/session12/SY/ICJInternationalCommissionJuristseng.pdf; (accessed 10 Oct 2013) Concluding observations of the HRC: *Yemen* (May 2012), Advanced Unedited Version, para17 (on the state of Yemen's judiciary); Concluding observations of the HRC: *Egypt*, UN Doc. CCPR/CO/76/EGY, 28 November (2002) para 16(b): '(b) The Committee notes with alarm that military courts and State security courts have jurisdiction to try civilians accused of terrorism although there are no guarantees of those courts' independence and their decisions are not subject to appeal before a higher court (article 14 of the ICCPR)'.

In Africa, there has been resistance to special courts and as such the Dakar Declaration on the Right to a Fair Trial in Africa identified special tribunals as factors undermining the realisation of this fundamental right. The Declaration recommended that military courts should only try 'offences of a pure military nature committed by military personnel and not try offences that fall within the jurisdiction of regular courts.'[566]

Other kind of special courts in Sudan are the police courts. In terms of the Police Forces Act of 2008, police courts are established by the Director General or the Police Director, composed of police officers, and have jurisdiction over any crimes committed by affiliates of the police forces, except for *Hudud* and *Qisas* offences. According to this Act, the Police Courts are not subject to any external judicial review. This system poses real concerns about its conformity with the rule of law.[567] These courts lack institutional independence.

The fact that members of the police force sit as judges over other members of the same institution raises concerns regarding the impartiality of the police courts, especially in light of a lack of institutional independence. The complete control of the executive over proceedings is underscored as the Act empowers the Director General to stop the procedure at any time before judgment.[568]

Both the Police Act of 2008 and the National Security Act of 2009 provide that members of the respective forces are subject to the jurisdiction of special police and security courts respectively.[569] This runs counter to recognised best practices.[570] The major point in these courts is the lack of independence, because the executive can control or

[566] The Dakar Declaration is the result of a seminar on the right to a 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. www.chr.up.ac.za/hr_docs/african/docs/achpr/achpr2.doc.
[567] REDRESS & KCHRED *Briefing note on Chapter 9 of the draft police forces bill* (2008) 1.
[568] Secs 55 & 56.
[569] Secs 46(1), 46(2) & 48 of the Police Act of 2008 and secs 75--81 of the National Security Act of 2009.
[570] Principle 9 of the UN Principles Governing the Administration of Justice through Military Tribunals http://www.dcaf.ch/Publications/International-Standard-Principles-Governing-theAdministration-of-Justice-Through- Military-Tribunals (accessed 10 October 2013).

direct the police courts by deciding on the appointment and dismissal of judges. Even the 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.[571] Proceedings before the police courts in which the judge and the person to be judged belong to the same forces clearly give rise to issues of bias.[572]

Another point in addition to the lack of independence is the lack of a clear definition of the position and rights of victims in proceedings before the police courts. The regulations for the procedure according to the law are made by the Minister of Interior and not the parliament. This puts victims of police crimes at a potential disadvantage if compared to criminal proceedings governed by the provisions of the CPA, such as the provisions on the right to cross-examine witnesses.[573] 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.[574]

The HRC stated in General Comment No 32 as follows:

> 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.[575]

The Emergency and Protection of Public Safety Act of 1997 also provide for the establishment of Special Courts without providing adequate fair trial guarantees.[576]

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[571] A case against a police officer may be heard by an ordinary criminal court but only if referred by the Minister of Internal Affairs or someone delegated by him pursuant to sec 46(2) of the Bill, which means that it is entirely discretionary.
[572] N 567 above, 2.
[573] Sec 155(2) of the CPA.
[574] N 567 above, 4.
[575] See HRC General Comment No.32 (n 10 above) para 19 and *Oló Bahamonde v Equatorial Guinea* Communication No. 468/1991, UN Doc. CCPR/C/49/D/468/1991, 10 November 1993, para 9.4.
[576] See chapter 2 p 57 & chapter 3, 95--96.

According to the Anti-Terrorism Act 2001, the cases of alleged terrorism are not tried by ordinary courts, but by 'Special Courts' established by the Chief Justice. The Rules of Procedure for such courts are established by the Chief Justice 'in consultation with the Minister of Justice.' The latter is a member of the Executive whose participation in the establishment of trial courts is a blatant violation of the principle of independence of the judiciary and the principle of separation of powers.[577] In effect, by making the Regulations adopted by the Chief Justice and the Minister above the applicable laws is a violation of legal and constitutional principles.[578]

The Special Rapporteur on the Situation of Human Rights in Sudan expressed concern about the work of the Courts, which were set up under the Anti-Terrorism Act after the armed attack on Omdurman.[579] The Special Rapporteur noted that they operate in accordance with procedural norms set out by the Chief Justice in consultation with the Minister of Justice, which override parliamentary laws and the protection they offer from unfair trials.[580]

[577] The special courts were set up under the Anti-Terrorism Act of 2001 after an armed attack on Omdurman in May 2008. In three rounds of trials from June 2008 to January 2010, the courts sentenced a total 106 people to death. On 29 & 31 July 2008, three of the five anti-terrorism courts in Khartoum pronounced 30 death sentences for alleged participation in the 10 May attacks on Omdurman. The verdict was reached primarily on the basis of confessions which the defendants said they were forced to make under torture or ill-treatment and which they retracted in court. Another important element was testimonies by some of the children detained on account of their alleged participation in the attacks. The children stated in court that they recognised the defendants as having been among the attackers. See Report of the Special Rapporteur on the situation of human rights in the Sudan, Sima Samar, submitted pursuant to Human Rights Council resolution 6/34, in which the Council decided to extend for one year the mandate of the Special Rapporteur, in accordance with Commission on Human Rights resolution 2005/82. The present report updates the previous one and covers the period from January to July 2008, para 30.

[578] Medani (n 96 above) 6.

[579] Attacked Omdurman on 10 May 2008. The courts between July & August 2008 pronounced 50 death sentences.

[580] Report of the Special Rapporteur on the situation of human rights in the Sudan, Ms. Sima Samar, U.N. Doc.A/HRC/9/13 (2008), para 29. Cf; See also, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Ms. Asma Jahangir: Mission to Sudan (E/CN.4/2005/7/Add. 2), paras 51--56 (on the use of special courts in the Darfur region).

One of the special courts issued a decision consistent with the standard to exclude evidence obtained through torture.[581] This is a commendable verdict that is in line with international human rights standards which prohibit a court from relying on evidence gained through torture. This case should be an example to be applied throughout all of Sudan.[582]

The Act enables the Chief Justice to establish a 'Special Court of Appeal', in blatant violation of the provisions of the CPA, under which there is a standing Court of Appeal. The Special Court of Appeal is authorised to confirm the death penalty and life imprisonment. This is a violation of the CPA, which gives such powers exclusively to the Supreme Court.

While the ICCPR does not ban the trial of civilians in military or special courts, it obliges that such trials are in full compatibility with the requirements of article 14 of the ICCPR and that its safeguards cannot be restricted or adjusted because of the military or special character of the court concerned.[583] The HRC also states that the trial of civilians in military or special courts could raise serious complications as much as the just, neutral and autonomous administration of justice is concerned. Therefore, it is significant to take all essential procedures to guarantee that such trials occur under circumstances which give the full safeguards specified in article 14 of the ICCPR. Trials of civilians by military or special courts should be in exceptional matters or circumstances.[584]

[581] On 26 April, the Special Court in Bahri, North Khartoum, delivered a verdict that acquitted 10 men whose confessions were obtained under torture at the hands of national security officers. The men were accused of plotting a military *coup* in September 2004.
[582] Third periodic report of the United Nations High Commissioner for Human Rights on the human rights situation in the Sudan, issued by the Office of the High Commissioner for Human Rights in co-operation with the United Nations Mission in Sudan para 96.
[583] HRC General Comment 32 (n 10 above) para 22.
[584] HRC General Comment No. 31: On the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted on 29 March 2004 at its 2187th meeting, para 11.

Communications of *Amnesty International and others v Sudan*[585] brought before the African Commission by the Lawyers Committee for Human Rights, describe government's exertions to weaken the independence of the judiciary and the rule of law. It was alleged, in particular, that the government established special tribunals, which are not independent. The ordinary courts were precluded from hearing cases that are within the exclusive jurisdiction of the special tribunals. It was further alleged that the right to defence before these special tribunals is restricted. The communication also indicated that individuals brought before these courts were deprived of the right to contest the grounds for their confinement under emergency statute.[586]

The famous special courts in Sudan are the Public Order Courts (POCs), established by a decision of the Chief Justice in 1995.[587] The current Public Order Courts have jurisdiction over a very wide range of administrative and criminal provisions.[588] The trial procedure is intended to be immediate.[589] There is no requirement to allow the accused to prepare a defence; the right to legal support and legal aid is not provided for; and no records need be kept of the proceedings, save for a note of the content of witness statements.[590] Once an individual has been found guilty of a crime, the penalty is immediately executed.[591] If fines are not paid, the person is transferred to prison.

Article 127 of the INC permits the legislature to form further domestic courts as may be required.[592] For the administration of criminal justice, substantial powers are awarded

[585] *Amnesty International & Others Africa v Sudan* Communications 48/90-50/91-52/91-89/93.
[586] As above, para 17.
[587] The POCs are essentially parallel courts outside the central legal system, a tradition which began with the creation of emergency courts during the 1970s. In their various forms since 1983, these parallel courts have been courts of summary jurisdiction with greatly restricted procedural safeguards and animated by a specific political objective.
[588] From national laws relating to alcohol and prostitution, to price fixing, classification of intellectual property, forestry and customs.
[589] A hearing may not take more than a few minutes and the arrest, detention, and imposition of a penalty occur within 24 hours.
[590] SIHA *Beyond Trousers: The public order regime and human rights of women and girls in Sudan* A discussion paper, submission to the 46th Ordinary Session of the African Commission, Banjul, The Gambia, 12 November 2009 13.
[591] See Also interview with Dr. Daf alla Al Haj Yousif (former Chief Justice) chapter 2 pp 61--62.
[592] It states 'Other national courts shall be established by law as deemed necessary'.

on the Chief Justice, who can issue circulars or direction to judges on criminal justice concerns.[593]

However, research has found that many prominent cases that involved human rights violations were administered through special courts. Thus, the issues of concern are not only how cases are allocated and how judges for each case are selected, but also, the operation of the system of special courts in terms of their establishment, procedures, jurisdiction and independence.[594]

At the international level, the United Nations High Commissioner for Human Rights (High Commissioner) fundamentally disagrees with the idea that special courts with special procedures can be more suitable to address terrorist crimes than ordinary criminal courts. The High Commissioner has re-emphasised that the use of special courts to try civilians has impacted upon the effectiveness of the regular court systems and often has seriously negatively impacted on due process and non-discrimination rights.[595]

8. Conclusion

Although the right of access to court is guaranteed under the Sudanese Bill of Rights, there are impediments that curtail the effective exercise of this right in Sudan. The chapter identified these impediments which include immunity of public officials, restrictions on access to court imposed by legislation, shortage of judges, lack of awareness of the Bill of Rights by the general public especially by IDPs and the restrictions on the right to litigate before the Constitutional Court. In addition, some serious crimes are not included in the Criminal Act of 1991 and are not in line with international standards and definitions.

[593] Sec 212 of the CPA.
[594] ACJPS (n 79 above) 14.
[595] Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, U.N. Doc.A/HRC/8/13 (2008) paras 40--42.

The UN treaty bodies and the African Commission have called on Sudan to eliminate immunities and reinforce its law implementation and judicial schemes. The chapter concluding with the following, members of the police, security and armed forces should be subject to prosecution and civil suits for exploitations of power without any legal restraints. A scarcity of judges and courts in some states should be resolved, and economic hindrances should be addressed to boost the right to access to court. In addition, it is submitted that section 58 of the CPA violates principle 4 of the Basic Principles on the Independence of the Judiciary, the fair trial standards outlined in article 14 of the ICCPR as well as article 35 of the INC. IDPs lack effective access to justice and have little understanding of human rights and rule of law doctrines. Furthermore, the availability of an effective constitutional remedy before Sudan's Constitutional Court is hindered by numerous key aspects namely: narrow *locus standi*, fees, qualification of lawyers and inaccessibility, in addition to common problems such as limited awareness. Regarding article 35 of the Bill of Rights, the Constitutional Court has failed to act as the constitutional guardian of rights and remedies provided for under Sudanese law and has proved to be mostly ineffective. Crimes like torture and enforced disappearances should be included in the Criminal Act with a suitable penalty. The definition of crimes like genocide, crimes against humanity and war crimes should be in line with the international standards. The international standards on the right of access to court seem harmonious with the Islamic law, but when compared to Sudanese law and practice, they are irreconcilable.

The right to legal aid is enshrined in the INC and regulated by laws. Among the obstacles that curtail the right to legal aid in Sudan include: restrictions in the law that make provision for legal aid only at trial stage and not all stages of the trial, legal aid is given only for serious crimes and the right is only enforced upon request from the beneficiary, and this may hamper a fair trial due to the high illiteracy rate. It is provided through the Ministry of Justice, an institution supervised by the executive arm of government which also represents the state in cases where the state is a party to a suit. It is submitted that legal aid should be provided in all criminal matters, including crimes, which their punishments that encompass restrictions on freedom of movement and

corporal punishments or crimes punishable with imprisonment for three years or more. The right to legal aid should be provided in all stages of the trial. In essence, section 135 of the CPA should be amended to include all stages. The role of the Faculty of Law at the University of Khartoum should be enforced to boost the right to legal aid. Efforts made by UNDP in its rule of law programme have resulted in substantial enhancements towards the right to legal aid. The legal aid mechanism should not be part of the executive. The previous independent body should be reinstituted. Although international standards on the right to legal aid are compatible with Islamic law, the standard in Sudanese laws and practice falls short of international human rights standards.

All Sudanese Constitutions have guaranteed the right to equality before the law. However, the Sudanese legal system has legislation which runs contrary to the principle of equality and contains impunity that restrains the right to equality before the courts. The system of special courts also violates ultimate legal doctrines for instance equality before the law as all citizens are not treated similarly in special courts.

In the INC and the Constitution of 1998, there is no express provision for the right to adduce and challenge evidence. In addition, there is no legislation that provides for effective protection of victims and witnesses. In principle, all the evidence must be produced in the attendance of the accused at a public hearing. The accused should be given a chance to challenge and question the prosecution's witnesses. Practice shows that many accused persons have been forced to confess guilt. When these persons appear before courts, they withdraw their confessions and the courts tend to ignore these retractions. The Evidence Act of 1994 does not outlaw evidence obtained through illegal or unlawful means. Sudanese law should provide sufficient protection for victims and witnesses of human rights. Under the INC, courts have the responsibility of safeguarding the constitutional rights of accused persons when their human rights are violated. The international standards on the right to adduce and challenge evidence are harmonious with Islamic law. However, Sudanese law falls short of international human rights standards.

Although, the INC provides for the right to a fair hearing in article 34(3), the restriction is evident in section 133 of the CPA of 1991. In addition, according to the Security Act of 2009, members of the security forces and their collaborators brought for trial before an ordinary court for acts relating to performance of official duty are tried in *camera*. The law permits the trial of persons in *camera*, contrary to the express provisions of the ICCPR. Undue delay may also damage the capability of the individual to present a full and fair defence to the charge. In Sudan, according to the Security Act, a detainee may be detained for four and half months at the pre-trial stage, this is inconsistent with international standards on the undue delay for trials. One important element that guarantees the right to fair hearing is the right to an interpreter. In various cases, some of the defendants were incapable of speaking Arabic and alleged they did not understand the details of their arrest or summary trials. In addition, the CPA provides for summary trials in cases of lesser punishment that do not respect the full rights of defence and fair hearing. The international standards on the right to fair hearing are harmonious with the Islamic law. However, Sudanese law falls short of international human rights standards.

The chapter concluding that providing a court the authority to veto the choice of counsel of a defendant is violating the right to freely choose one's counsel. In death penalty cases, the legal counsel should be willing and able to defend the accused, and the counsel must be changed if the accused so requests. The chapter shows that several requests by lawyers to meet defendants before the trial were adamantly rejected by the trial courts. Further, there are questions with respect to the freedom of lawyers to perform their professional liabilities, including the right to defend those accused of crimes, and the protection afforded to lawyers under the advocacy law. The international standards on the right to legal representation are compatible with the Islamic law. However, Sudanese law and practice falls short of international human rights standards.

The chapter identified the obstacles that curtail the right to a competent, independent and impartial courts in Sudan, including institutional constraints that have affected the

judiciary's independence, the battle or denial of the executive branches of government to implement the judgments of the courts, interference of the executive in the administration of justice, judges do not have powers to oversee the work of the National Intelligence and Security Services (NISS), no judicial review of search, arrest and detention, the judiciary cannot adjudicate over the police and armed forces because they can only be tried by special courts, the appointment of judges is based on considerations other than legal qualifications, discrimination against women in appointments, composition of revision circle, tenure of Constitutional Court justices, and specific laws impeding the independence of judiciary.

The National Judicial Service Commission has not played an active role in enhancing the independence of the judicial system.The judiciary faces noteworthy complications in terms of its resources and infrastructure and with regard to judges there are legal and administrative inadequacies.[596]

Key among the impediments includes existing laws which are impeding the judiciary's independence. Special or extraordinary courts or tribunals have been set up in Sudan to try certain offences, without following all the procedures of the ordinary court system. Many prominent cases that involved human rights violations were actually administered through special courts. They follow summary procedures even in serious accusations that may lead to long prison sentences or a promptly carried out sentence of lashing, without securing all trial rights. A number of persons had been tried before special courts in proceedings that did not guarantee fair trial standards, including accepting evidence alleged to have been obtained under torture.

[596] UNDP (n 86 above) 15-16.

Chapter 5

The compatibility of the right to a fair trial under Sudanese law with international human rights law: The post-trial phase

This chapter discusses post-trial rights and explores, more particularly, the right to appeal, punishment and the right to reparation under Sudanese law. The chapter elaborates upon a number of aspects pertaining to the right to appeal under Sudanese law and international human rights law, namely, the content and implications, extent to which courts deal with an appeal, time-frames, and the minimum standards of appeal. The chapter then discusses the punishment in Sudan with a particular focus on the death penalty, whipping, stoning and amputations. Comparisons are drawn between Sudanese law and *Shari'a* law, on the one hand, and international human rights law, on the other hand. In addition, the right to reparation under Sudanese law and its compatibility with international human rights law and *Shari'a* law are discussed.

1. The right to appeal

1.1 Content and implications of the right to appeal

The right to appeal arises out of the need to protect against error in judgment or sentencing, while allowing for the fact that judicial officers may reasonably differ in their conclusions.[1] The right to appeal gives an opportunity to correct serious errors. This right guarantees that everyone convicted of a crime has the right to have the verdict reviewed by a higher court. This right requires at least two levels of judicial scrutiny of the case, the second of which is by a higher court than the first.

[1] N Steytler *Constitutional criminal procedure: A commentary on the Constitution of the Republic of South Africa* (1998) 331--332.

The right to appeal is guaranteed at the international level. The right to appeal is enshrined in many international instruments, namely, the ICCPR,[2] the African Charter,[3] the American Convention,[4] Protocol 7 to the European Convention,[5] the Yugoslavia Statute,[6] the Rwanda Statute,[7] the ICC Statute,[8] and the African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.[9]

[2] Art 14(5) of the ICCPR reads as follows: 'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law'.

[3] Art 7(1)(a) of the ACHPR provides as follows: 'Every individual shall have the right to have his cause heard. This comprises: (a) the right to appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force'.

[4] Art 8(2)(h) of the AMCHR reads as follows: '2. every person is entitled, with full equality, to the following minimum guarantees; (h) the right to appeal the judgment to a higher court'.

[5] Art 2(2) of Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (which was adopted on 22 Nov 1984 and entered into force on 1 Nov 1988) provides as follows: 'The right of appeal may be limited according to law if the offence is of minor character, if the person was tried in the first instance in the highest tribunal of a state or if the person was convicted after an appeal against his or her acquittal'.

[6] Art 25 of the Statute of the International Tribunal (approved by the UNSC in resolution 827 of 25 May 1993) provides as follows: '1. The Appeal Chamber shall hear appeals from persons convicted by the Trial Chambers from the prosecutor on the following grounds: a) an error on a question of law invalidating the decision; or b) an error of fact which has occasioned a miscarriage of justice. 2. The Appeal Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber'.

[7] Art 24 of the International Tribunal for Rwanda (decided by UNSC resolution 955 of 8 Nov 1994) reads as follows: '1. The Appeal Chamber shall hear appeals from persons convicted by the Trial Chambers from the prosecutor on the following grounds: a) an error on a question of law invalidating the decision; or b) an error of fact which has occasioned a miscarriage of justice. 2. The Appeal Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber'.

[8] Art 81(b) of the ICC Statute provides as follows: 'A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows: b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds: (i) Procedural error, (ii) Error of fact, (iii) Error of law, or (iv) Any other ground that affects the fairness or reliability of the proceedings or decision'.

[9] Paragraph 1(2)(j) provides as follows: 'The essential elements of a fair hearing include: j) an entitlement to an appeal to a higher judicial body'. Paragraph 1(5)(d)(iv) reads as follows: 'd) The impartiality of a judicial body would be undermined when: (iv) a judicial official sits as member of an appeal tribunal in a case which he or she decided or participated in a lower judicial body'. Paragraph 14(10) reads as follows: 'a) everyone convicted in a criminal proceeding shall have the right to review of his or her conviction and sentence by a higher tribunal. (i) The right to appeal shall provide a genuine and timely review of the case, including the facts and the law. If exculpatory evidence is discovered after a person is tried and convicted, the right to appeal or some other post-conviction procedure shall permit the possibility of correcting the verdict if the new evidence would have been likely to change the verdict, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to the accused. (ii) A judicial body shall stay execution of any sentence while the case is on appeal to a higher tribunal. b) Anyone sentenced to death shall have the right to appeal to a judicial body of higher jurisdiction, and States should take steps to ensure that such appeals become mandatory'.

The right to appeal to a higher jurisdiction is recognised under Islamic law. The leading case to the right to appeal is that of the Hole '*Hufra*'.[10] In this case, a group of people were gathered around a big hole in Yemen to observe a lion. While watching, one of the attendants lost his balance on the edge of the hole. He held onto another person to gain support, and the second person held on to another. Subsequently, four people fell into the hole and were all killed by the lion. The victims' families engaged in a dispute about the apportionment of responsibilities, and they went to Ali Ibn Abi Talib, the forth Caliph, who afforded 25 percent of *Diya* (compensation) to the first person, 50 percent of *Diya* to the second, 75 percent of *Diya* to the third and 100 percent *Diya* to the fourth. Some of the families accepted this judgment, while others refused to accept it. In an illustration of the right to an appeal, Ali Ibn Abi Talib referred the case to Prophet Mohamed, who approved his decision.[11] Prophet Mohamed said anyone who has done anything contradicting *Shari'a* law has acted *ultra vires*.[12] On another occasion, the Prophet had reversed Khalid Ibn Al-Waleed's decision where he killed the captives from 'children of Khuzaima' tribe and explained that Khalid's decision contradicted *Shari'a* law.[13] On the basis of these examples, it may be averred that *Shari'a* jurisprudence, provides for the principles of appeal and revision of judgments.[14]

The Sudanese Interim Constitution of 2005 (INC) does not expressly enshrine the right to appeal. According to article 27(3) of its Bill of Rights, all international covenants and treaties ratified by Sudan are an integral part of the Bill of Rights. Sudan has ratified the ICCPR and the African Charter, all of which contain the right to appeal.[15] The previous Constitution of 1998 enshrined only the right to appeal to the Constitutional Court.[16]

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[10] M Elhamamiti 'The substantive guarantees for human rights in the trial stage: A comparative study between *Shari'a*and law' (Arabic) unpublished PhD thesis, Omdurman Islamic University (2005) 63.
[11] As above.
[12] E Alnawawy *Sahih Muslim* (1987) 16
[13] M Elbukhari *Sahih Elbukhary* http://islamport.com/Al-Bokhary.pdf (accessed 12 Jan 2014) 1346.
[14] M Baderin *International human rights and Islamic law* (2003) 109.
[15] See chapter 2, 40--41 & 69--76.
[16] Art 34 states as follows: 'Every injured or harmed person who has exhausted all his executive and administrative remedies has the right to appeal to the Constitutional Court to protect the sacred liberties and rights contained in this Part. The Constitutional Court in exercise of its authority may annul any law or order that is not in accordance with the Constitution and order compensation for damages'.

The Criminal Procedure Act of 1991 (CPA) regulates the right to appeal in many of its provisions. It covers the right of informing the accused of his or her right to appeal. It also stipulates the judicial measures which may be appealed, determines who has the right to contest, explains the time when an appeal can be made and also provides for the powers of a higher court to which an appeal is made.[17] According to section 6(h) of the CPA, the Chief Justice has the jurisdiction to establish special courts under the Judiciary Act or any other Act. Moreover, the Anti-Terrorism Act enables the Chief Justice to establish a Special Court of Appeal, in violation of the provisions of the CPA, under which the Court of Appeal has jurisdiction.[18]

Under the Anti-Terrorism Act, the Special Court of Appeal is authorised to confirm the sentences of the death penalty and life imprisonment. This is a violation of the CPA,

[17] Sec 171 of the CPA provides as follows: 'Where judgment of conviction has been passed, and the sentence is subject to appeal, the court shall inform the accused, and those having interest, that they have the right of appeal, and of the period within which appeal may be presented'. Sec179 states that the judicial measures may be appealed: (a) first instance judgments, and judgments which have not exhausted all the stages of appeal; (b) orders restricting the freedoms of the appellant, in his self, or property; provided that every appealed order shall be recorded on a separate record, and the record shall be sent to the court, to which the appeal lies, without staying the progress of the criminal suit; (c) decisions relating to matters of jurisdiction'. Sec182 provides that: 'The Supreme Court shall have competence to consider cassation of judicial measures, passed by the competent Court of Appeal, where the contested judicial measure is based upon contravention of the law, or error in application or interpretation thereof'. Sec 183 provides that: 'There shall be required for contest, by appeal, or cassation, that it shall be presented by one of the parties, or any person having interest'. Sec 185 provides that: 'The higher court, upon considering confirmation, or contest by appeal, or cassation, may exercise any of the following powers, to: (a) confirm the judgment in whole; (b) confirm the conviction decision, and alter the penalty, by remission, commutation or substituting the same, by any other penalty authorized by law; (c) alter the conviction decision, of an offence, to a conviction decision of another offence, which the accused would have been convicted of committing the same, upon the charge, or evidence; on condition that the commission of the other offence shall not be punishable with a severe penalty, and alter the penalty accordingly; (d) return the judgment, to the first instance court, to revise the same, as to such directions, as may be made; provided that the first instance court shall not admit any additional evidence, without the permission of the higher court; (e) quash the judgment and annul the procedure resulting therefrom, and the same shall be deemed as quashing the criminal suit, unless the higher court orders re-trial; (f) quash, or amend any subsidiary order'. Sec 186 provides as follows: 'The court having jurisdiction of confirmation, appeal or cassation, may pass an order releasing any person, who is detained in the criminal suit, considered before it, upon bond, or bail, or pass any other suitable orders, pending passing the final decision thereof, whenever it deems the same just, and may, likewise, pass an interlocutory order, to arrest whoever the first instance court has adjudged his release', and sec 187 provides that: 'The court having jurisdiction of confirmation, appeal or cassation, may hear the accused, the representative of the prosecution, or the complainant, whenever it deems that necessary; provided that the same shall be made in the presence of the parties'.

[18] ACJPS *The judiciary in Sudan: its role in the protection of human rights during the Comprehensive Peace Agreement interim period (2005--2011)* 2012 15.

which provides such powers exclusively to the Supreme Court.[19] Furthermore, the same Act gives the Chief Justice, in consultation with the Minister of Justice, the power of the issuance of the Rules and Measures to implement the Act.[20] Criticising their existence, the UN Special Rapporteur on the situation of human rights in Sudan has noted that 'they operate in accordance with procedural norms, set out by the Chief Justice in consultation with the Minister of Justice, which override parliamentary laws.'[21]

The African Commission in *Constitutional Rights Project (in respect of Wahab Akamu, G. Adega and others) v Nigeria,*[22] dealt with the complaint of applicants who were sentenced to death under the Robbery and Firearms (Special Provision) Act.[23] The Robbery and Firearms (Special Provisions) Act, provides that[24] '[n]o appeal shall lie from a decision of a tribunal constituted under this Act or from any confirmation or dismissal of such decision by the Governor.'[25] This Act creates special tribunals.[26] The Act does not provide for any judicial appeal of sentences, and sentences are subject to approval or disallowance by the Governor of a state, and no appeal was allowed against the Governor's decisions.[27] Under this Act, the tribunal had jurisdiction to sentence people to death. The African Commission found that an Act infringed the right to appeal particularly by excluding appeals against the judgments of special courts formed by the Act.

[19] A Medani *Criminal law and justice in Sudan* (2010) 20.
[20] Sec 21.
[21] Report of the Special Rapporteur on the Situation of Human Rights in the Sudan, Ms. Sima Samar, U.N. Doc.A/HRC/9/13 (2008) para 29. See also, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Ms. Asma Jahangir: Mission to Sudan (E/CN.4/2005/7/Add. 2), paras 51--56.
[22] *Constitutional Rights Project (in respect of Wahab Akamu, G. Adega & Others) v Nigeria* (60/91) 8th Annual Activity Report of the African Commission on Human and Peoples' Rights, 1994--1995.
[23] Decree No. 5 of 1984.
[24] Sec 11(4).
[25] *Constitutional Rights Project* case (n 22 above) para 12.
[26] Composed of one serving or retired judge, one member of the armed forces and one member of the police force.
[27] *Constitutional Rights Project* case (n 22 above) para 1.

The African Commission further, in *The Constitutional Rights Project (in respect of Zamani Lekwot and six others) v Nigeria,*[28] a communication brought on behalf of seven men sentenced to death[29] under the Civil Disturbances Decree,[30] which ban judicial appeal against the decisions of the special tribunal and forbids the tribunals from reviewing any feature of the procedure of the court.[31] The African Commission held that prevention of judicial review of the special courts and lack of judicial appeals for sentences of these courts violates the right to appeal.

One of the factors that curtail the right to appeal in Sudan is the lack of a formal justice system. In some areas,[32] only traditional courts operated and exercised jurisdiction over both criminal and civil matters with limited prospects of an appeal. Traditional and customary laws often violate due process rights and contravene human rights provisions in the INC and relevant international treaties ratified by Sudan.[33]

Another factor that curtails the right to appeal is that some laws in Sudan restrict the right to appeal, for example, the Khartoum Public Order Act of 1998 where the right of appeal is restricted only to one designated Supreme Court judge. Public Order Courts, although first instance magisterial courts, are thus, empowered to pass judgments that can only be challenged through a single step appeal to the appointed judge of the Supreme Court.

1.2 Extent to which courts deal with an appeal

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[28] *The Constitutional Rights Project (in respect of Zamani Lekwot & six others) v Nigeria* (87/93), 8th Annual Activity Report of the African Commission on Human and Peoples' Rights, 1994--1995, ACHPR/RPT/8th/Rev.I.
[29] As above, para 1.
[30] Decree No. 2 of 1987.
[31] Sec 8(1) of the Civil Disturbances Act provides as follows: 'The validity of any decision, sentence, judgment, or order given or made, or any other thing whatever done under this Act shall not be inquired into any court of law'.
[32] For example, Abyei area.
[33] See UNDP *Outcome evaluation for the country cooperation framework 2002--2006/Bridging Programme for Sudan Rule of Law (ROL)* 13 January 2009 18--20.

The HRC has held that 'the right to appeal is applicable to everyone convicted of any criminal offence, regardless of the seriousness of the offence.'[34] It further held that 'article 14(5) of the ICCPR does not require state parties to provide for several instances of appeal.'[35] The reference to national law in this provision is to be construed to mean that 'if domestic law provides for further instances of appeal, the convicted person must have effective access to each of them.'[36] This right is recognised by the ICCPR and not merely by domestic law.[37] The term 'according to law' articulates the determination of the modalities by which the appeal by an upper court is to be brought,[38] as well as which court is responsible for bringing an appeal compliant with the ICCPR.[39] Concerning the availability of several instances of appeal regardless of the seriousness of the sentence, Sudanese law is consistent with the provisions of international human rights law.

The HRC held that 'the right to appeal imposes on the state party the obligation to review a judgment both on the basis of facts and law.'[40] A review that is 'limited to the formal or legal aspects of the conviction without any consideration of the facts is not sufficient under the ICCPR.'[41] However, article 14(5) of ICCPR does not require a full retrial or a 'hearing',[42] on condition that the court carrying out the appeal can look at the actual dimensions of the case. For instance, where a court of higher instance, 'looks at the allegations against a convicted person in great detail, considers the evidence

[34] HRC General Comment 13: Administration of justice (article 14 of the ICCPR) adopted 13 April 1984, HRC/GEN/1/Rev.9, para.17, 'the guarantee is not confined to only the most serious offences'.
[35] *Rouse v Philippines* Communication No 1089/2002, para 7.6.
[36] *Henry vJamaica* Communication No 230/1987, 1 November 1991, Report of the HRC, (A/47/40), 1992, at 218, para 8.4.
[37] HRC General Comment No. 32: Right to equality before courts and tribunals and to a fair trial (article 14 of the ICCPR) UN Doc. CCPR/C/GC/32, 23 August 2007, para 45.
[38] *Gomaríz Valera v Spain* Communications No. 1095/2002 para 7.1; *Salgar de Montejo v Colombia* Communication No. 64/1979 para 10.4.
[39] HRC, General Comment 32 (n 37 above) para 45.
[40] *Bandajevsky v Belarus* Communication No. 1100/2002, para 10.13; *Aliboeva v Tajikistan* Communication No. 985/2001, para 6.5; *Khalilova v Tajikistan* Communication No. 973/2001, para 7.5; *Domukovsky & Others v Georgia* Communication No. 623-627/1995, para 18.11; *Saidova v Tajikistan* Communication No. 964/2001, para 6.5; *Rogerson v Australia* Communication No. 802/1998, para 7.5; *Lumley v Jamaica* Communication No. 662/1995, para 7.3.
[41] *Gómez Vázquez v Spain* Communication No. 701/1996, para 11.1.
[42] *Rolando v Philippines* Communication No. 1110/2002, para 4.5; *Juma v Australia* Communication No. 984/2001, para 7.5; *Perera v Australia* Communication No. 536/1993, para 6.4.

submitted at the trial and referred to in the appeal, and finds that there was sufficient incriminating evidence to justify a finding of guilt in the specific case, the ICCPR is not violated.'[43]

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has taken concern about appeal processes that examine only legal facets and not facts. He indicated these concerns in linking with the appeal of cassation by the Supreme Court in Algeria. He pointed out the same concerns about proceedings before the State Security Court in Kuwait where he specified the following:

> Defendants do not benefit fully from the right to appeal as set forth in the pertinent international instruments, since they are deprived of a stage of appeal which fully reviews the case, both with regard to the facts and legal aspects.[44]

Reviews on appeal must be more than formal verification of procedural requirements. The Inter-American Commission has stated that the state's responsibility to safeguard the right to appeal to the upper court needs not only the track of laws, but also measures to ensure the exercise of the right.[45] Reviews restricted purely to questions of law, as a contrast to an examination of the law and facts, may not conform to the requirements of this safeguard. The Inter-American Commission identified that appeals to tribunals which lacked autonomy or were not competent to practice the review task were irreconcilable with the right to appeal under the American Convention.[46]

In addition, the CPA enumerates the ways in which an appeal can be made. The decision of the Third and Second Criminal Court can be taken on appeal to the General Criminal Court, which is the highest Court for Appeal for matters heard in the Third and

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[43] HRC, General Comment 32 (n 37 above) para 48. See, for example, *Pérez Escolar v Spain* Communication No. 1156/2003, para 3; *Bertelli Gálvez v Spain* Communication No. 1389/2005, para 4.5.
[44] Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, 7 December 1993, UN Doc: E/CN.4/1994/7, paras 113 & 404. See also, M Nowak *U.N. Covenant on Civil and Political Rights: CCPR commentary* (1993) 266.
[45] See report on the Situation of Human Rights in Panama, OEA/Ser.L/V/II.44, doc. 38, rev. 1, (1978).
[46] See report on the Situation of Human Rights in Chile, OEA/Ser.L/V/II.66, doc. 17, 1985; report on the Situation of Human Rights in Nicaragua, OEA/Ser.L/V/II.45, doc.16, rev.1 1978.

Second Criminal Courts. The First Criminal Court and General Criminal Court sentences can be appealed against in the Court of Appeal whose judgment is final. While ruling in an appeal the General Criminal Court and Court of Appeal rule on cases on the basis of facts, evidence and law.[47]

However, according to section 182 of the CPA, the Supreme Court's review is limited to only track of laws.[48] Although the right is restricted to one level of appeal or review, in practice, lawyers and appellants appeal against the decisions of the General Criminal Court to the Court of Appeal under its power of review as set out in the CPA.[49] According to this section, it is sufficient to establish that there is a question as to whether the accused has received a fair trial or not.

In principle, on the one hand, Sudanese law is, therefore, compatible with the international human rights law as far as regarding appeals before the Court of Appeal and General Criminal Court which rule on the basis of facts, evidence and law. On the other hand, Sudanese law is incompatible with international human rights law regarding cases of cassation before the Supreme Court, which rule upon legal issues only.

1.3 Time-frames of appeal

The delay in rendering judgments have been criticised by the HRC, which held that 'article 14(5) of ICCPR is violated if the review by a higher instance court is unjustifiably delayed in violation of article 14(3)(c) of the ICCPR.'[50] For example, a delay of almost

[47] Sec 180 of the CPA.
[48] Sec 182 of the CPA provides as follows: 'The Supreme Court shall have competence to consider cassation of judicial measures, passed by the competent Court of Appeal, where the contested judicial measure is based upon contravention of the law, or error in application or interpretation thereof'.
[49] Sec 188 of CPA, which provides as follows: 'The Supreme Court, or the Court of Appeal, of its own accord, or upon petition, may require and review the record of any criminal suit, in which a judicial measure has been passed, before any court, within the limits of the jurisdiction thereof, for the purpose of ensuring soundness of procedure and achievement of justice, and order such as it may deem fit'.
[50] *Kennedy v Trinidad and Tobago* Communication No. 845/1998, para 7.5; *Sextus v Trinidad and Tobago* Communication No. 818/1998, para 7.3; *Daley v Jamaica* Communication No. 750/1997, para 7.4; *Brown and Parish v Jamaica* Communication No. 665/1995, para 9.5; *Thomas v Jamaica* Communication No. 614/1995, para 9.5; *Bennet v Jamaica* Communication No. 590/1994, para 10.5.

three years in an appeal in Canada, mostly triggered by the fact that it took 29 months to complete the trial records, was found by the HRC to be a violation of article 14 of the ICCPR.[51] The European Court deemed that a lapse of fifteen and a half months between the filing of an appeal and its assignment to the registry of the pertinent court of appeal was unreasonable, where the authorities offered no acceptable elucidation for such delay.[52]

In Sudan, the law does not specifically provide for the period during which a decision on appeal should be delivered. As a result, an appeal petition may take a long time, thus, causing undue delay which curtails the right to appeal.

According to section 184 of the CPA, an appeal can be brought generally up to 15 days after the rendering of a judgment. Section 184 of the CPA does not distinguish between minor and serious sentences, whereby the latter should have been given more time and adequate facilities to prepare an appeal. In addition, according to the section the period for appeal starts from the day of declaration of the judgment. This is problematic in a situation where a decision is declared in *absentia* since the convicted person, not being present, will have less time to prepare an appeal and 'as a result' prejudice an accused's right to appeal. Ideally, the period of appeal should be counted as from the date on which the accused became aware of the judgment.

Although the CPA determines the period for appeal to be 15 days, the Anti-Terrorism Act of the 2001 reduces the period for appealing from the decisions of Special Courts of Appeals Court from two weeks to one week only. This constitutes a violation of the express provisions of the CPA.[53]

[51] *Pinkney v Canada* Communication No. 27/1978, 29 October 1981, 1 Sel. Dec. 95, paras.10 & 22.
[52] *Bunkate v the Netherlands* Communications No. 26/1992/371/445 26 May 1993.
[53] *Kamal Saboon & Others v Sudan Government* CC/60/2008.

In the case of *Saboon*,[54] the accused had been tried by a special court established according to the Anti-Terrorism Act. The accused persons approached the Constitutional Court challenging that their fair trial rights were violated. They objected to their trial by the special courts. In addition, the period of appeal was only seven days and the rules of procedure that were issued by executive authority.[55] The Constitutional Court held that the issuing of the Rules and Measures by the Chief Justice in consultation with the Minister of Justice did not infringe the doctrine of separation of powers since the second is not unconditional. The Court also held that neither trial in *absentia* nor the formation of a Special Court violated the right to a fair trial. However, the Court stressed that the special court should not infringe the principles of a fair trial as provided in the INC. Significantly, the Constitutional Court defended the constitutionality of the Rules and Measures, that is, subsidiary legislation, even though they violated the provisions of the CPA and Evidence Act, arguing that the special circumstances required that they should take precedence. In addition, the Court upheld the constitutionality of restraining the period to furnish the defence and the period for appeal without scrutinising in-depth the compatibility of these procedures with the right to a fair trial as established in international law and jurisprudence.[56]

1.4 Minimum standards of appeal

1.4.1 Access to a reasoned judgment

The CPA provides as follows: 'where the accused requests a copy of the judgment, he shall be given the same; and where he desires its translation, to his language, and that is possible, his request shall be replied.'[57] This is compatible with the HRC's General Comment 32 which states that the convicted person is authorised to have access to a duly reasoned,[58] written judgment of the trial court, and, as a minimum in the court of

[54] As above.
[55] The courts were set up under the Anti-Terrorism Act of 2001 after an armed attack on the Omdurman in May 2008. In three rounds of trials from June 2008 to January 2010 they sentenced a total of 106 people to death.
[56] See Medani (n 19 above) 20.
[57] Sec 173.
[58] See HRC General Comment 32 (n 37 above) para 49.

first appeal where domestic law runs for numerous instances of appeal,[59] also to other documents, for instance, trial minutes which are essential to enjoying the effectual exercise of the right to appeal.[60] In one case, the HRC held that 'the failure of the Jamaican Court to render a reasoned, written judgment within a reasonable time prevented the accused from enjoying the effective exercise of their right to have conviction and sentence reviewed by a higher tribunal.'[61] The European Court stated that '[n]ational courts must indicate with sufficient clarity the grounds on which they base their decision. The failure to do so in time in order to allow the defendant to fully set out his grounds for review before the Court of Cassation, denied him adequate time and facilities to prepare his defence.'[62] The right to appeal can only be efficient if the defendant has been notified of the causes for the sentence within a reasonable time. This right is, therefore, associated with the right of the defendant to a reasoned judgment.

In Sudan, summary trials generally last for 30 minutes, and the individuals are not informed of their right to appeal against the court's decision.[63] Further, '[d]efendants in summary trials may in addition be anxious to minimise the societal fallout of drawn-out legal proceedings over charges of indecent behavior.'[64] Following conviction, they may give up their right to appeal in order to put the experience behind them as fast as possible.[65] The summary nature of the trial has an impact on the appeal. The right to appeal can, therefore, not be exercised effectively.[66]

1.4.2 Legal aid

[59] *Van Hulst v Netherlands* Communications No. 903/1999, para 6.4; *Bailey v Jamaica* Communication No. 709/1996, para 7.2*; Morrison v Jamaica* Communication No. 663/1995, para 8.5.
[60] *Lumley v Jamaica* Communication No. 662/1995, para 7.5.
[61] *Currie v Jamaica* (377/1989), 29 March 1994, Report of the HRC, vol. II, (A/49/40), (1994) 73.
[62] *Hadjianastassiou v Greece* (69/1991/321/393), 16 December 1992.
[63] Summary trials do not afford adequate rights for the defence. Defendants frequently have limited awareness of the law, have no legal assistance, and legal aid is extremely limited.
[64] ACJPS *Sudan human rights monitor* 2013 11.
[65] REDRESS, PCLRS & SHRM *No more cracking of the whip: time to end corporal punishment in Sudan* (2012) 15.
[66] See HRC General Comment 32 (n 37 above) para 49

According to the CPA after the amendment of 2009,[67] the right to legal aid is available only at a trial stage, and there is no specific provision to make it available at the post-trial stage. This is contrary to international standards where the right of appeal is important, particular in death penalty cases. A denial of legal aid by the court reviewing the death judgment of a disadvantaged convicted person establishes a violation of numeral provisions in the ICCPR.[68] This is because in such cases the depriving of legal aid for an appeal effectively prevents an effectual review of the conviction and sentence by an upper court.[69] The right to appeal is also infringed if convicted persons are not notified of the idea of their counsel not to put any arguments to the court, thus, averting them of the opportunity to seek substitute representation, so that their concerns may be expressed at the appeal level.[70] Furthermore, the right to have counsel appointed to represent the accused on appeal is subjected to identical conditions as the right to have counsel chosen at trial and this is considered to be in the interests of justice. For instance, the European Court has found that the miscarriage to appoint counsel for the last appeal of an accused who had been punished to five years incarceration infringed his rights.[71] The Court measured that the interests of justice demands the authorities to assign counsel for the accused on appeal as the accused was incapable of addressing the court proficiently on the legal issues without the assistance of counsel and consequently could not defend himself efficiently.[72]

1.4.3 Public and fair appeal

[67] Sec 135(3) of the CPA provides as follows: 'Where the accused is accused of an offence punishable with imprisonment, for the term of seven years, or more, amputation or death, is insolvent, the Ministry of Justice, upon the request of the accused, shall appoint a person to defend him, and the State shall bear all, or part of the expenses'.
[68] See HRC General Comment 32 (n 37 above) para 51. See for example, article 14(3)(d) & 14(5) of the ICCPR.
[69] *La Vende v Trinidad and Tobago* Communication No. 554/1993, para 5.8.
[70] See *Daley v Jamaica* Communications No. 750/1997, para 7.5; *Gallimore v Jamaica* Communication No. 680/1996, para 7.4; *Smith & Stewart v Jamaica* Communication No. 668/1995, para 7.3. See also, *Sooklal v Trinidad and Tobago* Communication No. 928/2000 paras 4&10.
[71] *Maxwell v United Kingdom* (31/1993/426/505), 28 October 1994; see also, *Boner v United Kingdom* (30/1993/425/504), 28 October 1994.
[72] As above.

The right to a fair and public trial must be observed during appeal proceedings.[73] Such a right includes, amongst others, the right to adequate time and facilities to prepare an appeal. The right to adequate time and facilities also applies to appeal proceedings where a person is in custody. The authorities must take reasonable steps to supply legal materials for the preparation of the appeal,[74] and ensure that the accused has the right to a lawyer, the right to equality of arms, the right to a fair hearing before a competent, autonomous and neutral court established by law within a reasonable period and the right to a public and reasoned judgment within a reasonable period.[75]

In Sudan, it is obvious that the right to appeal a murder, amputation and life imprisonment sentences is automatic, and the accused must do nothing whereas in ordinary offences, it must be claimed by the accused wherein if he is ignorant of his right or has no means, he can enforce the right according to section 181 of the CPA, which states that '[e]very death, amputation or life imprisonment sentence shall be submitted, to the Supreme Court, whenever becoming final, with intent of confirmation.'

Another right is the right to be present during appeal proceedings which depend on the nature of those proceedings. In particular, the right to present depends on whether the appeals court examines issues of facts in addition to law, and on the way in which the defendant's interests are obtainable and secured. If the court of appeal has jurisdiction to determine on both issues of law and facts, a fair trial generally requires the attendance of the accused. Under Sudanese law, the Appeal Court has discretionary powers to determine whether the appellant can be present or not according to section 187 of the CPA. However, the same section requires that proceedings of an appeal should be made in the presence of parties. For example, the European Court found a

[73] See HRC General Comment 13 (n 34 above) para 17.
[74] In *Simmonds v Jamaica* Communication No. 338/1988, UN Doc. ICCPR/c/46/D/338 (1992). The issue before the HRC was whether Mr. Simmonds should have been notified of the assignment to him of legal assistance for his appeal in timely manner and given sufficient opportunity to consult with council prior to the hearing of appeal. Under the circumstances of the case the HRC found a violation of art 14(3)(b) &14(3)(d).
[75] See *Melin v France* (16/1992/361/435) 22 June 1993, found no violations but noted that certain rights relating to appeal inherent in the notion of a fair trial; *Hadjianastassiou v Greece* (69/1991/321/393) 16 December 1992.

violation of the right to appeal in the case before the Supreme Court in Norway. The Supreme Court condemned and penalised an accused, overturning exoneration by a lower court and looked at both issues of law and fact, without summoning the accused to attend. The lack of any special reason to justify this step, the European Court found that the overturning of the acquittal in this case could not have been appropriately done without having evaluated the evidence of the accused personally. The European Court specified that, in this case, the Supreme Court was under an obligation to summon and take evidence directly from the accused.[76] The right to be present at an appeal hearing could be fulfilled if the accused's counsel of choice exists.[77]

However, the HRC has held that there may be instances when an accused need not be present during the appeal hearing and no violation will be considered to have occurred.[78] For example, in Jamaica where the accused was not present in person before a court of appeal, but was represented by counsel, there was no violation.[79] In Jamaica, only issues of law are at stake on appeal.[80] A similar finding was made by the European Court that ruled that the accused does not automatically have the right to be present where matters of law are addressed.[81]

The principle of equality of arms applies during appeals. This principle was quoted by the European Court when it found that there was no infringement of the right to be present when neither the prosecution nor the accused or their lawyers were present at a hearing to determine permission to appeal.[82] The Court held that the nature of the matter to be determined was not such that the physical presence of the accused was

[76] See *Botten v Norway* (50/1994/497/579) 19 February 1996, para 22; see also, *Kremzow v Austria* (29/1992/374/448), 21 September 1993, para 16. Amnesty International *Fair trial manual* Amnesty International Publications (1998) 128.
[77] Amnesty International *Fair trial manual* Amnesty International Publications (1998) 138.
[78] See HRC General Comment 13 (n 34 above) para 11
[79] *Henry v Jamaica* (230/1987) 1 November 1991, Report of the HRC, (A/47/40), 1992 para 225.
[80] As above.
[81] *Tripodi v Italy* (4/1993/399/477) 22 February 1994. The European Court found no violation of the European Convention when an accused was not represented at a hearing before the Court of Cassation in Italy because his lawyer failed to appear and he failed to obtain a substitute lawyer.
[82] *Case of Monnell & Morris v The United Kingdom* 9562/81, 9818/82, 2 March 1987,115 Ser. A 23. See (n 77 above) 129.

crucial and that the accused had not been positioned at a disadvantage as compared with the prosecution.[83] Equally, the European Court found that throughout the appeal of a man who encountered a five-year punishment, free counsel should have been chosen.[84]

In Sudan, in the Constitutional Court case of *Eltaib Mohamed Elzubair and Others*[85] the Court held that the Supreme Court's decision which was given without either summoning the applicants to reply or conferring upon them an opportunity to defend or prevent them from hearing their defence violated the Constitution of 1998.[86]

This right of equality of arms under Sudanese law according to the Constitutional Court case mentioned above is compatible with the international human rights law. However, regarding the right to hearing before a competent court and right to counsel are not compatible with the international human rights law.

1.4.4 Different judge on appeal than at first instance

One of the factors that curtail the right to appeal is the provision in the CPA,[87] which regulates the revision instance, stipulating that the revision circuit shall be constituted of five judges, the majority of whom have not participated in passing judgment, which is the subject of revision. Otherwise, judges who already ruled on a case could sit and review their own sentence and this would violate the right to appeal in contradiction of international standards. The HRC held that confirmation of a sentence by the original

[83] As above.
[84] *Maxwell v United Kingdom* (31/1993/426/505) 28 October 1994, 10; see also, *Boner v United Kingdom* (30/1993/425/504) 28 October 1994.
[85] *Eltaib Mohamed Elzubair, Mahmoud M. Elzubair & Ammir M. Elzubair v Sudan Government* CC/58/2001 SCCJR (1999--2003) 759--763.
[86] Arts 31 & 32
[87] Sec 188(A) provides that '(1)The Chief Justice may constitute a circuit of five judges of the Supreme Court, to revise any judgment passed thereby, where it transpires, to him, that such judgment may involve a contravention of the Islamic *Shari'a* Ordinances, or mistake in law, the application or construction thereof. The decision of the circuit shall be passed by the majority of members. (2) The revision circuit shall be constituted of judges, the majority of whom have not participated in passing the judgment, which is the subject of revision. (3) The time of revision shall be sixty days, commencing as of the day subsequent to announcement of the judgment, or notifying the applicant for revision thereof, where he is not present at the sitting of judgment'.

trial judge did not comply with this standard.[88] This provision clearly violated the right to appeal.[89]

The right to a different judge on appeal than at first instance under Sudanese law is incompatible with the international human rights law.

2. Punishment

2.1 Background

As part of the post-trial period, the subject of punishment is an important one. In general, the penological strategy is based on the notions of deterrence, retribution, and reform.[90] There are many rules regarding punishment, including, not imposing a penalty that is not based on pre-existing law;[91] not imposing retrospective penalties;[92] punishment must be adequate and must reflect the seriousness of the crime; no one should be punished twice for the same offence,[93] the prohibition of corporal

[88] *Salgar de Montejo v Colombia* (64 /1979) 24 March 1982, 1 Sel. Dec. 127 paras 129–130.
[89] For more details see chapter 4 207--208.
[90] M Baderin (n 14 above) 82.
[91] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), art 7 provides as follows: 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit therefrom'.
[92] The guarantee against retrospective offences and penalties in art 14(7) of the ICCPR providing that no one shall be liable to be tried or punished again for an offence of which they have already been finally convicted or acquitted in accordance with the law and penal procedure of each country. For instance, someone acquitted by a civilian court cannot be tried again for the same offence by a military or special tribunal. Art 7 of the ECHR was an essential element of the rule of law as it seeks to provide an effective safeguard against arbitrary prosecution, conviction and punishment. Steytler (n 1 above) 270.
[93] Right against double jeopardy ICCPR art 14(7) & AMCHR art 8(4), there is no reference to this right in the UDHR or the ECHR. Protocol 7 of 1984 to the ECHR the guarantee against double jeopardy was entrenched in art 4. The two main values underlying this right: a/ the need to secure finality of judgments, b/ the safeguarding against state oppression by placing constraints on the prosecuting authority when it seeks to institute successive prosecutions with regard to the same conduct. See Steytler (n 1 above) 381--382. Also, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa art 8 which provides as follows: 'No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of each country. See HRC General Comment 32 (n 37 above) para 54. Art 14(7) of the ICCPR does not prohibit retrial of a person convicted in *absentia* who requests it, but applies to the second conviction.

punishment;[94] the prohibition of the death penalty without due process and where imposed on minors;[95] the principle that, if legal reform reduces the penalty for offences, states are obliged to retroactively apply the lighter penalty; and punishment for an offence may be imposed only on the criminal.[96] Confiscation orders have been found to constitute penalties under article 7 of ECHR.[97]

Punishment provided for by law may be imposed only on those convicts of offences after trials which comply with international standards of fairness. The punishment imposed upon conviction following a fair trial must be equivalent to the seriousness of the offence and the circumstances of the offender.[98] Furthermore, punishment for a similar crime should be undistinguishable and not discriminated according to gender.[99] Neither the punishment nor the process in which it is imposed may violate international standards.

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[94] Torture and other cruel, inhuman or degrading treatment or punishments are absolutely prohibited, art 5 of the UDHR, art 7 of the ICCPR, CAT, Declaration against Torture, Principle 6 of the Body of Principles, art 5 of the ACHPR, art 5(2) of the AMCHR, art XXVI of the American Declaration, art 3 of the ECHR. However, the definition of torture specifically excludes pain and suffering arising from or inherent in or incidental to lawful sanctions.

[95] Art 11 of the UDHR, art 15(1) of the ICCPR, art 9 of the AMCHR, art 7(1) of the ECHR, also, art 7(2) of the ACHPR. The death penalty may not be imposed if it was not a punishment prescribed by law for the crime at the time the crime was committed.

[96] International standards prohibit the imposition of collective punishments. Art 7(2) of the African Charter provides as follows: 'Punishment is personal and can be imposed only on the offender'. Art 5(3) of the American Convention provides as follows: 'Punishment shall not be extended to any person other than the criminal'. There are many cases in Africa where an offender is not only made to pay for the alleged offence but all members of his family, community etc. are punished directly or indirectly for giving him or her moral support. See E Anakumah *African Commission on Human and Peoples' Rights: Practice and procedure* (1996) 125. Therefore, it is not surprising, that the number complaints submitted to the African Commission has allegedly inflicted punishment on family members of alleged offenders. For example, in *Alhass Abubakar v Ghana* Communication No. 103/93, *Monja Jaona v Madagascar* Communication No.108/93 and *Njoka v Kenya* Communication No. 142/94. In addition the European Court held that imposing a fine on relatives of a deceased person who had improperly withheld taxes, after the relatives had already paid from the estate back taxes due, violated the presumption of innocence (see *A.P, M.P. and T.P. v Switzerland* Communications 71/1996/690/882), European Court, 29 August 1997.

[97] See K Reid *A practitioner's guide to the ECHR* (2004) 296--297.

[98] Report of the 8th UN Congress on the Prevention of Crime and Treatment of Offenders, UN Doc. A/Conf.144/28, rev.1 (91.IV.2), Res. 1(a), 5(c), 1990.

[99] M Babikir *Criminal justice and human rights: an agenda for effective protection in Sudan's new constitution* (2011) 6.

The Sudanese Criminal Act of 1991 provides for penalties including death,[100] retributions *'qisas',*[101] imprisonment and expatriation,[102] a fine,[103] whipping,[104] forfeiture and destruction of property,[105] amputation,[106] and confiscation.[107] The Criminal Act sets out the measures of welfare and reform.[108]

Under the criminal law, the general rule is that the punishment should be proportionate to the offender's wrongdoings.[109] In Sudan, the punishment stipulated for some offences seems to be inappropriate. Punishments are either lenient, such as the maximum punishment of three months imprisonment for the offence of torture,[110] or excessive, such as some of the offences carrying the death penalty such as committing a third homosexual act. Several offences carry punishments of flogging, amputation or stoning, which the HRC and the African Commission has held to be inhuman and degrading.[111] Although a sanction may be legitimate under domestic law, if it violates international standards and includes, for example, torture and cruel, inhuman or degrading treatment or punishment, then the sanction is considered to be forbidden by the HRC and the African Commission. Any other interpretation would undermine the purpose of international principles which aims to exclude torture and cruel, inhuman or degrading treatment or punishment.[112]

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[100] Sec 27.
[101] Secs 28-32.
[102] Sec 33.
[103] Sec 34.
[104] Sec 35.
[105] Sec 36.
[106] Secs 168(1)(b) & 171(1).
[107] Secs 50 & 51.
[108] Secs 47--49.
[109] Steytler (n 1 above) 276.
[110] In sec 115(2) of the Criminal Act.
[111] Concluding observations of the HRC: *Sudan* UN Doc. CCPR/C/79/Add.85, 19 November 1997, para 9 and the African Commission on Human and Peoples' Rights, Concluding observations and recommendations on the 4th and 5th periodic report of the *Republic of Sudan* para 40.
[112] Report of the Special Rapporteur on torture, UN Doc. E/CN.4 / 1988/17 p.14; E/CN.4/1993/26, p 131; N Rodley *The treatment of prisoners under international law* (1999) 429--435; A Boulesbaa, 'Analysis and proposals for the rectification of the ambiguities inherent in article 1 of the UN Convention on Torture', (1990) 5/3 *Florida International* 317; See K Bennoune, 'A practice which debases everyone involved: Corporal punishment under international law' in *20 ansconsacrés à la réalisation d'une idée, Recueil d'articles en l'honneur de Jean-Jacques Gautier* Association for the Prevention of Torture, Geneva(1997) 292.

However, the CPA[113] empowers the Governor, or Commissioner, to order eviction and closure of any house or shop for a period not exceeding one year.[114] These types of punishments should be imposed by judges and not executive authority.

2.2 Death penalty

The death penalty is considered to be in conflict with the right to life.[115] The right to life is regarded by some jurists as the dominant right, because all other rights are subsumed from it.[116] The carrying out of the death penalty is regarded as a denial of the individual's right to dignity with reference both to a method of execution and the circumstances under which it is done, most notably the death row phenomenon.[117] The death penalty is cruel because the accused is subjected to the uncertainty of waiting for a decision about his or her fate.[118] It is inhuman because the sentence deprives the condemned person of his or her humanity.[119] The sentence is degrading because the person is treated as an object to be eliminated by the state.[120]

Opposition to the imposition of the death penalty has grown at the international level with international human rights standards encouraging its abolition as can be seen in the ICCPR[121] and the AMCHR.[122] The international community has also adopted treaties specifically aimed at the abolition of the death penalty, for example, the Second Optional Protocol to the ICCPR, the Protocol to the AMCHR to Abolish the Death Penalty and Protocol No. 6 to the ECHR prohibiting executions and requiring the abolition of the death penalty in peacetime. International standards oppose the death

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[113] Sec 129.
[114] Whenever it has been proved to him, after conducting the necessary inquiry, that any house, or shop is operated to deal in liquor, narcotics, psychotropics, gambling or prostitution.
[115] The right to life is fundamental and absolute and guaranteed in art 3 of the UDHR, art 6 of the ICCPR, art 4 of the ACHPR, art 2 of the ECHR, art 4 of the AMCHR, art 6 of the CRC and art 1 of the American Declaration.
[116] Steytler (n 1 above) 273.
[117] Steytler (n 1 above) 274.
[118] As above.
[119] Steytler (n 1 above) 275.
[120] As above.
[121] Art 6(6).
[122] Arts 4(2) & 4(3)

penalty in all cases on the grounds that it is the ultimate penalty and once imposed even if new information comes forth it cannot be reversed. It is a cruel, inhuman and degrading punishment and violates the right to life.

International and regional bodies and human rights experts encourage the abolition of the death penalty.[123] The HRC has stated that article 6 of the ICCPR refers generally to abolition in terms which intensely propose that abolition is necessary. The HRC concludes that 'all measures of abolition should be considered as progress in the enjoyment of the right to life.'[124] The HRC called upon all states that had not yet abolished the death penalty to 'establish a moratorium on executions with a view to completely abolishing the death penalty.'[125] The HRC has stated that 'the expression most serious crimes must be read restrictively to mean that the death penalty should be a quite exceptional measure.'[126] The African Commission has adopted resolution calling African States to observe a moratorium on the death penalty.[127] The African Commission's Working Group on Death Penalty and Extra-Judicial, Summary or Arbitrary killings in Africa sent a letter to the President of the Republic of Sudan,[128] urging Sudan to review its child laws in line with the total prevention of the death sentence of children under the ACHPR, the African Charter on the Rights and Welfare of the Child and ICCPR. In addition, it urged Sudan to observe a moratorium on

[123] The UN General Assembly has stated that 'the main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offences for which the death penalty may be imposed with a view to the desirability of abolishing this punishment'. Resolution 32/61, adopted on 8 December 1977, Resolutions and Decisions adopted by the General Assembly, A/32/45(1978) 136.
[124] HRC General Comment 6: Right to life (Article 6 of the ICCPR) Sixteenth session, 1992 UN. Doc. HRI/GEN/1/Rev.1 at 6 (1994) para 6.
[125] Resolution 1997/12, UN Commission on Human Rights, E/CN.4/1997/150.
[126] HRC General Comment 6 (n 124 above) para. 7.
[127] The African Commission's Resolution Calling on State Parties to Observe a Moratorium on the Death Penalty, adopted in meeting at its 44th Ordinary Session held from 10 to 24 November 2008 in Abuja, Federal Republic of Nigeria http://www.achpr.org/sessions/44th/resolutions/136/ (accessed 9 March 2014).
[128] On 10 January 2011, following information received indicated that four minors namely, Ibrahim Shrief (17), Abdalla Abadalla Doub (16), Altyeb Mohamed Yagoup (16), and Abdarazig Abdelseed (15) had been sentenced to death, among nine people sentenced for carjacking in Khour Baskawit in South Darfur.

executions and to take all essential actions to guarantee that persons facing the death sentence are not executed.[129]

The UN Security Council excluded the death penalty from the penalties which international tribunals such as the ICTR and YCTR can impose, although these courts have jurisdiction over the most brutal crimes, such as genocide, crimes against humanity and war crimes.[130] Likewise, the ICC Statute does not permit the ICC to impose the death penalty.

Eighteen African states have abolished the death penalty,[131] and 13 of them exercise a moratorium on its application.[132] Sudan has not taken any measures to implement the resolution calling on state parties to the ACHPR to observe a moratorium on the death penalty.[133]

Under Islamic law, there are many verses of the *Qur'an* and practices of the Prophet Mohamed that acknowledge the sanctity of human life, order its protection and prohibit its arbitrary deprivation.[134] In fact, the sanctity of life can be seen through the protection

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[129] Report of the Group on Death Penalty and Extra-Judicial, Summary or Arbitrary killings in Africa, The African Commission 49th ordinary session http://www.achpr.org/sessions/49th/intersession-activity-reports/death-penalty/ (accessed 10 April 2014.).

[130] Resolution 1998/8, Commission on Human Rights, Fifty-fourth session, E/CN.4/1998/L.12.In establishing the International Criminal Tribunals for the former Yugoslavia & for Rwanda, UN Security Council Resolutions 825 of 25 May 1993 & 955 of 8 November 1994, respectively.

[131] The African States that abolished the death sentence are: Angola (1992), Benin (2012), Burundi (2009), CapeVerde (1981), Ivory Coast (2000), Djibouti (1995), Gabon (2010), Guinea-Bissau (1993), Madagascar (2012), Maurituis (1995), Mozambique (1990), Namibia (1990), Rwanda (2007), Sao Tome and Principles (1990), Senegal (2004), Seychelles (1993), South Africa (1995), and Togo (2009). http://en.wikipedia.org/wiki/Use_of_capital_punishment_by_country#cite_note-amnesty.org.au-2 (accessed 8 March 2014.).

[132] Resolution on the composition and the operationalisation of the working group on the death penalty adopted on the African Commission meeting at its 38th ordinary session held in Banjul, The Gambia from 21 November to 5 December 2005.

[133] Amnesty International *Public Statement: Sudan – end Stoning, reform the criminal law* AI Index: AFR 54/035/2012 on 30 July 2012.

[134] The following *Qur'an* verses are examples in that respect: in Al-An'aam verse 151 '[t]ake not life which God has made sacred, except by way of justice and law; thus does He (God) command you that you may learn wisdom', Al-Israa verse 33 '[n]or take life which God has made scared – except for just cause. And if anyone is slain wrongfully, we have given his heir authority (to demand *Qisas* [retribution] or to forgive): but let him not exceed bounds in the matter of taking life: for he is helped (by the law)', Al-Maaida verse 32 '[i]f anyone slew a person – unless it be for murder or for spreading mischief in the land – it would be

of life in *Shari'a* law which extends to the ban of suicide, therefore, shutting out the concept of a right to die under *Shari'a* law.[135] The right to life is also protected under the Islamic Declaration.[136] However, the *Qur'an* prescribes the death penalty as punishment for certain crimes, basically for the offences of murder, adultery, apostasy, and armed robbery. Apostasy as a crime in *Shari'a* law is contradicting the right to freedom of religious which guaranteed in the ICCPR and the African Charter. A crime such as adultery is not considered a serious crime which requires the imposition of the death penalty according to the international standards.

Prophet Mohamed recommended that the death penalty should be avoided as much as possible.[137] He declared '[v]erily your lives and properties are sacred to one another till you meet your lord on the day of Resurrection.'[138] Prophet Mohamed is also reported to have warned as follows: 'The first offences to be judged by God between mankind on the judgment day will be unlawful taking of lives.'[139] Islamic law recommends the act of pardoning the wrongdoer. Islamic law recognises the principle of amnesty which may be granted by the ruler. The state may pardon any *ta'zir* punishment provided that the victim's right is not undermined.

Carrying out the death penalty against pregnant women is also prohibited under Islamic law. Until a breast-feeding woman weans a child, she is also exempt from the

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as he slew humanity as a whole: and if anyone saved a life, it would be as if he saved humanity as a whole', Surat Al-Baqara verse 178 '[o]h you believe! *Al-Qisas* (the law of equality in punishment) is prescribed for you in case of murder: the free for the free, the slave for the slave, and the female for the female. But if the killer is forgiven by the brother (or the relatives, etc) of the killed against blood-money, then adhering to it with fairness and payment of the blood-money to the heir should be made in fairness. This is alleviation and a mercy from your Lord. So after this whoever transgresses the limits (i.e. kills the killer after taking the blood-money), he shall have a painful torment'.

[135] Baderin (n 14 above) 68.

[136] See art 2 which provides 'a) life is a God-given gift and the right is guaranteed to every human being. It is the duty of individuals, societies and states to protect this right from any violation, and it is prohibited to take away life except for a *Shari'a* prescribed reason. b) It is forbidden to resort to such means as may result in the genocidal annihilation of mankind. c) The preservation of human life throughout the term of time willed by God is a duty prescribed by *Shari'a*. d) Safety from bodily harm is a guaranteed right. Itis the duty of the state to safeguard it and it is prohibited to breach it without a *Shari'a*prescribed reason'.

[137] W Al-Zuhayli *Al-Fiqh Al-Islami wa-Adillatuh* (Arabic) (1996) Vol. 7 5307.

[138] M Baderin (n 14 above) 68.

[139] Reported by Al-Bukhari and Muslim. See Al-Jaziri, *Al-Fiqh Ala Al-Madhahib Al-Arb'ah* (Arabic) (1997) Vol 5, 218.

punishment. A child will also not be liable to the death penalty under Islamic law based on a *Sunna* in which Prophet Mohamed stated that a child is free from responsibility until he reaches maturity.[140] The only difference is that it is possible for a child to attain maturity before the age of 18 years under traditional Islamic jurisprudence.[141]

Under the Sudanese law, the Constitution of 1998 allows the imposition of the death penalty in the most serious crimes only in accordance with law[142] and prohibits the imposition of such a sentence on persons below 18 years of age and those above the age of 70 except when they have committed crimes of *qisas* or *hadud*.[143] It also prohibits the imposition of the death penalty on pregnant or lactating women. Pregnant women may only be sentenced to death two years after giving birth.[144]

Article 36 of the INC states that 'no death penalty shall be imposed, save as retribution, *hudud* or punishment for extremely serious offences in accordance with the law.'[145] It also prohibits the imposition of the death penalty on a person under the age of 18 years or a person who had attained the age of 70 years[146] and postponed its execution on pregnant or lactating women after two years of lactation.[147] However, the Bill of Rights does not prohibit the death penalty, which can be imposed in cases of retribution, *hudud* or punishment for extremely serious offences.[148] International standards limit the execution of the death penalty on people in certain groups, including individuals who

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[140] See Al-Jaziri (n 139 above) 269.
[141] The *Qur'an* has answered the question when a child would be taken as mature (*baligh*) by saying: 'until they reach marriageability. Here, it has been indicated that real maturity is not tied up with any particular count of years. Rather, it depends on particular indicators and signs experienced by adults entering the threshold of adulthood. When, in terms of these indicators and signs, they would be regarded fit to marry, they would be considered mature, even if their age does not exceed thirteen or fourteen years.http://www.classicalislamgroup.com/index.php?view=tafseer/s4-v5to6-4 (accessed 10 April 2014.). See also, Baderin (n 14 above) 74.
[142] Art 33(1).
[143] Art 33(2).
[144] As above.
[145] Art 36(1).
[146] Art 36(2).
[147] Art 36(3).
[148] There were two individuals executed on 31 August 2005, in Khartoum at Kober Prison, who were reported by their relatives to have been less than 18 years old when they committed their capital offences.

were below the age of 18 years at the time the offence was committed, people over the age of 70 years, pregnant women and new mothers, the mentally impaired and the mentally ill. People who were below the age of 18 years at the time the offence was committed may not be punished to death, irrespective of their age at the time of trial or convicting.[149]

Sudan government in its report to the African Commission stated that 'Following the example of many countries, the Sudanese lawmakers thought it wise not to abolish capital punishment; nevertheless, they have confined it to the most dangerous crimes and those which jeopardize the security of society and the rights of its members such as premeditated murder, drug trafficking or extreme treason.'[150]

Sudanese law has categorised many offences which can be punishable by death penalty. The Criminal Act of 1991 contains twelve crimes punishable by capital punishment, these include; undermining the constitutional system,[151] waging war against the State,[152] apostasy,[153] homicide,[154] adultery if married,[155] sodomy for the third time,[156] armed robbery,[157] crimes against humanity,[158] genocide,[159] war crimes against the people,[160] war crimes by methods of fighting banned,[161] and war crimes for

[149] See art 6(5) of the ICCPR, art 37(a) of the CRC, para 3 of the Death Penalty Safeguards, rule 17(2) of The Beijing Rules, art 4(5) of the AMCHR, and art 6(4) of Additional Protocols I and II to the Geneva Conventions of 1949 prohibiting the death penalty being pronounced on people aged less than 18 years at the time the crime was committed.
[150] Periodic Report of Sudan pursuant to Article 62 of the African Charter on Human and Peoples' Rights It comprises the required reports up to April 2003, April 2003 21.
[151] Sec 50.
[152] Sec 51.
[153] Sec 126.
[154] Sec 130.
[155] Sec 146.
[156] Sec 148(2)(c).
[157] Sec 168(1)(a). The penalty of armed robbery *(haraba)* according to this section of the Criminal Act is the death or death then crucifixion.
[158] Sec 186.
[159] Sec 187.
[160] Sec 188.
[161] As above.

using the means and banned weapons.[162] There are three crimes of *hudud* and retribution, and nine crimes are *ta'zir* crimes. Other offences also carry the death penalty as a punishment, such as the Anti-Terrorism Act of 2001 which penalises crimes of terrorism,[163] organisations terrorist crimes,[164] and unlawful acts against the safety of aviation.[165] However, crimes like genocide, war crimes and crimes against humanity have been included in the Criminal Act in 2009. Therefore, people who were accused of committing such crimes in Darfur will not be charged pursuant to the principle of restrospectivity.

The Armed Forces Act of 2007 also makes mention of the death penalty in many sections dealing with rebellion against the constitutional regime,[166] dealing with another state,[167] mutiny against military discipline,[168] and offences relating to military equipment accoutrements or dress.[169]

Furthermore, the National Security Act of 2009 also provides for the death penalty in many of its provisions; offences relating to the enemy,[170] offences of conspiracy and

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[162] In terms of actual statistics, the available data regarding the imposition of the death penalty in Sudan shows that death sentences passed between 2000 and 2004 are as follows: in (2001), 26; (2002), 120; (2003), 24; and (2004),100. Regarding execution in Sudan, (2001), 3; (2002), 40; (2003), 13 and 2 (2004). L Chenwi *Towards the abolition of the death penalty in Africa: A human rights perspective* (2007) 171--172. The Government stated that as of 18 September 2005 there were 479 persons in Sudan sentenced to death and waiting execution. Second Periodic Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Sudan 27 January 2006, issued by the Office of the High Commissioner for Human Rights in co-operation with the United Nations Mission in Sudan 27. Sudan carried out execution in (2010) 6+, (2011) 7+ and (2012) 19+. http://en.wikipedia.org/wiki/Use_of_capital_punishment_by_country, *Amnesty International Death sentences and Execution in 2010,* http://www.amnesty.org.au/images/uploads/adp/Death%20Sentences%20and%20Executions%202010.pdf *Amnesty International Death sentences and Execution in 2011* http://www.amnesty.org/en/library/asset/ACT50/001/2012/en/241a8301-05b4-41c0-bfd9 2fe72899cda4/act500012012en.pdf and *Amnesty International Death sentences and Execution in 2012* http://www.amnesty.org/sites/impact.amnesty.org/files/PUBLIC/2012DeathPenaltyAI.pdf (accessed 8 March 2014).

[163] Sec 5.

[164] Sec 6.

[165] Sec 8(e).

[166] Sec 164(1).

[167] Sec 165.

[168] Sec 167.

[169] Sec 185(1).

[170] Sec 55(1).

mutiny,[171] and the offence of exposing the internal or external security of the other countries, or the organ to danger.[172]

The offences provided by all three Acts above are *ta'zir* offences. From an Islamic point of view, all the three Acts which comprise of the death penalties for *ta'zir* offences can be prohibited to impose a punishment which is consistent with international standards.

The INC and the previous Constitution of 1998, similarly confines the imposition of the death penalty to extremely serious offences.[173] The HRC has generally taken the view that those crimes that do not cause, or attempt to cause, intentional loss of life and perhaps grievous bodily harm, are not within the definition of most serious crimes in article 6(2) of the ICCPR. In its 1997 Concluding Observations on Sudan, the HRC objected to the application of the death penalty for the crimes of apostasy and committing a third homosexual act. The HRC has also objected to the death penalty being applied for the crime of adultery, which was permissible under section 146 of the Criminal Act of 1991.[174]

The Sudanese Criminal Act of 1991, in its section 27(2) prohibits the imposition of the death sentence against any person, who has not attained the age of 18 years, or who exceeds 70 years of age unless it is for *hudud* and retribution *(qisas)* offences. Section 193 of the Sudanese CPA of 1991 also prohibits the same.[175] The exception of *hudud* and *qissas* stressed by article 27(2) of the Criminal Act means that these *Shari'a* punishments shall be applied and carried out irrespective of age. Pregnant and breast feeding mothers are not protected against the death judgment, however, pursuant to

[171] Sec 56.
[172] Sec 57.
[173] Art 36(2) of the INC and art 33(1) of the Constitution of the Republic of the Sudan 1998.
[174] Concluding observations of the HRC: *Sudan* CCPR/C/79/Add.85, 19 November 1997, para 8.
[175] Which states '(1) Where it transpires, to the Prison Director, that the person sentenced to death, otherwise than in *hudud* and retribution offences, has attained seventy years of age, before executing the sentence, he shall suspend execution, and notify the same forthwith, to the Chief Justice, for submission thereof, to the Supreme Court, for considering substituting the sentence. (2) Where it transpires, to the Prison Director, before executing the death sentence, that the sentenced woman is pregnant, or suckling, he shall suspend executing the sentence and notify the same, to the Chief Justice, for postponing execution, until after delivery, or the lapse of two years, after lactation, where the baby is alive'.

article 33, they shall not be executed unless after two years of lactation.[176] Although the Criminal Act of 1991 permits the execution of the death penalty against individuals below the age of 18 years in conflict with international standards, the Child Act of 2010 has abolished the death penalty for children (individuals under 18).[177]

The HRC has expressed seriously concerns that despite the adoption of the Child Act of 2010, which bans the passing of the death sentence on children, under article 36 of the INC, the death penalty may be imposed on persons under the age of 18 years in cases of retribution or *hudud*. However, the Constitutional Court in the case of *Abdelmoiz Hamdon Saad v Sudan Government*[178] held that regarding article 36 of the Constitution of 1998 and section 27(2) of the Criminal Act of 1991 that the death penalty is forbidden against accused person below 18 years old. The Constitutional Court ruled out the death sentence because the offence was committed while the accused age was under 18 years old.

The ICCPR, as well as the CRC, prohibit sentencing someone to death if he or she was less than 18 years old when the offence was committed. The INC made these treaties an integral part of the Bill of Rights and article 32(5) provides that '[t]he State shall protect the rights of the child as provided for in the international and regional conventions ratified by the Sudan. It also allowed, in contravention of its obligations under international law, for the imposition of the death penalty for people under 18 years old in cases of retribution or *hudud*.

In keeping with article 6(5) of the ICCPR, the State party should safeguard that the death penalty will not be imposed on persons under the age of 18 years old.[179] In

[176] S Hussein 'Sudan: in the shadow of civil war and politicization of Islam' in A-Na'im (ed) *Human rights under African constitutions* (2003) 361.
[177] However, the UN Committee on the Rights of the Child expressed serious concerns that 'under art 36 of the Sudan INC, 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. CARC/C/SDN/CO/3-4, 1 October 2010, para 35.
[178] Case No.4/1999 SCCLR (1999--2003) 93-99
[179] Concluding observations of the HRC: *Sudan* CCPR/SDN/CO/3/CRP.1, para 20.

Nagmeldin Gasmelseed v Government of Sudan and the relatives of Abdelrahman Ali,[180] the applicant had been condemned to death for homicide committed when he was below the age of 18 years old. The Constitutional Court interpreted the Child Act which prevents the imposition of the death penalty on children less than the age of 18 years old, and held that the Child Act incompatible with the Criminal Act. The Criminal Act does not impose the death penalty on persons below the age of 18 years old, except in cases of *hudud* and *quisas* (retribution). The Court interpreted the Child Act as a specific law that should prevail over the general law (Criminal Act). The Court referred broadly to international human rights law and determined that article 27(3) of the INC made human rights treaties part and parcel of the national law that should prevail over domestic law.

Comparing the provisions of the death penalty in Sudanese Criminal Act and CPA with international standards and restrictions on the imposition of the death penalty regarding the seriousness of crimes as long as the death penalty is in force, should be restricted to the most serious offences only,[181] and any imposition of the death penalty should comply with the requirements of article 7 of the ICCPR. The death penalty remains in force for numerous offences, including those which cannot be considered to be the most serious. Some of these offences also violate other rights, such as the crime of apostasy.[182] The HRC concluded that apostasies, committing a third homosexual act, embezzlement by officials, and theft by force are not serious crimes.[183] However, Sudan stated during consideration of its second periodic report to the ICCPR that: 'since 1973 execution had been avoided in cases involving the death sentence, either because the higher court or the president had not confirmed the sentence or because blood-money the *Diya* had been paid instead.'[184] Sudan was requested to provide information on the

[180] *Nagmeldin Gasmelseed v Government of Sudan and the relatives of Abdelrahman Ali* MD/GD/18/2005. SCCLR 2011 399--424 (Decision on 2 December 2008).
[181] Art 6 of the ICCPR.
[182] Freedom of religion, sec 126 of the 1991 Criminal Act, which is incompatible with art 8 of the African Charter and art 18 of the ICCPR. See also, Hussien (n 176 above) 367.
[183] Concluding observations of the HRC: *Sudan* CCPR/C/79/Add.85 (1997) para 8.
[184] See HRC Summary Record of the 1628th Meeting: *Sudan* UN Doc. CCPR/C/ SR. 1628 of 02 October 1998 para 15.

number of executions which have taken place and the category of crime for which the death penalty has been executed.[185]

In cases of trials 'leading to the imposition of death penalty, scrupulous respect of the guarantees of fair trial is particularly important.'[186] The imposition of a sentence of death upon conclusion of a trial, in which the provisions of article 14 of the ICCPR have not been respected, constitutes an infringement of the right to life in article 6 of the ICCPR.[187] The restrictions on the death penalty stated out in article 6 of the ICCPR are imposed only for grave crimes compliant with the law in force at the time of the commission of the crime. The family of Taha requested the Supreme Court to declare the trial, judgment, and execution of Taha to be unconstitutional, and therefore, null and void.[188] The Supreme Court declared that the trial and execution of Taha were null and void because of the following:

> The trial and appellate courts had acted against express provisions of the law assumed legislative powers and created the criminal offense of apostasy, which was not part of the indictment and was not defined as a criminal offense by the laws in effect at the time.[189]

The Supreme Court did not have the chance to review the death ruling as required by law and, thus, the execution was untimely.[190] The execution of Taha in Sudan for committing apostasy is against domestic law because it was not a crime according to the Penal Code of 1983 and contradicted international human rights law which protects the freedom of religion. It additionally contradicts Islamic law which is according to the *Qur'an*, the *Sunna,* the practice of the truly guided Caliphs, and opinions of some

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[185] Concluding observations of the HRC: *Sudan* CCPR/SDN/CO/3/CRP.1, para 19.
[186] See HRC General Comment 32 (n 37 above) para 59.
[187] For example, *Shakurova v Tajikistan* Communications No. 1044/2002, para 8.5 (violation of art 14(1) & (3)(b)(d)(g)); *Ruzmetov v Uzbekistan Communication* No. 915/2000, para 7.6 (violation of art 14(1),(2) & (3)(b)(d)(e)(g)); *Chan v Guyana* Communication No. 913/2000, para 5.4 (violation of art 14(3)(b)(d)); *Rayos v Philippines*, Communication No. 1167/2003, para 7.3 (violation of art 14(3)(b)).
[188] The trial and execution denied the accused his right to be heard. The Supreme Court stressed that 'the right of the accused to be heard before condemnation is an eternal principle adhered to by all human societies as a sacred principle of natural law that, to be binding, does not need to be reinforced by express provisions of law'.
[189] *Asma Mahmoud Mohamed Taha and another v Sudan Government* (1986) SLJR 163.
[190] Hussein (n 176 above) 367.

traditional as well as modern Islamic jurists and scholars who pursue to found that apostasy simpliciter and was not an offence and therefore could not attract the death penalty.[191] Many of the scholars and jurists describe apostasy in terms of mutiny against the state, where a Muslim, who is a subject of the Islamic state, after disapproving Islam, associated with those who take weapons against the Islamic state, and therefore, commits a political crime against the state.[192]

The Criminal Act of 1991 contains in section 26 a prohibition against apostasy. This prohibition violates the INC, ICCPR and ACHPR. In a recent case heard in May 2014 the first court in Khartoum convicted a lady of apostasy.[193] However, the verdict of the court contradicts the interpretation illustrated above which states that *Shari'a* describes apostasy in terms of mutiny against the state by taking weapons against the Islamic state and not only converting from Islam to another religion. In addition, there is doubt that she was a Muslim because her mother was a Christian and her father passed away while she was a child. She stated before the court that she is a Christian and never committed apostasy. This doubt should drop the death penalty according to *Shari'a* law. The Prophet advised 'that one should avert the *hudud* punishment in case of doubt because error in clemency is better than error in imposing punishment.'[194]

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[191] Baderin (n 14 above) 123. See M Al-Awa *Punishment in Islamic law* (1982) 50—56 & 397. Twelfth century Maliki jurist Abu Al-Waleed Al-Bagi stated that apostasy is 'a sin for which there is no punishment'.

[192] Baderin (n 14 above) 124. The *Qur'an* does not stipulate any worldly punishment but is only described as attracting severe punishment in the hereafter. See Surat Al-Baqarah verse 217 '…and if any of you turn back from their faith and die in unbelief, their work will bear no fruit in this life and in the hereafter they will be companions of fire and will abide therein'. The death punishment for apostasy was based on a reported Tradition of the Prophet who said as follows: 'anyone who changes his religion, kill him'. Reported by Al-Bukhari. See Al-Asqalani, Ibn Hajar *Bulugh Al-Maram* (with English translations) 1996 428. Baderin (n 14 above) 124. Some scholars have however identified this traditionas a solitary tradition while others alleged weaknesses in its transmission. It has been contended that there is no precedent of the Prophet compelling anyone into Islam or sentencing to death for apostasy. See S Rahman *Punishment of apostasy in Islam* (1978) 63 See also Al-Ganushi R *Al-Hurriyyat Al-Amah fi Al-Dawlah Al-Islamiyyah in Islam* (1993) 47--51. El-Awa concluded as follows: '[t]he *Qur'an* prescribe no punishment in this life for apostasy and the Prophet never sentenced a man to death for it but some of the companions of the prophet recognised apostasy as a sin for which there was a *ta'zir* punishment'.El-Awa (n 190 above) 56.

[193] See http://news.msn.com/world/sudan-judge-sentences-christian-woman-to-death-for-apostasy (accessed 2 June 2014).

[194] Baderin (n 14 above) 80.

In recent cases where the courts have imposed the death sentence, fair trial standards protected by article 14 of the ICCPR were violated. For example, in the case of *Isahaq Al-Sanusi and others*,[195] the Special Court have imposed the death penalty where the defendants had been detained in solitary confinement and alleged that they had been tortured to pleaded guilty and were deprived of access to legal counsel.[196] They were executed following the conviction. Numerous submissions from UN Special Procedures urging Sudan to re-examine the convictions were disregarded.[197]

In the case of *Paul John Kaw and others,*[198] the Constitutional Court confirmed the death sentence of the six convicted of murder.[199] The executions proceeded, [200] despite urgent appeals from the UN Special Rapporteurs and UNMIS who expressed concerns with regards to violations of due process and fair trial guarantees and requesting a stay of execution.[201]

The African Commission in the case of *Amnesty International and others v Sudan*,[202] which concerned the imposition of the death penalty after unfair trials and the carrying out the executions after summary and arbitrary trials,[203] found the execution of the prisoners after summary and arbitrary trials to be in violation of article 4 of the ACHPR.[204]

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[195] *Isahq Al-Sanusi & Others v Successors of Deceased Mohamed Taha Mohamed Ahmed* Case No. MD/QD/121/2008.
[196] The Constitutional Court confirmed the death sentence of nine men convicted for the murder of the journalist Mohamed Taha. In April 2009, nine men, including one over 70 years old, were hanged, following the above conviction. This case, as well as convictions pursuant to trials under the Anti-Terrorism Act, raises serious concerns over their compatibility with the right to life and right to a fair trial. See REDRESS & ACJPS *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* (2012) 3.
[197] UNMIS Submission to the Universal Periodic Review Sudan (2011) para 10.
[198] *Paul John Kaw & Others v Ministry of Justice & Next of kin of Elreashhed Mudawee* Case No. MD/QD/51/2008. In January 2010 the authority executed six men implicated in the killing of 13 policemen during the 2005 riots in the Soba Aradi.
[199] *Paul John Kaw & Others* case (n 198 above).
[200] In January 2010.
[201] UNMIS (n 197 above) para 11.
[202] Communications 48/90, 50/91, 89/93, 13th Annual Activity reports 1999--2000 (2000) AHRLR 297.
[203] N 202 above, paras 1-20.
[204] N 202 above, paras 47-52.

It is expected of every state to respect fair trial standards when imposing the death penalty. Inthe HRC in case of in *Lubuto v Zambia,*[205] it stated that the State cannot use its economic condition to excuse abuses of minimum human rights principles containing violations of fair trial rights.

The death penalty may be imposed only when the guilt of the accused person 'is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.'[206] The death penalty '[m]ay only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial.'[207]

All defendants facing the imposition of capital punishment should be able to benefit from the services of a qualified defence counsel at each stage of the proceedings. Offenders should be presumed innocent until their guilt has been evidenced beyond a reasonable doubt and the implementation of the maximum criteria for the collecting and evaluation of evidence must be applied. Furthermore, all mitigating factors must be taken into account. The offender's right to pursue amnesty or forgiveness, commutation of judgment[208] or clemency must also be ensured.[209] All defendants charged with capital offences must benefit from 'an adequate provision for State-funded legal aid by competent defence lawyers.'[210] The UN Economic and Social Council has stated that an individual confronting the death penalty should be provided with 'adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in

[205] Communication No. 390/1990 CCPR/C/55/D/390/1990/Rev.1.
[206] UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ECOSOC Resolution 1996/15 adopted on 23 July 1996 (hereinafter referred to as ECOSOC Death penalty safeguards) para 4.
[207] At least equal to those contained in art 14 of the ICCPR, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed, to adequate legal assistance at all stages of the proceedings. ECOSOC Death penalty safeguards (n 206 above) para 5.
[208] See art 6(4) of the ICCPR & ECOSOC Death penalty safeguards (n 206 above) para 7& art 4(6) of the AMCHR.
[209] See Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. A/51/457, 7 October 1996, para 111.
[210] Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc: E/CN.4/1996/4, para. 547.

non-capital cases.'[211] The HRC has stated that 'it is axiomatic that legal assistance should be made available to a convicted prisoner under sentence of death.'[212] The HRC held that 'in capital cases, the case should not proceed if the accused was not represented by counsel.'[213] The HRC stated that: 'the accused in a death penalty case should be represented by counsel of choice, even if it requires an adjournment of the hearing.'[214] All people charged with a crime have the right to sufficient time and amenities in order to furnish a defence.[215]

Everyone convicted of an offence carrying the death penalty has the right to appeal of the conviction and the sentence by the upper court.[216] Any person punished to death has the right to appeal to a court of greater jurisdiction, and measures should be taken to confirm that such appeals be mandatory.[217] The death penalty may only be executed after a final judgment by a competent court.[218] An execution may not be brought out pending any appeal or another recourse procedure or other proceeding concerning amnesty or commutation of the judgment.[219]

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has suggested 'a period of at least six months before a death sentence imposed by a court

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[211] ECOSOC Resolution 1989/64, 24 May 1989, UN Doc: E/1989/INF/7, at 128; see also, ECOSOC Death Penalty Safeguards (n 206 above).
[212] *Kelly v Jamaica* (253/1987) 8 April 1991, Report of the HRC, (A/46/40), 1991, para 241.
[213] *Robinson v Jamaica* (223/1987) 30 March 1989, Report of the HRC, (A/ 44/40) 1989, para 241; see *Abdool Saleem Yasseen and Noel Thomas v Guyana* 30 March 1998, UN Doc. CCPR/C/62/D/676/1996, para 78, finding violations of art 14 where one of the accused was not represented for the first four days of a retrial of the case.
[214] See *Pinto v Trinidad & Tobago* (232/1987) 20 July 1990, Report of the HRC, Vol. II, (A/45/40), 1990, para 69.
[215] See art 14(3)(b) of the ICCPR, art 8(2)(c) of the AMCHR, art 6(3)(b) of the ECHR, & para 2(E)(1) of the African Commission Resolution on the Principles and Guidelines of the Right to a Fair Trial and Legal Assistance in Africa.
[216] See art 14(5) of the ICCPR, art 8(2)(h) of the AMCHR, art 2 of Protocol 7 to the ECHR, art 7(a) of the African Charter and para 3 of the African Commission Resolution on the Principles and Guidelines of the Right to a Fair Trial and Legal Assistance in Africa.
[217] ECOSOC Death penalty safeguards (n 206 above) para 6.
[218] See art 6(2) of the ICCPR, para 5 of the ECOSOC Death penalty safeguards (n 206 above) & art 4(2) of the AMCHR.
[219] Para 8 of ECOSOC Death penalty safeguards (n 206 above), art 4(6) of the AMCHR, see arts 14(5) & art 6(4) of the ICCPR.

of first instance can be carried out, so as to allow adequate time for the preparation of appeals to a court of higher jurisdiction and petitions for clemency.'[220]

According to the African Commission in *Achutan and Amnesty International v Malawi*,[221] held that the depriving of counsel to Vera and Orton Chirwa throughout a trial in Malawi in which they were punished to death, violated article 7(1)(c) of the African Charter.[222]

The rule under Sudanese law that 'death penalty can only be imposed in accordance with the law does not provide sufficient safeguards, given that some of these laws, such as the National Security Act of 2009, are incompatible with the Covenant as they allow, inter alia, incommunicado detention without prompt access to a lawyer or judicial body.'[223] The African Commission declared that military courts trying civilians commonly fail to meet these standards and that their judgments are bound to violate the right to life if they impose the death penalty.[224]

The HRC has held that it is important to ensure that persons on death row be treated in a manner that is dignified and which is not cruel or inhuman. In several death penalty cases, the HRC has reaffirmed that 'article 10 of the ICCPR, obliging states to treat individuals with respect for the inherent dignity of the human person, encompasses, among other things, the duty to provide adequate medical care, basic sanitary facilities,

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[220] Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc: E/CN.4/1996/4, para 553.

[221] *Achutan (on behalf of Banda) & Amnesty International (on behalf of Orton & Vera Chirwa) v Malawi* African Commission on Human and Peoples' Rights, Communications 64/92, 68/92, & 78/92 (1995), 8th Annual Activity Report of the African Commission on Human and Peoples' Rights, 1994--1995, ACHPR/RPT/8th/Rev.I.

[222] The sentences were upheld by the national traditional Appeals Court, although the Appeals Court criticised many aspects of the conduct of the trial. Mr. Banda was not allowed recourse to the national courts to challenge the violation of his fundamental right to liberty as guaranteed by art 6 of the African Charter and the constitution of Malawi. Furthermore, Aleke Banda was detained indefinitely without trial. The Commission finds that Mr. Banda's imprisonment violated art 7(1)(a) & (d) of the ACHPR. Vera and Orton Chirwa were tried before the Southern Region Traditional Court without being defended by counsel. This constitutes a violation of art 7(1)(c) of the ACHPR. *Achutan* case (n 220 above) paras 9 & 10.

[223] REDRESS & ACJPS *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* (2012) 3.

[224] *International PEN, Constitutional Rights Project, Civil Liberties Organisation & Interights (on behalf of Ken Saro-Wiwa Jnr.) v Nigeria* 137/94-139/94-154/96-161/97 (1998) para 103.

adequate food and recreational facilities for people held under sentence of death.'[225] The HRC found that 'notifying two men of a stay of execution just 45 minutes before the time of their scheduled execution, 20 hours after the stay had been granted constituted cruel and inhuman treatment in violation of article 7 of the ICCPR.'[226]

The jurisprudence of numerous courts in Africa on the death penalty reveals the potential influence of the judiciary. For instance, South Africa's Constitutional Court found that the death penalty is unconstitutional[227] and Kenya and Uganda's Constitutional Courts significantly constricted the scope of the imposition of the death penalty.[228]

2.3 Punishment conflicting with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment

2.3.1 Background

In terms of international human rights law, the prohibition of cruel, inhuman or degrading punishment is widely recognised in international instruments and is accorded a particular status as being non-derogable.[229] Corporal punishment[230] is banned by international standards as it conflicts with the total prohibition against torture and cruel, inhuman and degrading treatment or punishment. Such treatment or punishment 'may not be imposed on any person for any reason, no matter how heinous their crime'[231]

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[225] *Kelly v Jamaica* (253/1987), 8 April 1991, Report of the HRC, (A/46/40), 1991, para 241; *Henry and Douglas v Jamaica* (571/1994), 25 July 1996, UN Doc. CCPR/C/37/D/571/1994, para.3.8; *Linton v Jamaica* (255/1987), 22 October 1992, Report of the HRC, (A/48/40), part II, 1993. Notwithstanding national jurisprudence to the contrary see, for example*, Pratt and Morgan vJamaica* Judgment of the Lords of the Judicial Committee of the Privy Council of the United Kingdom, 2 November 1993.

[226] *Pratt & Morgan v Jamaica* (210/1986 & 225/1987) 6 April 1989, Report of the HRC, (A/44/40), 1989, para 222.

[227] *S v Makwanyane* 1995 (3) SA 391 (CC).

[228] See *Attorney General v Susan Kigula & Others* (Constitutional Appeal No.3 of 2006) [2009] UGSC 6 (21 January 2009) & *Godfrey Ngotho Mutiso v Republic* Criminal Appeal No.17/2008, Court of Appeal judgment of 30 July 2010, see further J Mujuzi, 'Challenging the ugly face of criminal laws in East Africa', in L Oette (ed) *Criminal law reform and transitional justice: Human rights perspectives for Sudan* (2011) 89--114.

[229] See ICCPR art 4(2), AMCHR art 27(2) & ECHR art 15(2).

[230] For the purpose of this study corporal punishment used for all kinds of punishment that causes physical pain includes whipping, stoning and amputation.

[231] IHRA *Highlights Singapore's mandatory death penalty* The Republic of Singapore Submission to the UN Universal Periodic Review Eleventh session of the UPR Working Group of the Human

and notwithstanding political instability. This right is guaranteed in the UDHR,[232] the ICCPR,[233] the ACHPR,[234] the ECHR,[235] the AMCHR,[236] and the UN Declaration on the protection of all persons from being subjected to torture and other cruel, inhuman or degrading treatment or punishment.[237] The UN Human Rights Council has stated that 'corporal punishment, including those against children, can amount to cruel, inhuman or degrading punishment or even to torture.'[238]

The UN Special Rapporteur on Torture stated that 'corporal punishment is inconsistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.'[239] The Special Rapporteur further stated that 'legislation providing for corporal punishment, including excessive chastisement ordered as a punishment for a crime or disciplinary punishment, should be abolished',[240] and the Rapporteur mourned the continuing use of this form of punishment, finding as follows:

> What is common to all these forms of corporal punishment, however, is that physical force is used intentionally against a person in order to cause a considerable level of pain. Furthermore, without exception, corporal punishment has a degrading and humiliating component. All forms of corporal punishment must therefore, be considered as amounting to cruel, inhuman or degrading punishment in violation of international treaty and customary law.[241]

Rights Council Human rights violations associated with Singapore's anti-drug laws http://www.theonlinecitizen.com/2011/01/ihra-highlights-singapores-mandatory-death-penalty/ (accessed 8 April 2014).

[232] Art 5 of the UDHR.

[233] Art 7.

[234] Art 5.

[235] Art 3.

[236] Art 5(2).

[237] Art 1.

[238] Human Rights Council Resolution 8/8, 18 June 2008 para 7(a).

[239] Report of the UN Special Rapporteur on torture, UN Doc: E/CN.4/1997/7, 5, para. 6.

[240] Commission on Human Rights, Report of the Special Rapporteur on the question of torture submitted in accordance with Commission resolution 2002/38, UN Doc. E/CN.4/2003/68, 17 December 2002, para 26(c).

[241] Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/13/39/Add.5, 5 February 2010, para 209.

The UN Special Rapporteur on Sudan had criticised the application of Islamic law punishment in the Sudan as violating the prohibition of cruel, inhuman and degrading punishment under international law.[242]

According to the Oxford English Dictionary, cruel is defined as 'causing pain or suffering', inhuman 'not seeming to be produced by a human, and therefore, frightening. It is lacking the qualities of kindness and pity as destitute of natural kindness or pity, brutal, unfeeling, savage, barbarous', and degrading is 'treating somebody as if they have no value, so that they lose their self-respect and the respect of other people.'[243]

Corporal punishment is a cruel bodily punishment including knock-backs, shocks to the body or resection, imposed by judicial order or as an administrative sanction. It includes flogging, caning, whipping, amputation and stoning.[244] The imposition of corporal punishment as a penalty for a criminal or disciplinary offence and violates the right to a fair trial since it is a sanction which is prescribed under international law.[245] The HRC has stated that 'the prohibition against torture in the ICCPR extends to the prohibition of corporal punishment and also to excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.'[246]

Under Islamic law, the *Qur'an* warns against persecution of human beings in 299 places.[247] Prophet Mohamed was also reported to have warned against torture saying

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[242] See also, the HRC Concluding observations: *Sudan* CCPR/C/SDN/CO/3/CRP.1 26 July 2007, para 10.
[243] Oxford Advanced Learner's Dictionary of Current English (1997) Oxford University Press 353, 772 & 385 respectively.
[244] See, K Bennoune 'A practice which debases everyone involved: Corporal punishment under international law' in *20 ans consacrés à la réalisation d'une idée, Recueild'articles en l'honneur de Jean-Jacques Gautier* [20 years dedicated to the realisation of an idea: articles in honour of Jean-Jacques Gautier], Geneva: Association for the Prevention of Torture, Geneva, 1997 203.
[245] See rule 31 of the Standard Minimum Rules, rule 37 of the European Prison Rules.
[246] HRC General Comment 20: Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment (article 7 of the ICCPR) forty-fourth sessions, adopted on 10 March 1992, para 5.
[247] M Bassiouni 'Sources of Islamic law, and the protection of human rights in the criminal justice system' in M Bassiouni (ed) *The Islamic criminal justice system* (1982) 19.

the following: 'God will torture in the hereafter those who torture people in this life.'[248] Prophet Mohamed also, when he entrusted anyone with the affairs of the state, instructed the latter to '[g]ive glad tidings and do not terrorise, give ease and do not molest the people.'[249] Following this principle, Caliph Omer Ibn Abdul Aziz was reported to have indicated in reply to the demand of one of his rulers who wanted authorisation to torture those who refused to pay tax outstanding to the public treasury, as follows:

> I wonder at you asking permission from me to torture people as though I am a shelter for you from God's wrath, and as if my satisfaction will save you from God's anger, upon receiving this letter of mine accept what is given to you or let him give an oath, by God it is better that they should face God with their offences than I should have to meet God torturing them.[250]

Article 20 of the Islamic Declaration provides the following:

> it is not permitted to subject an individual to physical or psychological torture or to any form of humiliation, cruelty or indignity. Nor is it permitted to subject an individual to medical or scientific experimentation without his consent or at the risk of his health or of his life. Nor is it permitted to promulgate emergency laws that would provide executive authority for such actions.

In Islamic law the philosophy of penalty is grounded on the faith of the divine exposure contained in the *Qur'an* and the *Sunna*.[251] The *hudud* punishments[252] are set as punishment for infringing divine commands that safeguard public interest and are thus, not remissible.[253] Therefore, they are preventive punishments specified by God to

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[248] See O Alsalih 'The right of the individual to personal security in Islam' in M Bassiouni (ed) *The Islamic criminal justice system* (1982) 72.
[249] Baderin (n 14 above) 76.
[250] Alsalih (n 248 above) 72.
[251] El-Awa (n 191 above) 398.
[252] The *hudud* punishments are fixed by law. Their strict nature is evident in the rule that limits the imposition of the death penalty (not to be passed against any person who has not attained the age of eighteen or who exceeds seventy years of age or pregnant or lactating women (after two years of lactation) and limits the punishment of whipping (not to be passed against any person sixty years of age or older, or a sick person whose life would be endangered by whipping or whose sickness would thereby be aggravated). It is also underscored by the rule that such sentences 'shall not be remitted by pardon'.
[253] Baderin (n 14 above) 81.

preclude men from committing what He banned.[254] Muslim jurists hold that their harshness cannot be examined.[255] The *hudud* punishment 'cares very little for the criminal and his reform, and concentrates on preventing the commission of offences.'[256] The priority is for the interest of society by wanting to preclude the happening of the *hudud* crimes through a deterrent and punitive approach.[257]

Some scholars argue that the implementation of punishment in Islamic law is protected by the right to freedom of religious which enshrined in the UDHR, ICCPR and the ACHPR and therefore he does not see a conflict between them and the international human rights law.[258] However it is very obvious in the international human rights law those kind of punishment are violating the international standard. In addition, the rights and freedoms based on citizenship and not religious as the INC adopts the multi-cultural, linguistic religious and ethnic system under the Republic of Sudan.[259]

However, *hudud* punishments can be suspended in certain situations. Historically, Prophet Mohamed suspended the implementation of a *hudud* sentence for theft during war, and the second Caliph Omer Ibn Al-Khatab deferred its application at a period of widespread starvation in Madina.[260] Baderin stated as follows:

> It can, therefore, be argued that, while to Muslims the prescription of the *hudud* punishment is not questionable; its application by the state is, however, not in isolation of other sociological factors within the state. The determination of the enabling or inhibiting sociological factors for the

[254] See A Al-Mawardi *Al-Ahkam Al-Sultanyyah* (Arabic) (1386 A.H).
[255] See S Abu Zahrah *Al-Jarimah wa Al-Uqubah fi Al-Fiqh Al-Islami* (Arabic) 1958.
[256] El-Awa (n 191 above) 134.
[257] Baderin (n 14 above) 82.
[258] Interview with Dr. Ahmed Al Mufti director of the Khartoum Human Rights Centre, Khartoum 19 November 2014.
[259] The Third Periodical Report of the Republic of the Sudan under Article 62 of the African Charter on Human and People's Rights May 2006 para 19.
[260] See M Abu Zahrah *Usul Al-Fiqh* (Arabic) (1958) 222-228. Also, see M Kamali *Principles of Islamic jurisprudence* (1991) 247 & 270. El-Awa referred to the account of Abu Yusuf the great eighth century *hanafi* jurist in his famous work *Kitab Al-Kharaj*, see, Y Abu Yusuf *Kitab Al-Kharaj* (Arabic) (1352 A.H) 149--152, to indicate that circumstances could make it necessary to relax or suspend the enforcement of the *hudud* punishment by the ruling authority. El-Awa (n 190 above) 165--171.

> application of the *hudud* punishment is as shown by the examples above left to the discretion of the state to be exercised in good faith and the best interest of society and the populace.[261]

The *ta'zir* punishments, due to the comprehensive authority that the State has in its prescription, provide methods for penalties assist the criminal's reform.[262] The *Qisas* penalties are taking the interest of the victim into consideration in the implementation of a retributive penalty. The victim or his heir in *Qisas* has a mediating role in the punishment of the offender.[263] It could be contended that the three levels of punishment under *Shari'a* law can be practically interpreted to accommodate contemporary penological doctrines reliant on the political and humanitarian spirit of the reigning authority.[264]

From an international human rights perspective, various scholars argued that *hudud* punishments are at variance with modern human rights standards.[265] Although Muslim jurists and scholars might not contribute to the categorisation of the *hudud* penalties as 'harsh and degrading', together traditional and modern scholars of *Shari'a* law do not contradict the severity of the punishment. Their reasoning, though, is that the harshness of *hudud* punishments is meant to and truly does, function as a preventive method to the crimes for which they are set. Muslim jurists have additionally debated that the standard of proof for all the *hudud* crimes[266] under *Shari'a* law is very difficult to meet. Since the *Shari'a penalties* are harsh, the admissibility of evidence required to follow precise procedures includes; two eyewitnesses for most offences, four witness in case of *Zina*, hearsay evidence unacceptable, testimony have to be unequivocal, the witness obligated to retain ethical truthfulness, testimony have to be delivered expeditiously

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[261] Baderin (n 14 above) 83.
[262] As above.
[263] As above.
[264] As above.
[265] See A Mayer 'A critique of An-Na'im's assessment of Islamic criminal justice' in T Lindholm & K Vogt (eds) *Islamic law reform and human rights: Challenges and rejoinders* (1993) 37. See also, Baderin (n 14 above) 80.
[266] See chapter three of this thesis p. 100 footnote 109.

from the time of the alleged crime.[267] They must be evidenced beyond any doubt based on the practice of the Prophet in which he said: '[a]vert the *hudud* punishment in case of doubt for error in clemency is better than error in imposing punishment.'[268] This requirement frequently creates the application of the punishment exceptional.[269] Remarking on *Zina,* for example, Shalabi stated that 'punishment for *Zina* is applicable only to those who committed the offence openly without any consideration for public morality at all, and in a manner that is almost impossible and intolerable in any civilised society.'[270]

The tension between *Shari'a* law and international human rights law is essentially regarding the *Hudud* punishments which are fixed and unchangeable as long as the offence is established by *Shari'a* law.[271] The contradiction among criminal penalties under *Shari'a* law and the ban of cruel, inhuman and degrading penalties under international human rights law can be discussed from two points. The first point relates non-*hudud* crimes: As the State has an option under *Shari'a* law to impose less severe penalties for non-*hudud* crimes, Muslims countries can, therefore, efficiently practice that discretion in realisation of their international human rights commitments, and directly ban their non-*hudud* punishments that infringe the prohibition of cruel, inhuman and degrading punishments.[272] The second point relates to *hudud* crimes. An-Na'im has perceived regarding *hudud* penalties that 'in all Muslim societies, the possibility of human judgment regarding the appropriateness or cruelty of a punishment decreed by God is simply out of the question' and that '[n]either Islamic re-interpretation or cross-cultural dialogue is likely to lead to their total abolition as a matter of Islamic law.'[273] Inquiring *hudud* penalties is deemed to be inquiring the godly sense underlying them

[267] See Richard J Terrill *World criminal justice system: A comparative servey* Anderson Publishing New York 2013 567--568.
[268] See W Al-Zuhayli *Al-Fiqh Al-Islami wa-Adillatuh* (Arabic) (1997) Vol. 7 5307.
[269] Baderin (n 14 above) 80.
[270] M Shalabi *Al-Fiqh Al-Islamiyy bayn Al-Mithaliyyah Al-Waqi'iyyah* (Arabic) (1960) 201.
[271] See El-Awa (n 191 above) 1.
[272] Baderin (n 14 above) 83.
[273] See A An-Na'im 'Towards a cross-cultural approach to defining international standards of human rights: The meaning of cruel, Inhuman, or degrading treatment or punishments' in A An-Na'im (ed) *Human rights in cross-cultural perspectives: A quest for consensus* (1992) 35-36.

and doubting the theology of the *Qur'an* and the consistence nature of *Shari'a* law. From a *Shari'a* legal perspective, the contradiction may yet be addressed indirectly through procedural methods. Islamic legalists admit the point that it is legitimate to utilise procedural strategies to avoid the *hudud* penalty without disputing the law, the Prophet having recommended that one should avoid the *hudud* penalty in cases of uncertainty as error in forgiveness is better than error in executing the penalty.[274] Under *Shari'a* law the accused have the right to extract a confession before the execution of a judgement. As a consequence, the confession could not be used as part of the evidence to convict the person.[275] With the recent renaissance and renewal of Islamic law in several Muslim countries, it is more practicable to pursue a compromise between *hudud* penalties and the proscription of cruel, inhuman and degrading penalties under international human rights law indirectly through legal procedural guarantees obtainable within *Shari'a* law.[276]

In most countries the implementation of corporal punishment has been justified on the reasons of creed, custom or its preventive value.[277] An Na'im pointed out, 'historical experience has shown that the exclusivity of religion tends to undermine possibilities of peaceful co-existence and solidarity among different communities of believers and that secularism has evolved as the means for ensuring the possibility of pluralistic political community among different communities. The key feature of secularism is its ability to safeguard the pluralism of the political community, subject to significant differences as to how that might be achieved in practice.'[278]

[274] Baderin (n 14 above) 84.
[275] Richard J Terrill *World criminal justice system: A comparative servey* Anderson Publishing New York 2013 567.
[276] Baderin (n 14 above) 85.
[277] See Baderin 'A macroscopic analysis of the practice of Muslim states parties to international human rights treaties: Conflict or congruence? (2001) 1 *Human Rights Law Review* 288--293. See also, REDRESS (n 65 above) 41.
[278] A An-Na'im*The synergy and interdependence of human rights, religion and secularism* (2009) 3.

Under the Sudanese law, historically, corporal punishment has been part of the system for centuries. The Mahdi regime[279] imposed a rule of *Shari'a* law that relied on corporal punishments to impose a moral order envisaged. During the colonial era,[280] the enacted legislation relied on corporal punishment which was to be used for the purpose of colonial control.[281] The Nimeri regime[282] replaced the 1925 Criminal Act by the 1974 Criminal Act during, which retained flogging as a punishment.[283] In 1983, the Penal Code of 1974 was amended to add the Islamic punishments of *Hudud* and *Qisas*.[284] The laws resulted in a flood of extreme and arbitrary punishments,[285] including a case where an accountant accused of embezzlement had his hand amputated before his conviction was overturned on appeal.[286] This period climaxed in the execution of Mohamed Taha for the crime of apostasy. This crime was not even in the Penal Code at that time.[287]

The use of corporal punishment through Sudan's history displays that it originally served as a symbolic drive for frightening would-be offenders and opponents in what essentially were dictatorial systems with weak law implementation tools.[288]

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[279] From 1885 to 1899.
[280] From 1899 to 1956.
[281] Criminal Act of 1898, which was amended in 1925.
[282] From 1969 to 1985.
[283] N 65 above, 8.
[284] It includes: amputation of a hand for theft, cross amputation or death for robbery, stoning to death for *Zina* if the person is married or 100 lashes otherwise, 100 lashes and possible imprisonment for 5 years for sodomy and possible death penalty or life imprisonment in case of a third conviction, 100 lashes and imprisonment of up to 10 years for rape, unless it also amounted to adultery or sodomy, it becomes punishable with death, and flogging for drinking or possession of alcohol. Although the Sudan Penal Code of 1898 was based on the then applicable Indian Penal Code, and although India had abolished that punishment since 1865, the British introduced it in the Sudan Code for many offences. Although that Code has been amended and re-enacted several times, that abhorrent punishment remains one of its ugly features. See A Medani 'A legacy of institutionalised repression: Criminal law and justice in Sudan' in L Oettee (ed) *Criminal law reform and transitional justice: Human rights perspectives for Sudan* (2011) 61.
[285] Medani (n 19 above) 5.
[286] A Layish and G Warburg *The reinstatement of Islamic law in Sudan under Numayri: An evaluation of a legal experiment in the light of its historical context, methodology and repercussions* (2002) 75--142. See also, A Abdelsalam & A Medani 'Criminal law reform and human rights in Africa and Muslim countries, with particular reference to Sudan' in L Oette (ed) *Criminal law reform and transitional justice: Human rights perspectives for Sudan* (2011) 46.
[287] N 65 above, 8.
[288] Abdelsalam & Medani (n 286 above) 38--43.

Article 20 of the Constitution of 1998 guaranteed the rights to liberty and life by providing the following: 'Everyone has the right to life and liberty and security of person in accordance with the law. Everyone shall be free and no one shall be held in slavery or servitude or degraded or tortured.'Article 33 of the INC guaranteed the right to prohibition of torture which states that 'no person shall be subjected to torture or to cruel, inhuman or degrading treatment.'Article 33 of the INC prohibits torture and other ill-treatment but omits any mention of punishment. Consistent to the current constitutional exercise in states such as 'in Morocco and Nepal, the right to be free from torture should stipulate a duty to criminalise torture and recognise a specific right to reparation for torture, both of which are absent in Sudan's law.'[289]

Corporal punishment is provided for in the 1991 Criminal Act for crimes subject to *hudud*, *qisas* and *ta'zir* punishments, as well as in numerous other laws, particularly Public Order Acts. However, a closer examination of the law reveals that the crimes for which corporal punishment can be imposed significantly exceed offences subject to *Shari'a* punishments. There are also differences of view in respect of the circumstances in which *Shari'a* should be implemented, with scholars holding that it should be confined to just ideal societies that we do not live in today.[290] The *hudud* system is 'based on the rationale that these offences constitute the most serious crimes and deserve severe punishment because they violate the just order. The imposition of such punishments is subject to strict evidentiary requirements, which differ between, and even within, the Islamic schools of law.'[291]

In 2007, the HRC expressed its concern about the scale of standards applied to punishment in the Sudan's legislation and it considered that 'corporal punishment including flogging and amputation is inhuman and degrading. The state party should abolish all forms of punishment that are in breach of articles 7 and 10 of the

[289] Babikir (n 99 above) 12.
[290] See A An Na'im 'Toward a cross-cultural approach to defining international standards of human rights: The meaning of cruel, inhuman or degrading treatment or punishment' in A An Na'im (ed) *Human rights in cross-cultural perspective: A quest for consensus* University of Philadelphia Press (1992) 34--37.
[291] N 65 above, 20.

Covenant.'[292] The HRC stated that 'flogging, amputation and stoning, which are recognized as penalties for criminal offences in Sudan are not compatible with the ICCPR.'[293] This recommendation was rejected by Sudan in its reaction to the HRC in 2009 stating the following:

> Sudan 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.[294]

However, the statement contradicts section 189 of the CPA which states that '[s]entences of whipping, retribution and death shall publicly be executed, such that they are attended by the first instance court Magistrate, or whoever succeeds him, and a number of attendants.'

Similarly, based on the conclusion that punishment such as amputation and stoning are incompatible with the prohibition against torture, the HRC recommended that 'the imposition of such punishments in Iraq should cease immediately and all laws and decrees for their imposition should be revoked without delay.'[295] The HRC also stated that '[i]rrespective of the nature of the crime that is to be punished or the permissibility of corporal punishment under domestic law, it is the consistent opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the ICCPR.'[296]

The HRC has also remarked on the gendered element of corporal punishment of specific interest in the Sudanese framework. The HRC stated that article 7 may be

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[292] Concluding observations of the HRC: *Sudan* UN Doc.CCPR/SDN/CO/3, 29 August 2007 para 10.
[293] Concluding observations of the HRC: *Sudan* UN Doc. CCPR/C/79/Add.85, 19 November 1997, para 9.
[294] REDRESS, PCLRS & SHRM *Sudan law reform update* November-December 2010 2.
[295] Concluding observations of the HRC: *Iraq* UN Doc. CCPR/C/79/Add.84, 19 November 1997, para 12.
[296] *Malcolm Higginson v Belarus* Communication No. 792/1998, UN Doc. CCPR/C/74/D/792/1998 (2002).University of Minnesota Human Rights Library, http://www1.umn.edu/humanrts/undocs/792-1998.html (accessed 8 April 2014).

violated if corporal punishment is imposed to apply any specific regulation of clothing to be worn by women in public.[297]

Some Muslims states have consistently objected to those criticisms.[298] Sudan, for example, has argued that this was 'an unwarranted interpretation of the international human rights instruments since they excluded from such category all punishments provided for in national legislation.'[299] In its concluding observations on the reports submitted by states parties, the HRC continually articulated concern about the imposition of corporal punishment by state parties in Sudan, reasoning that such practice is irreconcilable with article 7 of ICCPR. In the period 2005-2010, the HRC called on many states to abolish laws allowing for corporal punishment as a judicial sanction.[300]

In the regional human rights system, the European Court was approached with the *Tyrer* case[301] which was referred by the European Commission of Human Rights. The case initiated in a claim against the UK related to a civilian of the UK, who was a dweller of the Isle of Man. After confessing guilty in the local juvenile tribunal to illegal violence causing real physical injury to an elder learner at his school, Mr. Tyrer was punished to three blows of a birch according to section 56 (1) of the Petty Sessions and Summary Jurisdiction Act 1927 (as amended by section 8 of the Summary Jurisdiction Act 1960). Subsequent to a failed appeal, the High Court of Justice of the Isle of Man ordered Mr. Tyrer to be medically inspected on that day to decide whether he was fit to receive the penalty. After waiting in a police station for a substantial time for a physician to arrive, Mr. Tyrer was birched on the same day. The European Court has found that corporal

[297] HRC General Comment No. 28: The equality of rights between men and women (article 3 of the ICCPR) adopted at sixty-eighth session on 29 March 2000 UN Doc. CCPR/C/21/Rev.1/Add.10, para 13.
[298] See M Baderin 'A macroscopic analysis of the practice of Muslim state parties to International human rights treaties: Conflict or congruence?' (2001) 1 *Human Rights Law Review* 265--303.
[299] See UN Doc. E/CN.4/1994/122. See also, Sudan's contentions in that regard before the HRC in UN Doc. CCPR/C/SR. 1628 (1998). Quoted in Baderin (n 14 above) 77.
[300] Including Botswana, Iran, Libya, Tanzania, Sudan & Yemen See (n 65 above) 21.
[301] *Tyrer v* United Kingdom of Great Britain & Northern Ireland (1978) ECHRR, Series A 26, 25 April 1978.

punishment such as 'birching' is a humiliating penalty that infringes the ban against torture and other cruel, inhuman or degrading treatment or punishment.

The Inter-American Court of Human Rights, in the case of *Caesar v Trinidad and Tobago*,[302] held that the sentence of 15 strokes against a male convicted of rape violated article 5 of the Inter-Convention to Prevent and Punish Torture.[303]

The African Commission has specified that the ban of torture, cruel, inhuman, or degrading treatment or punishment is to be construed as broadly as possible to cover the broadest possible range of physical and mental exploitations.[304] The African Commission scrutinised Sudan's compliance with its substantive commitments under the African Charter when considering the state's third periodic report. The African Commission found that corporal punishment was still a provision in the Criminal Act and continued to be applied in practice. It recommended that Sudan 'enact legislation banning the use of corporal punishment and all other inhuman and degrading treatment.'[305]

The highest courts of many African countries have construed constitutional provisions that proscribe torture and other cruel, inhuman or degrading treatment or punishment to implement to all methods of corporal punishments. The Zimbabwe Supreme Court found that 'corporal punishment was inhuman and degrading, and violated the prohibition of torture and degrading punishment in Zimbabwe's Constitution.'[306] Namibia's Supreme Court has found that corporal punishment instituted a practice of

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[302] *Caesar v Trinidad & Tobago* case 12.147, Report No. 88/01, OEA/Ser./L/V/II.114 Doc. 5 rev. (2001)
[303] See *Caesar* case (n 302 above) 292. The Inter-American Convention to Prevent and Punish Torture adopted by the Organisation of American States in 9 December 1985 and entered into force 28 February 1987. It defines torture more expansively than the CAT including 'the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish'.
[304] *Doebbler v Sudan* Communication 236/2000 (2003) Sixteenth Activity Report 2002--2003, Annex VII.
[305] Sudan state party report, 13-27 May 2009, Banjul, The Gambia, consideration of reports submitted by States parties under the terms of art 62 of the African Charter on Human and Peoples' Rights, Concluding observations and recommendations on the Third Periodic Report of *the Republic of Sudan* (2003-2008) 54.
[306] *Stephen Ncube v The State; Brown Tshuma v The State; Innocent Ndhlovu v The State* Zimbabwe Supreme Court Judgment No. 156/87, (SC) Common L Bull(1988) 593.

inhuman or degrading punishment.[307] The South African Constitutional Court held that 'if adult whipping were to be abolished, it would simply be an endorsement by our criminal justice system of a world-wide trend to move away from whipping as a punishment.'[308] The Ugandan Constitutional Court likewise established that corporal punishment (six strokes of the cane) infringed the prohibition of torture and cruel, inhuman or degrading treatment or punishment in Uganda's Constitution.[309]

Religious orders are another justification set forward for corporal punishment. Numerous states with a Muslim majority retain corporal punishment. Under *Shari'a*, such punishment is confined to a restricted ambit of offences only. This means that the corporal punishment does not have to impose to *tazir* crimes, as has been recognised in Pakistan. In addition, there is an ongoing debate on whether the *Shari'a* punishments should be applied literally in present times. Actually, a number of countries with a Muslim mainstream do not have corporal punishment in their laws.

African and UN treaty bodies, in addition to UN Charter mechanisms have been unwavering in their criticism of corporal punishment in Sudan as an abuse of the ban of torture and inhuman, cruel or degrading punishment.[310] They have underlined its discriminatory features in the context of Public Order Acts.[311] However, Sudan has defied these conclusions and recommendations as it has not taken any measures to evaluate the imposition of corporal punishment, especially in the method of flogging.[312]

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[307] *Inre*corporal punishment by organs of the State, Supreme Court of Namibia, 5 April 1991 (SAL 1991(3) 76 NMS SA 14/90) 22--23.
[308] *S v Williams & Others* Constitutional Court of South Africa, 9 June 1995 (CCT20/94) [1995] ZACC 6; 1995 3 SA 632 or 1995 7 BCLR 861 (CC) (9 June 1995) para 12.
[309] *Kyamanywa Simon v Uganda* Constitutional Reference No.10 of 2000, ruling of 14 December 2001.
[310] Concluding observations of the HRC: *Sudan* UN Doc. CCPR/C/SDN/CO/3, 29 August 2007, para 10 and the African Commission, Concluding observations and recommendations on the 4th and 5th periodic report of the *Republic of Sudan* para 40.
[311] Concluding observations of the HRC: *Sudan* UN Doc. CCPR/C/79/Add.85, 19 November 1997, para 22. Concluding observations of the Committee on Economic, Social and Cultural Rights: *Sudan* UN Doc. E/C.12/1/Add.48, 1 September 2000, para 24. See HRC, General Comment 28 (n 297 above) para 13
[312] HRC, Information received from Sudan on the implementation of the concluding observations of the HRC (CCPR/C/SDN/CO/3) UN Doc. CCPR/C/SDN/CO/3/Add.1, 18 December 2009, para 14. N 65 above, 35. HRC, Consideration of third periodic report of the *Sudan* CCPR/C/SDN/3, 12 July 2007, para.11.

On the contrary, Sudan has continually pursued to defend the practice, referring both to its domestic laws and utilitarian opinions.[313] The views specified by Sudan do not pardon it from its commitment to abolish corporal punishments.[314] National laws conflicting with international standards are no excuse.[315] States are obliged to bring their legislation in line with their international commitments. Indeed, Sudan's INC provides in article 27(3) of its Bill of Rights that '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.' However, in article 33 of the INC, the word 'punishment' has been omitted from the prohibition that 'no person shall be subjected to torture or to cruel, inhuman or degrading treatment.' The inconsistency between international treaties and article 33 has not been considered by the Sudanese courts as yet. Nevertheless, it raises questions about Sudan's obligation to fully incorporate treaties provisions into its national laws.

The next part of the chapter will consider specific types of corporal punishment, namely; whipping, amputation and stoning.

2.3.2 Whipping

The punishment of whipping is found in about 20 sections of the Criminal Act of 1991 dealing with common crimes (more than 10 percent of the penal sections). Whipping is provided for as *hudud* punishment for fornication,[316] wrongful accusation of fornication or adultery and drinking of alcohol, and for 18 other offences in the Criminal Act of

[313] HRC, 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, para.14. N 65 above, 35

[314] N 65 above, 35.

[315] HRC General Comment No. 31: 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.

[316] One major impediment of implementing the punishment here is the legal one, under sec 62 of the Evidence Act, 1994, adultery (*Zina*) can be proved by: (i) Confession before the court, unless retracted prior to execution of sentence; (ii) Evidence of 4 just men; (iii) Pregnancy by a woman (not a wife) in case of any doubt; and (iv) *Li'an* i.e. where a wife denies her husband's oath of *li'an*. Medani (n 19 above) 12.

1991.[317] Public order laws provide for whipping as one of the punishments. For instance, the Khartoum Public Order Act permits for the imposition of flogging regarding17 preclusions contained in the Act, including for the failure of men and women to queue separately.[318]

The number of whips is identified in the offences concerned and varies from 20 to 100.[319] The punishment of whipping can be imposed by all courts.[320] The CPA stipulates how the punishment is to be implemented, namely, that it shall be in public and that:

> [a] man shall, generally, be whipped while standing and a woman shall be whipped while sitting and execution shall be made, at such time, and place, as the court may specify. Whipping shall be lump sum, temperate, moderate and non-cracking and non-breaking, distributed, otherwise than the face, head and fatal places, by a moderate whip, and any other similar tool may be used.[321]

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[317] These according to the Criminal Act of 1991 are secs 68 (rioting), 69 (breach of public peace), 78 (intoxication and nuisance), 80 (gambling), 81 (habitual dealing in alcohol),125 (insulting religious beliefs), 146 (adultery), 148 (sodomy), 149 (rape), 151 (gross indecency), 152 (indecent and immoral acts), 153 (materials and displays contrary to public morality), 154 (practicing prostitution), 155 (running places of prostitution), 156 (seduction), 157 (false accusations of unchastity), 160 (insult and abuse), 173 (capital theft where *hudud* is remitted) & 174 (theft).

[318] Sec 20 of the Khartoum Public Order Act of 1998, which provides as follows: 'Every authority requiring citizens to queue must separate between men and women and the public must adhere to this provision'.

[319] For examples, sec 68 of the Criminal Act sets the maximum number of lashes at 20 for the offence of disturbing the peace. Sec 78 makes a Muslim liable for up to 40 lashes for drinking, possessing or dealing in alcohol for first offenders and up to 80 lashes for recidivists. Sec 125 punishes insulting religion with up to 40 lashes. Sec 149 punishes an unmarried person who commits adultery with 100 lashes. Sec 149 provides the same punishment for adultery. Sec 152 prescribes a punishment of up to 40 lashes for indecent acts against public morality. Sec 153 provides the same punishment for acts against public morality. Sec 154 set up to 100 lashes for prostitution and sec 155 provides the same punishment for running a brothel. Sec 155 set up to 28 lashes for insulting a person. Sec 174 provides for a punishment of up to 100 lashes for theft.

[320] According sec 9(1) of the CPA, the General Criminal Court can inflict any whipping determined by law. Sec 10(1), the First Criminal Court if summary trial inflict whipping not exceeding 80 lashes, if not summary, any whipping determined by law. Sec 11(2)(c) the Second Criminal Court if considered suit summarily whipping not exceeding 40 lashes and if not summarily, any whipping determined by law. Sec 12 the Third Criminal Court which considered suit summarily, can inflict whipping not exceeding 40 lashes. Sec 13 the People's Criminal Court can inflict any whipping punishment according to its warrant of establishment.

[321] Secs 197(a) & (b).

A sentence may be suspended where the health condition of the offender does not allow the rest of the sentence to be executed.[322] Moreover, according to the CPA 1991:

> (1) save in *Hudud* offences, no sentence of whipping shall be passed, upon a person, who attained sixty years of age, or a sick person, whose life would be endangered by whipping, or whose sickness would thereby be aggravated
> (2) Where the penalty of whipping is remitted, by reason of age, or sickness, the offender shall be punished with an alternative penalty.[323]

Nevertheless, with the exemption of *hudud* penalties, the law does not oblige the medical evaluation of an individual prior to whipping.

The scope of application for whipping is widened by the fact that numerous of the offences carrying the penalty are ambiguously defined, for instance, breach of a public peace,[324] alcoholism, insult and misuse, and most public order law crimes, predominantly those connecting to indecent behavior. This is problematic because it is irreconcilable with the principle of legality, which indicates that a person should know what conduct is liable for punishment. This equivocal definition provides officials and judges with a tremendously wide discretion that may result in arbitrary law implementation and judicial decision-making. Furthermore, the nature of crimes is such that they are more expected to target certain categories in society, mostly women in

[322] Sec197(c).
[323] Sec 194.
[324] For example, sec 67 of the Act defines 'rioting' as the participation of an assembly of five or more persons which demonstrates force or use thereof, terrorism, violence if the predominant intention is: (i) resisting the enforcement of the law; (ii) committing an offence of criminal mischief or trespass; (iii) exercise of any rights or claim in a way that disturbs peace; and (iv) forcing anyone to commit an unlawful act. In addition, sec 67 states such offence is punishable with up to six months imprisonment or flogging up to 20 lashes; if the accused carries arms or a weapon which threatens life or injury, the punishment may go up to two years or a fine or both. Under sec 69 any persons who disturbs the public or commit an act which may lead to disturbance of public peace and tranquility, may be liable up to one month imprisonment, fine or up to twenty lashes. The foregoing sectionsmust be read in conjunction with the relevant section of the CPA. Furthermore sec 124 of theAct authorises a police officer or prosecutor to order the dispersal of any unlawful assembly or assembly which may commit riot or disturbing the pubic peace. If the assembly disobeys the order, force may be used to do so, provided that firearms may be used with permission of the prosecutor. Sec 127 empowers the Governor (Wali) of a State or Province ruler to order to prevent or restrict any meeting or public assembly which may disturb public order in the streets or public places. See also, Medani (n 19 above) 13.

case of public order crimes for such as 'wearing indecent dress', which makes the law potentially discriminatory.[325]

Public order laws confer the public order police widespread powers. The Public Order Acts are not in line with international standards for many reasons, which include the enforcement of these laws is arbitrary and discriminatory, the exercise of swift trials in violation of defence rights, and the imposition of corporal punishment violate the right to prohibition of cruel, inhuman and degrading punishment.[326] As distinguished by the Independent Expert on Sudan: 'In Khartoum, ongoing violations stemming from the uneven application of public order laws remain a major concern.'[327] The HRC in its General Comment 28 stated that:

> States parties should provide information on any specific regulation of clothing to be worn by women in public. The Committee stresses that such regulations may involve a violation of a number of rights guaranteed by the Covenant, such as: article 26, on non-discrimination; article 7, if corporal punishment is imposed in order to enforce such a regulation; article 9, when failure to comply with the regulation is punished by arrest; article 12, if liberty of movement is subject to

[325] N 65 above 17.

[326] The journalist Lubna Hussein was arrested in July 2009 for wearing an indecent dress. She refused to stand trial and publicly protested against her treatment. Her case generated publicity around the world, casting the spotlight on arbitrary law enforcement and administration of justice in the context of Sudanese public order laws. This may have been crucial in influencing the court's determination of punishment, namely convicting her to payment of a fine instead of the customary whipping. See n 42 above 15--16. On 30 January 2013 the Public Order Court in Kosti, White Nile state, sentenced a female of 19 years of age, and a man of unknown age to 70 lashes under sec 145 (adultery) of the 1991 Sudanese Criminal Act. When she came out of the private home they had entered, they were met by Public Order police. The two were arrested and taken to the police station where they were referred to a doctor, who examined them and found that no sexual activity had taken place. Despite this, they were both charged and found guilty by the Public Order Court. The sentence of 70 lashes was implemented on the same day. See ACJPS & SHRM *Human rights monitor update* January-February 2013.On 5 August 2010, 19 men were reportedly given 30 lashes each for 'dancing in a womanly fashion' (i.e. wearing women's dresses and makeup). BBC News *Cross-dressing men flogged in Sudan for being womanly* 4 August 2010 http://www.bbc.co.uk/news/world-africa-10871494 (accessed on 1 Oct 2011). HRC highlighted that 'on 3 July 2009, the Public Order Police arrested 13 Muslim and non-Muslim women from a privately-owned restaurant and charged them with indecent dressing. Some of the women were allegedly slapped and harassed. A judge in a Public Order Court found most of them guilty and sentenced them to lashing and the payment of fines or, in the alternative, imprisonment. On 18 November 2009, a 16 year old non-Muslim Sudanese girl was sentenced by a Public Order Court to 50 lashes for indecent dressing since she was wearing a skirt and blouse. Mohamed Chande Othman *Report of the independent expert on the situation of human rights in the Sudan* UN Doc.A/HRC/14/41, 26 May 2010, para 29.

[327] Mohamed Chande Othman *Report of the independent expert on the situation of human rights in the Sudan* UN Doc.A/HRC/14/41, 26 May 2010, para 29.

> such a constraint; article 17, which guarantees all persons the right to privacy without arbitrary or unlawful interference; articles 18 and 19, when women are subjected to clothing requirements that are not in keeping with their religion or their right of self-expression; and, lastly, article 27, when the clothing requirements conflict with the culture to which the woman can lay a claim. States parties should provide information on any specific regulation of clothing to be worn by women in public.[328]

These concerns were resonated in 2000 by the Committee on Economic, Social and Cultural Rights accountable for observing the International Covenant on Economic, Social and Cultural Rights, which stated as follows: 'The Committee is also gravely concerned about the occurrence of flagellation or lashing of women for wearing allegedly indecent dress or for being out in the street after dusk, on the basis of the Public Order Act of 1998, which has seriously limited the freedom of movement and of expression of women.'[329] It strongly recommended that 'Sudan reconsider existing legislation, particularly the 1996 Public Order Act, in order to eliminate discrimination against women, thereby ensuring their full enjoyment of human rights in general and economic, social and cultural rights in particular.'[330]

In 2010, the Committee on the Rights of the Child stated its concerns regarding the corporal punishment of children. The CRC Committee noted that the Child Act of 2010 prescribes corporal punishment in schools. The CRC Committee, however, was concerned that corporal punishment, mainly caning and flogging, is extensively practiced in schools, homes, courts and prisons.[331] Taking into account its General Comment No. 8 (2006) on the right of the child to safeguard from corporal punishment and other cruel or degrading practices of punishment, the CRC Committee urges the Sudan to take all the essential actions to terminate the exercise of corporal punishment,

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[328] HRC General Comment No.28 (n 297 above) para.13.
[329] Concluding observations of the Committee on Economic, Social and Cultural Rights: *Sudan* 1 September 2000 UN Doc. E/C.12/1/Add.48, 1 September 2000, para 24.
[330] As above para 34.
[331] Concluding observations of the Committee on the Rights of the Child: *Sudan* Fifty-fifth session 1 September–13 October 2010 Consideration of reports submitted by states parties under article 44 of the CRC. UN Doc. CRC/C/SDN/CO/3–4, 1 October 2010, para 39--40.

and specifically, to unambiguously outlaw corporal punishment in all settings, ensure effectual application of the law and prosecute criminals.[332]

The legality of applying corporal punishment to the extent that it is applied in Sudan has been verified at the international level when a case was brought before the African Commission in the communication of *Doebbler v Sudan.*[333] The case concerned eight students (males and females) who had been punished and sentenced to fines and whippings on the grounds that they had disrupted public order by contravening sections of the Criminal Act of 1991. They were found guilty of not being properly dressed and acting in a way considered being immoral. Each of the students was punished to a fine and received between 25 to 40 lashes.[334] The Commission terminated the debate that the penalty was acceptable as the acts for which it was imposed were crimes under national law. It held as follows:

> There is no right for individuals, and particularly the government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning State sponsored torture under the African Charter and contrary to the very nature of this human rights treaty.[335]

Accordingly, the African Commission held that the punishment had violated the African Charter.[336] The decision in *Doebbler v Sudan* establishes a strong prohibition of corporal punishment under the Charter.[337] Following an evaluation of international norms, it found that the whipping violated article 5 of the African Charter and requested the Government of Sudan to '[i]mmediately amend the Criminal Act of 1991 in conformity with its obligations under the African Charter and other relevant international human rights instruments; abolish the penalty of lashes; and to take appropriate measures to ensure compensation of the victims.'[338]

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[332] As above para 39-–40.
[333] In *Doebbler* case (n 304 above).
[334] N 65 above, 16.
[335] *Doebbler* case (n 304 above) para 42.
[336] Art 5.
[337] N 223 above, 14.
[338] *Doebbler* case (n 304 above) para 34.

Shari'a law imposes the punishment of whipping for three offences only. The INC, in its article 27(3), provides that Sudan is committed to the principles of international human right treaties which Sudan has ratified. The ICCPR, which Sudan has ratified, described corporal punishment as cruel, inhuman and degrading to human dignity. This practice reveals that the HRC rejects the statements made by states, such as by one of the Sudanese delegates in 2007, that 'whipping, for example, were lawful forms of punishment in the Sudan and as such not incompatible with the Covenant.'[339] States may not raise domestic laws to excuse a failure to implement their treaty commitments. The HRC's position was also confirmed in its jurisprudence, particularly in *Osbourne v Jamaica*[340] and *Higginson v Jamaica.*[341] In theses cases, concerning the use of whipping by a tamarind switch as a criminal sanction, the HRC found a violation of article 7 ICCPR.

Moreover, both the HRC responsible for monitoring state compliance with the ICCPR and the African Commission on Human and Peoples' Rights responsible for monitoring state compliance with the African Charter have found that corporal punishment is irreconcilable with the prohibition of torture and inhuman treatment or punishment.[342]

The HRC remains to be concerned by the scheme of trial in the Public Order Courts. Therefore, '[t]raining should be given to judges on appropriate penalties and on procedural safeguards which must be observed. Lashes should be excluded as a punishment, and an appellate procedure should be introduced to review convictions and sentences.'[343]

2.3.3 Amputation and stoning

[339] HRC Consideration of third periodic report of the *Sudan* CCPR/C/SDN/3, 12 July 2007, para 38.
[340] *George Osbourne v Jamaica* Communication No. 759/1997, U.N. Doc. CCPR/C/68/D/759/1997 (2000).
[341] *Higginson v Jamaica* Communication No. 792/1998, U.N. Doc. CCPR/C/74/D/792/1998 (2002).
[342] A Medani 'The draft Social Control Act, 2011, for Khartoum State: Flogging into submission for the public order' November 2011 www.pclrs.org 14 (accessed 29 July 2012).
[343] Concluding observations of the HRC: *Sudan* 19/11/97. CCPR/C/79/Add.85, para 16.

The recognition of corporal punishment (stoning,[344] amputation[345] and cross-amputation[346]) in Sudanese law has been a concern for a long time.[347] According to the Criminal Act of 1991, whoever commits adultery is punishable with stoning to death if he or she married.[348] Procedurally, the punishment can be remitted if the offender retracts his confession, before execution of the penalty, where the offence is proved by confession only or if the witnesses retract their testimony, thereby lessening the *nisab* of such testimony.[349] Pursuant to the Criminal Act, whoever commits the offence of 'capital theft'[350] shall be punished with amputation of the right hand, from the wrist joint.[351] This right shall be remitted pursuant to the Criminal Act.[352] Section 168(1)(b) of the Sudanese Criminal Act provides cross amputation as a penalty for equipped robbery

[344] Sec 146(1)(a) of the Criminal Act of 1991.
[345] Sec 171(1) of the Criminal Act of 1991.
[346] Sec 168(1)(b) of the Criminal Act of 1991.
[347] *Doebbler* case (n 304 above) para 9.
[348] Sec 146(1)(a)
[349] Sec 147.
[350] Sec 170 provides that: '(1) There shall be deemed to commit the offence of capital theft, whoever covertly takes, with the intention of appropriation, any movable property belonging to another; provided that the property shall be taken out of its (*hirz*) and be of a value not less than the (*nisab*). (2) Covertliness includes covertly violating the *hirz* and the seizure of property openly, or forcibly. (3) Property belonging to another includes public property, and property of *wakfs*, and places of worship. (4) *Hirz* means the place where property is kept, or the manner in which the particular property, or the similar types thereof are normally kept, or that of the custom of the people of the country, or the particular profession; and property shall be deemed to be in *hirz* whenever it is guarded. (5) The *Nisab* shall be a Dinar of gold weighing 4.25 grams, or its value in money, according to what the Chief Justice may determine, from time to time, in consultation with the competent bodies. (6) Where a group of people participate in the taking, regard as to the (*nisab*), shall be had to the total of property taken and not to what each of them has individually taken. Value in money, according to what the Chief Justice may determine, from time to time, in consultation with the competent bodies'.
[351] Sec 171(1).
[352] Sec 172 states that: (1) The penalty of *hadd* in capital theft shall be remitted in any of the following cases: (a) where theft has taken place between ascendants and descendants, or between spouses, or relatives of the prohibited degree (*arham*); (b) where the offender is in a case of necessity, and does not take from that property more than what is sufficient to satisfy his need, or the need of his dependents, for the sake of food, or treatment, and not exceeding the (*nisab*); (c) where the offender has, or believes, in good-faith to have a share in stolen property, and such stolen property does not exceed that share with what amounts to the (*nisab*); (d) where the offender has a debt unsatisfied by the victim of the theft and the victim is unwilling to pay, or dilatory and the debt is due, before the theft and the amount of money stolen by the offender is equal to, or more than, his debt, by more than the (*nisab*); (e) where, before being brought for trial, the offender restitutes, to the victim, his alleged stolen property, and declares his repentance, or becomes the owner of the alleged property in question, and in addition to that, he is not previously accused, or convicted of offences against property; (f) where the offender retracts his confession, before the execution of the penalty, and the capital theft has been proved by confession only; (g) where the victim is permitted to enter the (*hirz*); (h) where amputation exposes the life of the offender to danger, or if his left hand is amputated, or paralysed.

when it results in serious harm or encompasses the robbery of property equal to an amount declared by the judiciary.[353] Procedurally, according to the Criminal Act of 1991, this punishment can be remitted if the offender voluntarily abandoned the commission of armed robbery (*Haraba*), and declared his repentance, before he or she is arrested.[354]

Notwithstanding expectations that a *de facto* moratorium had been in process since 2001 on the execution of amputation and cross-amputation, sentences still applied.[355] In reaction to community distress related to the case, Sudan's Deputy Chief Justice is said to have affirmed at a media meeting on 11 March 2013 that 16 cases of amputation had been imposed by the authorities since 2001.[356]

There are many cases where amputation has been used as a punishment in Sudan. For example, *Abdu Ismail Tong* and *Yusuf Yaow Mombai* were convicted of stealing 3 million Sudanese pounds[357] and were punished to amputation of the right hand.[358] In another case, there were two men punished to amputation of their right hands followed by death by hanging by a court in Northern Darfur province after they have been convicted of offences of armed robbery and murder.[359]

[353] Currently set at 1500 Sudanese Pounds (approximately US$ 200).) http://www.cbos.gov.sd/ (accessed 12 July 2013).
[354] Sec 169(1).
[355] By amputating 30 year old Adam Al-Muthna's right hand and left foot by court order in Khartoum. It carried out by Government doctors on 14 February 2013 for an armed robbery conviction under article 167 of the 1991 Sudanese Criminal Act in relation to an armed attack on a truck carrying passengers between North Kordofan and East Darfur ACJPS *Sudan human rights monitor* October 2012--February 2013 18, & ACJPS *Sudan human rights monitor* March-April 2013 10.
[356] ACJPS *Sudan human rights monitor* March-April 2013 10.
[357] Approximately $1160 at that time.
[358] They confessed to the theft in police custody, but denied the crime after the trial, raising concerns that they may have confessed under duress. They were tried by an emergency court in Nyala (South Darfur) without access to lawyers. See Sudan Human Rights Organisation (SHRO) Cairo *Amnesty Action* Public Al Index: AFR 54/001/2002 February 2002.
[359] *Mohamed Adam Yahia Ahmed Suliman Mohamed* Sudan Human Rights Organisation (SHRO) Cairo *Amnesty Urgent Action* Public Al Index: AFR 54/001/2002 February 2002.

Sudanese courts imposed the sentence of stoning in many cases, for examples: a 20 year old woman was penalised to death by stoning for *Zina*,[360] and,[361] a 23 year old woman was sentenced to death by stoning for adultery.[362] The sentence of stoning was imposed after an unfair trial in which she was condemned only on the basis of her confession and she did not have access to a lawyer.[363] One noteworthy case is that of two married women, who were arrested and detained on charges of adultery by the police.[364] A Criminal Court in Gezira State convicted them and sentenced them to death by stoning.[365] Furthermore, Abok Alfa Akok was convicted of adultery and sentenced to death by stoning by the Criminal Court in Nyala (State of South Darfur). The Court of Appeal repealed the death penalty on the premises that as a non-Muslim, she should not be subjected to death of stoning. However, the Criminal Court re-sentenced her to 75 whips, a penalty which was executed immediately.[366]

The Government of Sudan stated in its reply to the HRC in 2009: '[t]he State does not impose a penalty of amputation under any circumstances.'[367] However, in reality the imposition of amputation as punishment in Sudan continued.

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[360] *Intisar Sharif Abdallah*, 0n 13 May 2012. In the course of the trial she had no legal representation and she was found guilty according to her statements taken after being beaten by her father. She was psychologically distressed and she did not understand the nature of the oath. Although she pleaded not guilty, she was forced to retract at another hearing, apparently after being beaten by her father. Her statement of culpability was based only on the confession extorted. During the trial *Intisar Sharif Abdallah* neither had the right to counsel nor an interpreter although she could not understand Arabic, which is not her mother tongue. Her parents filed an appeal with the Court of Appeal, which dropped the charges on 3 July 2012 and released her. The case was retried and the charges dropped on 3 July 2012 and she was released. *Amnesty International Public statement: Sudan: end stoning, reform the criminal law*AI Index: AFR 54/035/2012 on 30 July 2012.

[361] The case of *Laila Ibrahim Issa Jamool* (2012).

[362] On 10 July 2012 in Khartoum under sec 146 of the Criminal Act of 1991.

[363] During the trial the judge failed to appoint legal counsel for her, in contradiction of sec 135 of the CPA.

[364] In Gezira State in June 2006. See 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* issued by the Office of the High Commissioner for Human Rights on 28 November 2010 31--32.

[365] In March 2007, the women's convictions were eventually overturned by the Gezira State Appeal Court. On 7 April 2007, the two women were reportedly released from prison, after having spent more than nine months in prison. See 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* issued by the Office of the High Commissioner for Human Rights on 28 November 2010 31--32.

[366] Amnesty International *Amnesty urgent action* 20 February 2002 Al Index: AFR 54/005/2002.

[367] N 65 above 35.

3. Right to Reparation

The ICCPR says the following on the right to reparation:

> When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributed to him.[368]

The HRC in its General Comment 32 stated that compensation pursuant to article 14(6) of the ICCPR shall be paid to a convicted person by the final sentence and have undergone punishment as a result of such conviction.[369] If the conviction is reversed or pardoned on the ground that a newly revealed fact demonstrates convincingly that there has been a miscarriage of justice, compensation should be paid to a convicted person.[370]

Further, the HRC urges all state parties to comply with its obligation under article 14(6) by enacting legislation to guarantee compensation as required by article 14(6) of the ICCPR and that the compensation should be made within a reasonable period.[371]

Nevertheless, this guarantee does not apply if it is verified that the non-disclosure of such a substantial fact in good time is entirely or relatively attributable to the accused.In such cases, the burden of proof rests on the State. Moreover, no compensation is payable in many instances including, if the sentence is set aside upon appeal,[372] or before the sentence becomes final,[373] or by an amnesty that is humanitarian or optional

[368] Art 14(6).
[369] See HRC General Comment 32 (n 37 above) para 52.
[370] *Uebergang v Australia* Communications No. 963/2001, para 4.2; *Irving v Australia* Communication No. 880/1999, para 8.3; *W.J.H. v Netherlands* Communication No. 408/1990, para 6.3.
[371] See HRC General Comment 32 (n 37 above) para 52.
[372] As above para 53.
[373] *Irving v Australia*, Communications No. 880/1999; para 8.4; *Wilson v Philippines* Communication No. 868/1999, para 6.6.

in nature, or driven by attentions of equity, or not implying that there has been a miscarriage of justice.[374]

Furthermore, the UN 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 precisely afford that States must give victims real access to justice and suitable and sufficient reparation. Sufficient reparation must be effective, speedy and proportionate to the seriousness of the violation and consequential damage.[375]

The African Charter does not include a separate express right to reparationThis is justified in view of the weak African economies.[376] However, the Commission has the authority to identify or endorse reparation, where it finds that the state party has violated the African Charter. In the case of *Embga Mekongo Louis*,[377] the African Commission decided that the applicant is entitled to compensation. However, the African Commission was unable to determine the amount of compensation and recommended that it should be determined in terms of the laws governing Cameroon.

The African Commission adopted instruments which provide for a right to reparation, for example, the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa obliges State parties to create mechanisms for reparation.[378]

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[374] *Muhonen v Finland* Communication No. 89/1981, para 11.2.
[375] UN General Assembly *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* Adopted and proclaimed by General Assembly resolution 21 March 2006, A/RES/60/147. The principles also clarify the different forms of reparation, which include: (1) restitution -– measures to restore the victim to his or her original situation, without exposing the victim to a risk of further harm; (2) compensation for economically assessable damage from physical or mental harm; (3) rehabilitation through, for instance, medical/psychological care and social services; (4) measures of satisfaction, which may include a full investigation and prosecution of those responsible, a judicial decision restoring the dignity and reputation of the victim(s), an apology by the State and acceptance of responsibility; and (5) guarantees of non-repetition, that could include law reform or reform of police or military services.
[376] E Anakumah *African Commission on Human and Peoples' Rights: Practice and procedure* (1996) 132.
[377] *Embaga Mekongo v Cameroon* (2000) AHRLR 56 (ACHPR 1995).
[378] Arts 4 & 25.

Further, the Robben Island Guidelines provides that State parties have an obligation to offer reparation.[379]

The African Commission adopted the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, which provides as follows:

> a) Everyone has the right to an effective remedy by competent national tribunals for acts violating the rights granted by the constitution, by law or by the Charter, notwithstanding that the acts were committed by persons in an official capacity. b) The right to an effective remedy includes: (i) access to justice; (ii) reparation for the harm suffered; (iii) access to the factual information concerning the violations. c) Every State has an obligation to ensure that: (i) any person whose rights have been violated, including by persons acting in an official capacity, has an effective remedy by a competent judicial body; (ii) any person claiming a right to remedy shall have such a right determined by competent judicial, administrative or legislative authorities; (iii) any remedy granted shall be enforced by competent authorities; (iv) any state body against which a judicial order or other remedy has been granted shall comply fully with such an order or remedy. d) The granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy.[380]

The African Commission's jurisprudence regarding the right to reparation is rather varying and to date does not appear to take into account the several developments in terms of international law. Where it does rule on reparation, it is mainly restricted to recommending a State to pay compensation, while leaving it up to the State to decide on the amount. Only in very few cases has the African Commission gone further and recommended, for instance, the commencement of an independent enquiry to clarify the fate of disappeared persons, the restitution of property and a change of legislation to prevent future violations of the ACHPR.[381] The African Commission has confirmed that

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[379] The Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, also known as the Robben Island Guidelines, were adopted by the African Commission on Human and People's Rights on 23 October 2002.

[380] Art 6.

[381] *Malawi African Association & Others v Mauritania* Communications 54/91, 61/91, 96/93, 98/93, 164/97-196/97, 210/98.

'the obligation to provide reparation to victims continues to exist even after a change of government, in regard to violations committed by prior governments.'[382]

The lack of a clear mechanism to enforce the African Commission's decisions is another challenge in providing reparation. In addition, the length of proceedings before the African Commission is a barrier to reparation by impeding access to justice, with some cases taking up to 10 years for a decision to be handed down.[383] However, The African Court could provide an alternative opportunity to obtain reparation in cases where the State has recognised the competence of the Court and allowed individual communication under rule 34(4) of the Court's Rules of Procedure.

A sub-regional mechanism in Africa such as the ECOWAS Court of Justice, dealt with the right to reparation but not as post-trial rights.[384] In the case of *Mme Hadijatou Mani Koraou*,[385] the ECOWAS Court held that the government of Niger had violated its international obligations to prohibit slavery.[386] However, 'in the few cases concerning article 5 of the ACHPR violations that the ECOWAS Court has heard to date, it appears to limit its reparation mandate to awarding compensation, and does not take into consideration other forms of reparation.'[387]

Islamic law guarantees the right to reparation of an individual who suffers harm or is penalised in the course of judicial fault or miscarriage of justice.[388] The jurists depend on an event in which Ali ibn Abi Talib ordered that the second Caliph Omer Ibn Al-Khatab should disburse compensation to a lady who suffered a miscarriage as a

[382] REDRESS, SHRM, ACJPS & FIDH *Alternative report* 109th Session of the Human Rights Committee Pre-Sessional Meeting on Sudan 7.
[383] See n 382 above, p 8.
[384] *Community Court of Justice, ECOWAS, Musa Saidy khan v Republic of The Gambia* Judgment No.ECW/CCJ/JUD/08/10, 16 December 2010 http://bit.ly/11KL3S1. ECOWAS Court ordered the government of Gambia to pay damages up to $200,000 USD in a case involving torture and arbitrary detention.
[385] *Mme Hadijatou Mani Koraou v The Republic of Niger* 27 October 2008, ECW/CCJ/JUD/06/08; for further information see H Duffy, 'Hadijatou Mani Koroua v Niger: Slavery Unveiled by the ECOWAS Court' in Human Rights Law Review, 2008.
[386] Awarded the equivalent of $19,000 USD to the victim, with which Niger complied.
[387] REDRESS (n 382 above) 8.
[388] Baderin (n 14 above) 110.

consequence of the Caliph's commands.[389] However, there is a variance of views amid the jurists as to whether or not the compensation would be funded from public resources or the private moneys of the officer or judge accountable for such fault or failure of justice.[390]

The Sudanese Constitution of 1998 provides as follows: 'All persons have a right to an effective remedy and no person may be subjected to criminal proceedings or deprived of the right to bring a claim at law, except in accordance with law.'[391] The Bill of Rights of the INC provides that '[t]he right to litigation shall be guaranteed for all persons; no person shall be denied the right to resort to justice.'[392] However, the Constitutional Court has failed to act as a custodian of rights and remedies. In practice, there are few cases which have resulted in compensation or other methods of reparation being granted to victims of torture and other grave human rights abuses.

One of the violations of the right to reparation is the amendment to the Sudanese Civil Procedure Act 1983, which was passed by means of a provisional order.[393] The order has modified section 243 of the Act to exempt the government from subjection to the implementation of civil sentence orders resulting from matters against state organs by methods of attachment and auctioning of property, and incarceration of individuals to fulfill the sentence debts.[394] In security laws, the remedies provided do not conform to the demands of protection of the right to a good administration of justice and right to reparation.[395]

In Sudan, there are various factors curtailing the right to reparation. These include immunities which serve as a main obstacle to claiming damages against government

[389] As above.
[390] As above.
[391] Art 31.
[392] Art 35 of the INC.
[393] In March 2004.
[394] A Khalil 'Guarantees for protection of human rights in national and international' unpublished LLM thesis, University of Khartoum (2004) 60.
[395] REDRESS, PCLRS & SORD *Security for all: Reforming Sudan's national security services* (2009) 5.

officials,[396] non-inclusion of serious crimes such as torture as defined in international law as a criminal offence, a lack of political will to prosecute such violations and to provide reparation to victims, particularly with regards to crimes committed by State agents, and a lack of enforcement of judicial decisions.

The HRC in its concluding observations on Sudan (2007) regarding the right to reparation stated as follows:

> The State party should: (a) 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; (b) Provide the human and financial resources required for the efficient functioning of the Sudanese legal system, particularly the special courts and tribunals established to try crimes committed in Sudan.[397]

The HRC also specified that the State party should guarantee that its legislation should make provision of the rights recognised in the ICCPR. It should in particular guarantee the right to reparation. The HRC expressed its concern to the awareness of the ICCPR to law enforcement personnel.[398] In addition to the ability to safeguard, it must ensure that victims of grave violations of human rights are assured appropriate reparation.[399]

To guarantee this right in Sudan, Sudanese citizens should, therefore, be made aware of the process and mechanisms under Sudanese domestic law for obtaining such remedies. The judiciary should base its decisions upon international human rights principles pursuant to article 27(3) of the INC. The international human rights treaties that Sudan has ratified require that local avenues of redress be exhausted before individuals can properly lodge a complaint with international treaty bodies.[400]

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[396] See chapter 2, 55--57 & chapter 4, 133--137.
[397] Concluding observations of the HRC: *Sudan* (2007) CCPR/C/SDN/CO/3/CRP.1 para 11.
[398] As above, para 8.
[399] As above, para 9.
[400] D Shelton *Remedies in international human rights law* (2008) 292.

There is a clear need for legislation to be introduced specifically providing for the right to reparation as a post-trial right and in instances of human rights violations. The lack of such legislation is a substantial gap in the national legal framework on international crimes, as victims are not protected more than any other party to the proceedings including post-trial proceedings,[401] Such legislation would specify the cases or crimes that subject to reparation amenable to the jurisdiction of tribal elders.[402]

4. Conclusion

It is evident from the analysis above that a number of aspects of Sudanese law are incompatible with international standards of post-trial rights.

Concerning the right to appeal as a post-trial right, there is no specific provision in the Bill of Rights to guarantee the right to appeal. It is obvious from the CPA of 1991 that the right to appeal is not upheld in Sudanese law as it is in international human rights law. A period of 15 days to lodge an appeal which starts from the day judgment is pronounced, presents a significant hurdle where sentence is passed in *absentia,* since a delay in apprising the person of the conviction deprives such person of an opportunity to prepare an appeal, and therefore, the guaranteed right to prepare an appeal is violated. In addition, the appeal court is not bound by law to schedule an appeal hearing within a specific time limit.

Some laws are clearly at variance or even directly in conflict with the CPA regarding the right to appeal. The Anti-Terrorism Act enables the Chief Justice to establish a 'Special Court of Appeal', in violation of the provisions of the CPA, under which the Court of Appeal has jurisdiction. The Special Court of Appeal is authorised to confirm the death penalty and life imprisonment. This is a violation of the CPA, which gives such powers exclusively to the Supreme Court. The appeal under the Anti-Terrorism Act according to

[401] REDRESS *Access to justice for victims of systematic crimes in Africa: Challenges and opportunities* Kololi, the Gambia: 13-14 April 2012 summary of proceedings 5 April 2013 10.
[402] See Prof Michelo Hansungule (The supervisor) chapter 2 p. 65 footnote 200.

the regulations issued under the same Act has been reduced to 7 days in conflict with the CPA. Furthermore, the same Act gives the Chief Justice, in consultation with the Minister of Justice, the power of issuance of Rules and Measures. Another factor that erodes the right to appeal is the lack of formal justice systems in some areas. The traditional courts do not have an obvious structure to safeguard the right to appeal.

Regarding the minimum standards of the right to appeal according to international standards, the right to a fair and public trial must be observed while appeal proceedings are not properly implemented under Sudanese law. The appeal should be heard by a different judge. One of the problematic provisions in the CPA is section 188(A), which gives judges who already decided on a case to sit and review their own decision, thereby violating the right to appeal and contradicting international standards. Other rights should be provided during the appeal such as legal aid.

As explained, the rule that the death penalty can only be imposed in accordance with the law does not provide sufficient safeguards. Additionally, Sudan's courts have imposed the death penalty in several instances where the defendants did not provide sufficient safeguards according to article 14 of the ICCPR.

It is obvious that the exception of *hudud* and *qissas* stressed in terms of article 27(2) of the Criminal Act of 1991 means that these *Shari'a* sanctions have to be executed irrespective of age. The Criminal Act, therefore, allows the imposition of the death penalty on persons who are below the age of 18 years, which is in contravention of international standards.

It is submitted that the elimination of the death penalty or corporal punishment, without infringing upon *Shari'a* law, is quite feasible in respect of *ta'zir* crimes.It is submitted that the conflict may lie between *Shari'a* and international standards which prohibit the death penalty. This could be addressed indirectly through legal procedural safeguards available within Islamic law.

The African Commission, the HRC, other UN treaty bodies, as well as UN Charter mechanisms similarly condemn the imposition of corporal punishment in Sudan as a violation of the prohibition of torture and inhuman, cruel or degrading punishment. Further, the HRC has also commented on the gender dimension of corporal punishment in Sudan.

The INC prohibits torture and other ill-treatment, but omits any mention of punishment. Corporal punishment is incompatible with article 27(3) of the INC and international standards that are binding on Sudan

The African Commission found that in meting out corporal punishment, Sudan had violated article 5 of the African Charter. It found that the punishment of whipping violated article 5 of the African Charter and requested the Government of Sudan to amend the Criminal Act of 1991 to align itself with the African Charter. However, the CPA has not been amended to comply with the African Charter in this respect.

It is obvious that the scope of imposition of whipping is broadened by the vague definition of punitive measures prescribed for many crimes. There are many ambiguously worded crimes which provide police officers with significant scope and authority in deciding whether a person is suspected of having breached the law. Further, despite the declaration of a *de facto* moratorium on amputations and stoning in Sudan sentences, in some instances amputations are still being reported.

Sudan has comprehensively ignored its obligation to uphold the right to sue and secure reparation in criminal matters. It is submitted that there is a need for legislation to be introduced specifically providing for the rights to reparation.

Chapter 6

Conclusions and recommendations

Based on the discussions undertaken in substantive chapters, this chapter consists of the conclusion, recommendations and suggestions for further research. The conclusion contains an introduction, and parts are dealing with the sources of the right to a fair trial (constitutional development, legislation, *shari'a* law, custom, international law and domestication of international law), pre-trial rights, trial rights, post-trial rights and makes some concluding remarks. The recommendations include legal reform, institutional reform and identify avenues for further research.

1. Conclusions

1.1 Introduction

The main research question in this study focussed on the discrepancy between existing standards of the right to a fair trial under Sudanese law compared to the right to a fair trial in terms of international standards. The thesis has examined the work emanating from the international level, such as the ICCPR, ACHPR, HRC decisions, General Comments, and other jurisprudence. All of these considerations have been juxtaposed against Sudan's laws, to determine the extent to which the internationally recognised right to a fair trial has been upheld in Sudan.

The constitutional developments in Sudan together with various pieces of legislation have been analysed to determine how conducive the legal climate is to preserving the right to a fair trial in Sudan. The role of the judiciary, in particular, has been explored to evaluate pre-trail rights, trial rights and post-trial rights in Sudan. Islamic and international human rights law are compared, with specific reference to fair trial rights, in order to establish guidelines for the future development of Islamic law in line with international human rights law.

1.2 Sources of the right to a fair trial

1.2.1 Constitutional development of the right to a fair trial

As observed in chapter two, the successive Constitutions in Sudan have been the main reference source in respect of fair trial rights in Sudan, albeit often displaying breaches rather than observances to this right. For example, in 1966, the Supreme Court found that amendments made by the Parliament to the Constitution to exclude members of the Communist Party from Parliament were unconstitutional. However, the government did not abide with the Court's judgment. The 1973 Constitution included most international standards on fair trial rights, but the military regime ruling the country at that time chose to ignore these provisions. The Transitional Constitution of 1985 included some international standards concerning fair trial rights, but this Constitution was repealed in 1989 after a military *coup*. Once more, the Constitution of 1998 included some internationally recognised fair trial rights. The executive influenced the development of the 1998 Constitution, for example, the Constitutional Court has decided that the declaration of emergency made by the President be constitutional even though it was not submitted to the Parliament within 15 days, in violation of the 1998 Constitution. Therefore, it can be concluded that during the constitutional developments, fair trial rights in Sudan were largely breached in different periods.

To support the finding that constitutional developments in Sudan have not dealt objectively with fair trial rights is found in the latest Constitution (INC) which does not measure up to Sudan's international obligations. According to article 27(3) of the INC, the fair trial rights provided by the ICCPR and the ACHPR became part of Sudan's Bill of Rights. However, the Constitutional Court justice[1] in an interpretation of article 27(3) of the INC held that the whole Bill of Rights is not part of the Constitution and defined it as only a covenant among the Sudanese people and between them and their

[1] Justice Abdalla A Abdalla now President of the Constitutional Court.

governments at different level, while the Constitution is defined as a set of legal rules, and, therefore, the Bill of Rights is not the Constitution.[2]

Previous chapters have revealed that the interpretation of Sudan's Bill of Rights must be aligned with international standards. Article 27(4) of the Constitution requires every court to give a reasonable interpretation of the law that is consistent with international law, and that takes precedence over alternative interpretations that are inconsistent with international law. Such an interpretation of the Bill of Rights in my view is in line with the best advantage of democratic values (for example; *liberté, égalité and fraternité*) proclaimed by the French Revolution, particularly as laid down in international law and foreign law.

1.2.2 Legislation

The analysis in the previous chapters reveals that much of Sudan's legislation is fraught with shortcomings concerning fair trial rights and is irreconcilable or even in direct conflict with international standards. The most pertinent examples of these shortcomings are found in the CPA, the Criminal Act of 1991 and the Evidence Act of 1994.

The CPA has failed to recognise a number of international standards. For example, the CPA does not fully guarantee the right against arbitrary detention, the right to *habeas corpus,* the right to silence, the right to legal aid, and the right to compensation for arbitrary arrest. In addition, the CPA allows for the existence of special courts, confers upon Mayors and Governors judicial authorities, permits plea bargaining contradicting the right not to be compelled to testify against oneself or confess guilt, grants the Minister of Justice power to stay a criminal suit, and provides a court the authority to veto the choice of counsel of defendant.

[2] As he interpreted art 27(1) of the INC in *Alhaj Yousif A. Makki v Izzeldin Ahmed M. Alhassan and Sudan Government* Constitutional Case No. 6/2006, (2011) CCLJR 245-246.

The Criminal Act of 1991 also contains some provisions affecting the right to a fair trial in Sudan, including allowing for the punishment of whipping, stoning and amputation, and the definition of some crimes that are not in line with the international law definitions including torture, genocide, war crimes, and crimes against humanity. The Criminal Act of 1991 further contains vaguely worded crimes such as 'indecent moral acts' and 'waging war against the state.' According to the Criminal Act, rape is deemed to be committed by way of adultery. Evidence of adultery requires four male witnesses, making it difficult to prove where a woman alleges rape. This places a woman at risk of facing prosecution for false accusation if she did not prove rape.

The study identified the obstacles that may curtail prosecutions and prevent Sudanese courts from charging certain acts as international crimes including the definition of some of these crimes that are not in line with their definition in international law.[3] In addition, the Criminal Act does not cover some war crimes.[4] Pursuant to the principle of retrospectivity, crimes committed before the amendment of the Criminal Act in 2009 cannot be prosecuted as international crimes. This is problematic because the definitions of some domestic crimes are weak and do not amount to the grave penalties that a war-related brutality should require.[5]

1.2.3 *Shari'a* law

A major legal source dealing with fair trial issues in Sudan is found in *Shari'a* law. However, many scholars have criticised the implementation of Islamic law without criticising Islamic law itself. The main principle in Islam is that nothing is unlawful unless it is expressly forbidden by law. However, the Islamic law in Sudan has not been properly implemented and consequently its principles are misused by implementing the rigid and traditional interpretation of some of its provisions. The selective and rigid

[3] Genocide under Sudanese law must be committed through murder and in a context of widespread and systematic attack.
[4] Such as sexual slavery that is criminalised under international law.
[5] See S Horvitz *Sudan: Interaction between international and national judicial responses to mass atrocities in Darfur* (2013) 20.

implementation of provisions of Islamic law has resulted in contradiction of generally accepted international standards of fair trial rights such as apostasy, stoning, amputation, and discrimination against women particularly in testimony. What the study establishes is that a more progressive interpretation of Islamic law may resolve the current contradictions with international human rights law. The progressive and positive interpretation of Islamic law allows for a single female witness. In addition, in respect of non-*hudud* crimes, the state has an option to impose less severe penalties, and banning non-*hudud* punishment that infringes the international standards. Further, in respect of *hudud* punishment the contradiction between *Shari'a* law and international human rights law may yet be addressed indirectly through procedural methods. Furthermore, modern scholars of Islamic law found apostasy simpliciter and not as an offence, they describe apostasy in terms of mutiny against the state by taking weapons versus Islamic state and not only converting from Islam to another religion.

1.2.4. Custom

Custom as source of law in Sudan has been criticized in many ways; for the poor treatment of women and children, the customary law in Sudan is not found in written form, the unwritten form may lead to conflict between the customary law and the Criminal Law and its procedure. Moreover, the customary law is confronted from several ways, mostly by legislative law, *Shari'a* law, and International human rights law. Procedures to be followed according to custom does not comply with the fair trial rights enshrined in international human rights law and the INC.

1.2.5 International human rights law

It must be considered that although Sudan ratified the ICCPR and the ACHPR in 1986, many international human rights instruments have yet to be ratified by the Sudanese government, including CEDAW and the Protocol on Women's Rights in Africa (2003),

which guarantees fair trial rights for women.[6] Another three important treaties yet to be ratified by Sudan are CAT, as well as the First Protocol and Second Protocol to the ICCPR. Moreover, Sudan has yet to ratify the Protocol Establishing the African Court on Human and Peoples' Rights (1998). The key principles in all these instruments ought to form part of Sudan's Constitution and laws in general in order that an adequate protective bulwark can be established to serve the observance of human rights.[7] In addition, the study concludes that many factors sustain the incompatibility with international standards, including religion, lack of political will and the unsettled status of domestication of international law.

1.2.6 Domestication of international standards

The study identified various challenges to the effective domestication of international human rights standards into the national legal system, despite article 27(3) of the INC which reveals a monist approach to international law in Sudan. One factor that curtails the domestication of international human rights law in Sudan is a different interpretation of article 27(3). The Constitutional Court in the *Nagmeldin Gasmelseed v Government of Sudan and the relatives of Abdelrahman Ali* case[8] decided that article 27(3) made human rights treaties intrinsic part of the national law, and that treaty provisions should prevail over national law. According to this conclusion, Sudan is a monist country. In contrast, the Constitutional Court in the case of *Alhaj Yousif A. Makki v Izzeldin Ahmed M. Alhassan and Sudan Government*[9] concluded that Sudan is a dualist country pursuant to article 27(4) of the INC. This approach is supported by the current practice of the Constitutional Court, which unfortunately, reveals that the Constitutional Court has been unsuccessful in protecting the constitutional human rights of the Sudanese people. The unclear nature of international human rights treaties to which Sudan is a state party is affecting the administration of justice. This lack of clarity evidenced in the jurisprudence of the courts has been marked by its limited reference to binding

[6] See chapter 2 p 67 footnote 208.
[7] See chapter 2 of this thesis, pp 66--68 & 71--76.
[8] *Nagmeldin Gasmelseed v. Government of Sudan and the relatives of Abdelrahman Ali* MD/GD/18/2005.
[9] *Alhaj Yousif A. Makki* case (n 2 above) 245--246.

international standards. In addition, the lack of clarity raises and increases serious problems in practice in terms of real application by law enforcement officials in addition to courts. This has been principally the case where an inconsistency arises between statutory law including *Shari'a* and human rights standards. The Constitutional Court in the case of *Alhaj Yousif A. Makki v Izzeldin Ahmed M. Alhassan and Sudan Government* concluded that in the case of conflict between international law and Islamic law, Islamic law prevails because the international law is a 'general law' and the Islamic law is a 'specific law.' According to this view, Islamic law is the foundation of the INC in accordance with article 5(1) of the INC. Further, international human rights law does not apply automatically in domestic courts if it contradicts Islamic law. This unclarity should be resolved by legislature or a judicial approach clarifying the status of international human rights law when it contradicts the national law and *Shari'a* law. The Chief Justice should issue guidelines or policies providing directions on the implementation of international human rights at the domestic level.

1.3 Pre-trial rights

As observed in chapter three, the study reveals gaps between Sudanese observance of human rights and international standards laid down and endorsed (for example, the principle to be presumed innocent). Even though *Shari'a* law guarantees rights such as the presumption of innocence, what the study reveals is that Sudanese law is not fully compliant with *Shari'a* principles.[10]

Conditions of detainees in Sudan are incompatible with international and regional standards. For example, Sudanese law does not explicitly recognise the prohibition of arbitrary arrest and detention. The Office of the High Commissioner for Human Rights has repeatedly reported on cases of arbitrary arrest and detention documented by United Nations human rights officers in Sudan; the right to be brought promptly before a competent judicial authority; and the detention duration before bringing detained

[10] See chapter 3 of this thesis, pp 98--101.

persons before competent judicial authorities. In practice, many detained persons are detained in unrecognised places for detention. The system of judicial oversight through police custody and its duration in cases of detention of individuals by law enforcement agents for political offences are not satisfactory in terms of global and regional standards. Further, there is no provision under the CPA for the right to a lawyer and right to an interpreter in the pre-trial stage. Furthermore, the right to compensation for illegal detention is not fully adhered to as guaranteed in terms of international standards.

The right of not to be compelled to testify against oneself or confess guilt is not fully guaranteed in Sudanese law. For example, evidence obtained by unlawful means should not be disallowed for that reason alone.[11] The CPA provision regulating the plea bargaining and tender of pardon, contradicts *Shari'a* law and international standards. Further, the right to silence is not guaranteed in Sudanese law, and the CPA punishes an accused person when he or she refuses to answer the question posed by the investigator.[12]

With respect to bail decisions, there are no explicit criteria to be considered to establish the grounds for justifications of rejection of release on bail. According to the CPA, a detained person or his or her lawyer may not be present when the renewal or extension of detention is decided, which means that the decision is made in the absence of the detainee.

Impediments are imposed on pre-trial rights in the form of legislative structures (for example, as embodied in the Security Act of 2009, the Anti-Terrorism Act of 2001, the Emergency and Public Safety Act of 1997, and Khartoum Public Order Act of 1998).[13]

Pre-trial rights are poorly protected in Sudan. Many laws need reforms. Much practice needs to be revised and changed to be on the same level as international standards.

[11] See chapter 3 of this thesis, pp 111--114.
[12] See chapter 3 of this thesis, p 115--116.
[13] See chapter 3 of this thesis, pp 91--98.

The CPA and other Sudanese statutes should be amended to fill the gaps between Sudanese law and international standards.

1.4 Trial rights

As observed in chapter four, in Sudan access to courts is barred by impediments, including current statutory provisions. The HRC, the African Commission, various UN bodies, the AU High-Level Panel on Darfur and others have called on Sudan to eliminate immunities. In addition, lack of awareness among rights holders is an impediment to the realisation of the rights. In addition, some serious crimes are not included in the Criminal Act of 1991 and definitions of some crimes are not in line with international standards and definitions. The accessibility of an effective constitutional remedy in Sudan is blocked by major obstacles including narrow *locus standi*, fees, qualification of lawyers, remoteness and delays.[14]

The right to legal aid in Sudan is infringed by various impediments such as legal restrictions which confine legal aid to the trial stage (excludes the pre-trial stage). Legal aid is also only provided for serious crimes and has to be requested by the beneficiary, thus, prejudices many who are illiterate. In addition, legal aid is provided by the Ministry of Justice, which is an institution supervised by the executive arm of government and also represents the state in cases where the state is party to a suit, thus, eroding the principle *nemo judex in sua causa* (don't judge your own case).[15]

The Sudanese legal system is peppered with legislation that violates the principle of equality before the courts by providing a selective impunity.[16] The system of special and military courts is especially vexatious in this regard, given the unequal treatment meted out by them. This is apart from the facts that the courts are essentially extrajudicial in

[14] See chapter 4 of this thesis, pp 141--144.
[15] See chapter 4 of this thesis, pp 149--155.
[16] See for example, the Armed Forces Act 2007, the Police Act 2008, & the Security Forces Act 2010.

nature. Another critical lacuna under Sudanese law is its failure to protect victims and witnesses adequately.

Sudanese law permits the trial of persons in *camera*, contrary to the express provisions of the ICCPR. In addition, detainees could be detained for up to four and half months at the pre-trial stage, which constitutes undue delay in terms of international standards relating to the administration of justice. Further, the CPA provides for summary trials that do not respect the full rights of defence and fair hearing. It follows naturally in light of these facts that the summary trials cannot offer adequate protection for the rights of the defence. In addition, the CPA allows for trial in *absentia* without fully guaranteeing the fair trial rights as stipulated in article 14(3)(d) of the ICCPR.

In Sudan, the accused cannot appoint a defence counsel unless the court approves. The imposition of such a restriction erodes the accused's right to conduct a defence to best advantage without extraneous interference.[17]

It is submitted that access to competent, independent and impartial courts in Sudan is severely circumscribed by many impediments, such as the resistance or refusal of the executive to implement court decisions, interference by the executive in the administration of justice, the special courts preventing public scrutiny of the police and military establishments, composition of revision circles, tenure of Constitutional Court bench, specific laws eroding the independence of the judiciary and gender discrimination in awarding employment.[18]

1.5 Post-trial rights

As observed in chapter five, some post-trial rights under Sudanese law are irreconcilable with international standards.

[17] See chapter 4 of this thesis, pp 185--188.
[18] See chapter 4 of this thesis, pp 194--210.

For example, concerning the right to appeal as a post-trial right, no specific provision exists in the Bill of Rights to guarantee the right to appeal. It is obvious from the CPA that some standards of the right to appeal is not upheld in Sudanese law as it is in international human rights law. Further, the period of 15 days for appeal which starts from the day judgment pronounced, would present a significant hurdle where sentence is passed in *absentia* since delay in apprising the person of their conviction will deprive him or her of an opportunity to prepare an appeal, and therefore, the guaranteed right to lodge an appeal is violated. It must also be considered that the appeal court is not bound by law to schedule an appeal hearing within a specific time limit.[19]

Some laws are clearly at variance or in direct conflict with the CPA regarding the right to appeal. The Anti-Terrorism Act enables the Chief Justice to establish a 'Special Court of Appeal', in violation of the provisions of the CPA, under which the Court of Appeal has jurisdiction. The Special Court of Appeal is authorised to confirm the death penalty and life imprisonment. This is a violation of the CPA, which provides such powers exclusively to the Supreme Court. The appeal under Anti-Terrorism Act according to the regulations issued under the same Act has been reduced to 7 days in conflict with the CPA which determines 15 days as an appeal period. Furthermore, the same Act gives the Chief Justice, in consultation with the Minister of Justice, the power of issuance of rules and measures. The African Commission held that the right to appeal was violated by provision of that Act specifically prohibiting appeals against the decisions of special tribunals created in terms of the Act.[20] A further factor which erodes the right to appeal in Sudan is that in some areas there is an absence of formal justice systems.[21]

Numerous offences attract the death penalty under Sudanese law, for example apostasy and committing a third homosexual act (as an indictable offence for the third

[19] See chapter 5 of this thesis pp 237--239.
[20] See chapter 2 p 57, chapter 3 pp 96--98, chapter 4 pp 213--214 & chapter 5 pp 232--234 and pp 238--239.
[21] See chapter 5 of this thesis p 234.

time after previous arraignments and convictions). The HRC objected to the imposition of the death penalty in these instances.[22]

As explained previously, the death penalty can only be imposed in accordance with the law after providing adequate safeguards as stipulated in the international human rights law. In Sudan, the death penalty could be imposed without providing sufficient safeguards that recognised international norms. Additionally, Sudan's courts have imposed the death penalty in several instances where the accused persons were not provided with adequate safeguards enshrined in article 14 of the ICCPR.[23]

It is obvious that the exception of *hudud* and *qissas* stressed in terms of article 27(2) of the Criminal Act means that these *Shari'a* sanctions have to be executed irrespective of age. The Criminal Act allows the imposition of the death penalty on persons who are below the age of 18 years, which is in contravention of international standards.

It is submitted that abrogation of the death penalty or corporal punishment without infringing *Shari'a* law is quite feasible in respect of *ta'zir* crimes. It is submitted that regarding the three offences of *huhud* punishable by death and corporal punishment in the Criminal Act of 1991, that there is a conflict between Sudanese law and *Shari'a* law on the one hand and international human rights law which prohibit the death penalty and corporal punishment on the other hand. This conflict would be addressed indirectly through procedural means. Under Islamic law, the issue of a fair trial and due process being procedural is covered by the methods rather than by sources of Islamic law. *Shari'a* law mainly covers the substantive aspects of Islamic law, while the procedural aspects fall within the realms of *fiqh* as formulated by the jurists. *Shari'a* law mainly emphasises substantive justice, leaving implementation of the law and its formation to the state authority to decide in accordance with the best interests of society. Islamic legalists concede that it is lawful to utilise procedural devices to avert the *hudud* penalty without impugning the law, the Prophet having advised that one should avert the *hudud*

[22] See chapter 5 of this thesis pp 252--259.
[23] See chapter 5 of this thesis pp 260--264.

punishment in case of doubt because error in clemency is better than error in imposing punishment. With the current resurgence and restoration of Islamic law in many Muslim States, it is more possible to seek for a compromise between the *hudud* penalties and the proscription punishments under international human rights law indirectly through legal procedural safeguards existing within *Shari'a* law or on the basis of proclamations from Islamic jurists.[24]

The HRC, the African Commission, the UN treaty bodies and the UN Charter mechanisms similarly condemned the imposition of corporal punishment in Sudan as a violation of the prohibition of torture and inhuman, cruel or degrading punishment. Further, the HRC has also commented on the gender dimension of corporal punishment in Sudan.

The African Commission found that in meting out corporal punishment, the courts had violated article 5 of the African Charter. It found that the lashings violated article 5 of the African Charter and requested the Government of Sudan to revise the Criminal Law of 1991, in consistency with its commitments under the African Charter and other pertinent international human rights instruments. Corporal punishment is incompatible with article 27(3) of the Sudanese Bill of Rights and international standards, which are binding on Sudan.

It is obvious that the scope of imposition of whipping is broadened by the vague definition of punitive measures prescribed for many crimes. The large number of vaguely worded offences gives police officers considerable leeway and power in determining whether person is suspected of having breached the law. In addition, despite the declaration of a *de facto* moratorium on amputations and stoning in Sudan sentences, in some instances amputations have been reported.

[24] See chapter 5 of this thesis pp 266--271.

Sudan has comprehensively ignored its obligation to uphold the right to sue and secure reparation in criminal matters for the following reasons: Sudanese Criminal Act does not recognise torture as defined in international law as a criminal offence. Apart from the lawful immunities enjoyed by certain echelons (for example, police, military, and security members), governmental agencies lack the political will to prosecute such violations and compensate victims particularly where perpetrators are state agencies. In addition to lack of enforcement of judicial decisions, there are inadequate legal and practical frameworks providing for the protection of victims and witnesses which prevents victims and witnesses from coming forward to participate or testify in proceedings. Further, the lack of adequate resources, corruption and poor training of staff curtail the right to reparation. Furthermore, the remedies provided for in pieces of legislation do not conform to the demands of protection of the right to a good administration of justice.[25] In March 2004, there was an amendment to the Sudanese Civil Procedure Act of 1983 which has amended section 243 to exempt the government from subjection to execution of civil judgment against state's organs by way of attachment and sale of property and detention of persons to satisfy the judgment debts.[26] It is submitted that there is a need for legislation to be introduced specifically providing for the rights of victims to protection.

1.6 Concluding remarks

The study is concluding that the existing mechanisms have not effectively protected fair trial rights. The National Judicial Service Commission and the Constitutional Court have not protected fair trial rights. The National Judicial Service Commission has not enhanced the independence of the judicial system. The Constitutional Court has instead largely supported existing laws and despite persistent requests by the UN treaty bodies, rapporteurs and independent experts to abolish these pernicious enactments (for example, granting immunity from prosecution to certain bodies and persons - the military and police). This selective impunity was based on rather questionable grounds.

[25] See chapter 5 of this thesis pp 292--294.
[26] See chapter 5 of this thesis p 292 & chapter 2 p 56.

In several instances, it was argued that the offences concerned called for the defendents claim that confessions had been extracted from them under torture. Sudanese jurisprudence has also been known for its limited reference to binding international standards or relevant comparative experiences.

The previous chapters show that a number of factors have hampered the development of fair trial rights in Sudan. These include the lack of political will, poverty, lack of awareness about rights, laws that violate fair trial rights, laws that inadequately protect victims and witnesses, immunity, corruption, scarcity of human and financial resources, lack of training on international standards, frequent states of emergency, abuses of power, existence of military and special courts as a tool of oppression, institutional constraints, discrimination against women, and the refusal or reluctance of the executive branch of government to implement decisions of the courts. The study revealed that the realisation of the right to a fair trial depends on numerous factors which include the rule of law, democracy, independence and impartiality of the judiciary.

2. Recommendations

The following are recommendations with regard to law and institutional reforms.

2.1. Law reform

The main purpose of these suggested reforms is to ensure as soon as possible that fair-trial rights are adequately implemented in Sudan.

Regarding international human rights law, Sudan should ratify all key human rights instruments to be aligned with accepted international standards. Important instruments to be ratified include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and its Optional Protocol (which prohibits cruel, inhuman and degrading treatment or punishment); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which guarantees the right to a fair trial for women; the First Protocol to the ICCPR (which provides for an individual complaints mechanism); the Second Protocol to the ICCPR (which prohibits

the death penalty); the Rome Statute on International Criminal Court (international jurisdiction for international crimes); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (which guarantees the right to a fair trial for women in Africa); the Protocol to the African Charter on Human and Peoples' Rights on Establishment of an African Court on Human and Peoples' Rights (as an effective mechanism with binding decisions); the African Union Convention on Preventing and Combating Corruption (corruption is one factor that curtails many fair trial rights); and African Union Charter on Democracy, Elections and Good Governance (which strengthening and promoting universal values, principles of democracy, and good governance all these factors are advancing the right to a fair trial).

Further, Sudan should also declare its acceptance of the competence of the African Court under article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights. According to this declaration, the African Court on Human and Peoples' Rights will be competent to receive cases under article 5(3) of the Protocol.

Sudan should domesticate all relevant regional and international instruments that have been ratified in line with international obligations. In addition, it must ensure compatibility between Islamic and Sudanese law and make a verifiable commitment to proper implementation of Islamic law, especially where fair trial rights are concerned. Courts should take steps to ensure that *Shari'a* law is not applied to Christians and other non-Muslim groups. Further, courts need to uphold universally recognised fair trial rights. Furthermore, Sudan should vigorously develop and defend socio-economic rights, including informing citizens of their rights.

The Bill of Rights should be augmented to include the omitted rights as follows: the right not to be subjected to arbitrary arrest, the right to appeal and the right to be brought promptly before a judge, the right to be tried by an independent tribunal, and the right to examine witnesses as stipulated in the ICCPR. In addition, article 33 of the INC should be amended to prohibit cruel, inhuman and degrading punishment. Article 31 of the INC

should rule out discrimination on grounds of age or disability and should guarantee equality in respect of the administration of justice.

Sudanese legislators should clarify the status of international human rights law in domestic matters pursuant to article 27(3) of the INC which makes international human rights standards binding on Sudan. Legislation should give direction to judges to interpret and apply international human rights law in fulfilling their tasks.

Moreover, legislation such as the Criminal Procedure Act of 1991, the Criminal Act of 1991, the Evidence Act of 1994, the Emergency and Public Safety Act of 1997, the Anti-Terrorism Act of 2001, the Armed Forces Act of 2007, the Police Act of 2008, and the National Security Act of 2009 should be amended to comply with the INC and to fill the gaps between Sudanese law and international human rights law. Amendments should conform to the Bill of Rights and international human rights standards, declaring laws that are not in such conformity to be null and void.

As one of the main fair trial sources in Sudan, the CPA needs amendment. The components of the right to a fair trial with reference to article 14 of the ICCPR, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa and the Robben Island Guidelines should be added to the CPA, as follows: (1) The CPA should prohibit arbitrary detention; and to that end expressly include procedural guarantees contained in article 9(2) to 9(5) of the ICCPR which endorse substantive guarantees, including public knowledge of arrests made by security organs and the location of detention centres or facilities, enforceability of conditions of arrest, preliminary interrogation and detention of suspects in line with international standards, and judicial oversight of the lawfulness of detention within 48 hours of arrest and at regular intervals thereafter. (2) It should exclude pre-trial detention, except where detainees are shown to be dangerous to the community, and to the conduct of an investigation, or a flight risk. (3) Bail should be promptly granted without exception. (4) The right to compensation for unlawful arrest or detention should be guaranteed. Further guarantees should be the right to *habeas corpus* and to be brought before a

judge promptly (a judicial officer or another person authorised by law) within 48 hours. The right of *habeas corpus* should be unconditional. (5) The right of access from the outset of a procedure to a lawyer of the detainee's choice and the police must inform the arrestee of his or her right to seek assistance from a lawyer, who must have access to the procedures that require his or her client to be present, especially during interrogations and must be allowed to review the investigation dockets once the indictment has been filed by the prosecution. (6) The right to medical and humane treatment and the detainee's right to inform members of his or her family of his or her arrest should be guaranteed. (7) Prohibition of press announcements convicting accused persons without trial and further prohibition of long detention without charge. (8) The right of the accused to be silent during the pre-trial stage should be guaranteed. (9) The right to legal consultation without interference from the court should be guaranteed. (10) In the pre-trial stage, the right to legal aid, regardless of the crime should be guaranteed. Necessary legislative measures should be taken to extend free legal assistance where the accused person cannot afford legal fees and providing women with equal access to legal aid. (11) The right to employ the services of a translator in the pre-trial stage should be guaranteed. (12) The right to be exempt from self-incrimination should be guaranteed. (13) Civilians should be exempt from being arraigned before military or special courts.

Some provisions of the CPA should be abolished: (1) Section 97 of the CPA regarding selling of absconded accused person's property according to section 78 of the CPA, because it is a punishment without trial and any accused person has a right to be presumed innocent until proven guilty. (2) Section 129 of the CPA which gives an executive judicial power to close or evacuate shops or houses without judicial decision, such power should only be exercised by a competent judicial authority (3) Section 59 of the CPA which confers the authority with the power to force an admission of guilt.

The Criminal Act of 1991, as an authoritative text in terms of which the right to a fair trial in Sudan is guaranteed, should be amended as follows: (1) Punishments considered cruel, inhuman and degrading (eg. whipping, stoning, amputation and cross-amputation)

should be prohibited. Sudan should publicly declare an unequivocal moratorium on the imposition of all forms of corporal punishment with immediate effect; (2) Cruel, inhuman or degrading treatment or punishment, including whipping, should be declared a criminal offence carrying penalties reflecting the gravity of the offence; (3) Torture should be declared a criminal offence in line with the definition contained in article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and subject to punishments commensurate with the seriousness of the offence; (4) the definition of international crimes in the Armed Forces Act of 2007 and the Criminal Act of 1991 must be aligned with international standards and remove barriers to effective prosecutions for the commission of any of these crimes. (5) Make statutory provision for the crimes of extrajudicial, summary or arbitrary executions; enforced disappearances; and acts of gender-based violence. (6) Abolish the crime of apostasy, which promulgation violates article 18 of the ICCPR. (7) Abolish the death penalty, or at least ensure that it may only be imposed strictly in conformity with international standards (following a fair trial for the most serious crimes on a non-mandatory basis, and allowing for the right to appeal). (8) Remove the reference to adultery in article 149 of the Criminal Act of 1991 and enact legislation that adequately criminalises other forms of sexual violence. (9) Remove all vague words and ambiguities in provisions delineating offences. (10) Remove gender-based differentiation between criminal penalties (ie. same crime, same penalty regardless of gender). Impose a duty on the state to protect women against all forms of violence by adopting appropriate legislative and other counter-measures.

Other statutes need to be reviewed and revised to conform to the CPA, the INC, and international fair-trial standards (1) Removal of the power of the NISS to arrest and detain individuals; or reform the National Security Act of 2009 to ensure adequate custodial safeguards. For example, prohibit arbitrary arrest and detention, including incommunicado detention, guarantee access to a lawyer of detainee's choice from the beginning of proceedings as well as the right to be brought before a judge within 48 hours of detention; (2) Prohibit prolonged pre-trial detention in police or NISS custody which is a serious violation of human rights and conducive to torture and deprivations;

(3) Repeal immunity provisions in the Armed Forces Act of 2007, the Police Act of 2008, and the National Security Act of 2009 and instead enact laws providing sufficient safeguard against extortions, harassment and assaults on victims, witnesses and human rights defenders. (4) Remove all provisions in the Police Act of 2008 and the Armed Forces Act of 2007 that can be construed as enabling and authorising the functioning of special courts, and try civilians before military courts. (5) Take urgent and concrete actions to abolish laws that permit corporal punishment.

The Evidence Act of 1994 should be amended as follows: (1) Incorporate unequivocal preclusion of evidence obtained by torture or other ill-treatment; (2) In line with international safeguards of the right to be presumed innocent, provide in virtue of the Evidence Act that the burden of proof in cases where women are charged with adultery shall be on the prosecution and not the accused; (3) Liberalise interpretation of Islamic law by declaring the admissibility of a single female witness according to the Evidence Act, and by the same token guarantee women's rights to testify on equal terms with men.

It is submitted that there is a need to enact legislation providing for an explicit right to reparation in the Constitution and statutory law where detainees have suffered torture and related human rights violations. Adequate protection for victims and witnesses of human rights violations including effective access to justice must be ensured. State liability to pay compensation should cover all international crimes, including serious violations of human rights, and the State (national entity) should compensate for human rights and other violations committed by members of security forces, police and armed forces.

Finally, Sudan should undertake a comprehensive review of Sudanese laws with a view to ending discrimination and providing protection to citizens by aligning its legislation with the African Charter and ICCPR.

2.2 Institutional reforms

Sudan should establish a law-reform commission mandated to review conformity of existing laws and new laws with the Bill of Rights.

It should also establish an independent oversight body with resources and powers to monitor, investigate and eliminate allegations and real instances of abuses of the judicial and law-enforcement system. The mandate of the independent body should be to review decisions made by NISS members that infringe on individual rights, to scrutinise and investigate members of NISS, as well as determine whether they have committed human rights or other criminal violations. The independent body should be tasked to monitor detention facilities and determine whether conditions prevailing in them are suitable, as well as addressing the problem of police corruption. Further, it must be mandated to investigate all extrajudicial executions, secret detention and torture by the police and make public its findings. Legal and administrative guarantees are required in order to stop torture and abuse of prisoners and effectively address overcrowding, poor ventilation and other unsuitable conditions in holding cells. The provision of food to detainees should also be reviewed in order to ensure adequate nutrition. The independent body should have a complaint's mechanism in order to enhance transparency and accountability.

With regard to security organs, the powers of the National Security Services should be limited to intelligence gathering and should explicitly exclude powers of arrest and detention, as well as the power to use force. Its foremost concern should be to safeguard internal and external security for the people of Sudan. In addition, a culture of accountability within the NISS, the police and the army should be promoted. An anti-torture policy should be adopted by the government to prevent torture and to ensure accountability and justice for torture victims. Further, codes of conduct need to be adopted that prohibit torture and ill-treatment as a disciplinary sanction and that incorporate human rights training.

A new mandate is required to commence the process of institutional reform of the judiciary. The National Judicial Service Commission should be tasked with focusing on

substantive issues, including promotion of the rule of law and enhancing judicial independence, as well as human rights standards and not limit its mandate to the adoption of the budget of the judiciary and making recommendations on the appointment of judges. The National Judicial Service Commission should also be mandated to promote public confidence in the administration of justice and enhance accessibility of the criminal justice system to the public with a view to safeguarding the principle of due process and overseeing the role of the judiciary in respect of special courts and immunities granted to government officials.

The constitutional review process and its outcomes must ensure respect for the independence of the Sudanese judiciary. The laws creating the National Judicial Service Commission and the Constitutional Court must be amended to ensure that there are structural and functional safeguards against political or other interference in judicial work and autonomy. A Constitution should require the provision of mechanisms to prevent interference by the executive branches of government in the work of the judiciary in order to ensure operational independence and autonomy of the judiciary.

New judicial and prosecutorial measures should be introduced, and substantive laws, especially relating to criminal conduct and Security Act matters should be passed to ensure that the rule of law is maintained to prescribed standards. Reform should proceed as envisaged in article 14 of the ICCPR and article 9 of the ICCPR with regard to fair trial and liberty and the security of persons. Standards and guarantees are essential to address serious violations of human rights occurring in Sudan.

The Sudanese judiciary requires technical support in order to train judges about international human rights law and its jurisprudence as developed by international and regional human rights courts. Sudanese academic institutions can assist in this regard by offering targeted programmes for judges on the protection of human rights and upholding the rule of law.

There should be an express obligation on courts to countenance of international human rights law and its developed jurisprudence, and to promote the spirit, purpose, and objects of the Bill of Rights when interpreting any legislation, to which end best practices adopted in other countries may be considered.

The role and duty of the Constitutional Court to act as an independent institution and to assume guardianship of the Constitution and fundamental rights must be emphasised. The composition of the Constitutional Court should reflect Sudan's ethnic diversity, and an equitable gender balance. The Constitutional Court should be mandated to hear individual complaints and carry out abstract and concrete reviews of the constitutionality of bills and laws. The Constitutional Court should be empowered to hear constitutional complaints brought on behalf of individuals and groups who cannot represent themselves. Court hearings should be free of charge and accessible to all with or without legal representation. The Constitutional Court should be flexible in the interpretation of standing requirements in order to broaden access and allow public interest litigation in furtherance of protection of human rights. The potentially adverse impact of legislation on the exercise of rights should be sufficient to give standing. The Constitutional Court should take cognisance of international and regional human rights treaties and comparative jurisprudence when interpreting the Bill of Rights. Adequate guidance should be given concerning the interpretation of legislation that articulates Sudan's obligations and the nature of legislation that needs to be enacted where existing law is found to be unconstitutional. The rights enshrined in the Bill of Rights need to be aligned with Sudan's obligations under international human rights treaties.

Special Courts should be abolished. Civilians should not be tried before special or military courts and measures should be taken to ensure that all courts of whatever kind act in consonance with the African Charter, ICCPR and the HRC General Comment No 32.

Criminal trials against police officers should be heard exclusively by independent ordinary criminal courts in order to ensure that the rule of law prevails, the right to an

effective remedy of victims is granted, and the right to a fair trial of the defendant is protected. The jurisdiction of police courts should be confined to hearing disciplinary cases against police officers. Victims of criminal offences allegedly committed by police officers should be given the right to be present at and participate in proceedings, emanating from official complaints in this regard. This includes the right to bring private prosecutions, submit evidence and cross-examine witnesses, lodge an appeal, and claim compensation. The power of the Director General to stop criminal proceedings against police officers at any time before a verdict is pronounced should be abolished. The Independent Police Complaints Authority should be established to enhance police oversight.

The National and State Governments must ensure that national programmes in educational curricula and the media include provisions to raise public awareness around issues affecting public order, public security and tranquility, public health, environmental concerns, civics and the duties of individuals towards fellow citizens. Further, universities must be encouraged to create legal education and clinical legal schools programmes as a means of strengthening law faculties in Sudan and to support the capacity of the libraries.

The Ministry of Justice should be separated from the office of the Attorney General and criminal prosecutions, in order to remove the conflict in his powers as a representative of the state prosecution and his power to appropriately terminate legal proceedings. The judiciary should adjudicate matters brought before it without interference from the executive or party political interests and changes required in the existing statute book should be referred to the Ministry of Justice for attention, particularly with a view to assert human rights as enshrined in international human rights law. The Attorney General's Office should be independent and not subordinate to the executive authority. Concerning the appointment of the Attorney General or Director Public Prosecutor (DPP), an individual should not be eligible to be or act as DPP or Attorney General unless he or she is qualified for appointment as a Supreme Court Judge. Further, the appointment should not be left to the executive alone, but should be subject to the approval of parliament. Furthermore, his or her security of tenure, earnings and

conditions of service should be the same for the Judges of the Supreme Court, the Director General of Police, and the Constitutional Court justices.

Clear guidelines, policies and standards for legal aid network must be set in all areas of Sudan in order to promote the sustainability of legal aid network.

The Ministry of Interior Affairs should train local attorneys, police and security and custody supervisors on the international standards of detainees' rights.

The NISS, Ministry of Interior Affairs, Judiciary system, and National Assembly should establish adequate measures to guarantee the protection and rights of detained women.

3. Areas of further research

There may be a number of questions raised that are left unanswered and need further in-depth research, for example, lack of political will, which plays a main role for non-compliance with the international human rights law. There is a need for further understanding and research on what factors have to be in place to make the implementation of the recommendations of this study possible. For example, what kind of leadership is needed, what socio-political and legal culture should be in place, and how to change the socio-political and legal culture in place?

A further question is how to harmonise international human rights law in the national level due to conflict between different legal regimes including *Shari'a* law. What are the legislative and judicial measures that could harmonise them under the Sudanese legal system?

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Annexure 1

List of discussions

Name	Position	Place	Date
Abdalla Ahmed Abdalla	President Constitutional Court	Khartoum	Tuesday 29 May 2013
Adil Alajib Yagoub	Director of Training Department Ministry of Internal Affairs	Khartoum	Monday 10 June 2013
Ahmed Abas Al-Razam	Head Legal Department Gazira State	Medani	Thursday 24 November 2011
Al-Tahir Hamdalla	Director Sudanese Human Rights and Legal Aid Organisation	Khartoum	Sunday 27 November 2011
Al-Wasila Hago	Advocate and human rights activist	Khartoum	Saturday 26 November 2011
Amaal Al-Tinay	Chairperson Sudan Human Rights Commission	Khartoum	Wednesday 19 June 2013
D. Abdelrahman Sharfi	Deputy Chief Justice	Khartoum	Wednesday 12 June 2013
D. Ahmed Al Mufti	Director of the Khartoum Human Rights Centre	Khartoum	Wednesday 19 November 2014
D. Ali Suliman Fadallah	Fellow of theFaculty of Law University of Khartoum	Khartoum	Tuesday 4 June 2013
D. Al-Rasheed H Sayid	Dean Faculty of Law University of Khartoum	Khartoum	Monday 3 June 2013
D. Daffalla Al Haj Yousif	Former Chief Justice	Khartoum	Thursday 20 November 2014
D. Mohamed Abd-Al-Salam Babikir	Associate Professor Faculty of Law	Khartoum	Wednesday 5 June 2013

	University of Khartoum and Human rights activist		
Hamida Hamid Fadul	Training Department Ministry of Internal Affairs	Khartoum	Monday 10 June 2013
Hashim Abu-Bakr Al-Gali	Secretary-General Sudan Bar Association	Khartoum	Tuesday 20 June 2013
Mohamed Ahmed Abusin	Chief Justice	Khartoum	ThursdY 13 June 2013
Mutaz A. Al-Nour	Judge Al-Fashir Darfur	Khartoum	Tuesday 30 May 2013
Prof. Hassan Makki	Former Vice Chancellor of Africa Interantional University	Khartoum	Friday 21 November 2014
Yousif Alsayim	Head Legal Aid Department	Khartoum	Wednesday and Thursday 5 and 6 June 2013