

Sudanese National Security Forces Act (1999) and Problems of Criminal Justice During the Transitional Period in Sudan (With Emphasis on Crime of Torture) *

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Introduction:

Modern history of Sudan has witnessed forms of violence of varying degrees in volume and nature – especially in the post independence era. However, the violence that followed the coup d’etat of June 30, 1989 has surpassed all previous forms in terms of cruelty, excesses and its systematic nature. From day one of assuming power, coup leaders suspended the Constitution and (military) Constitutional Decrees were put in place thereof. The institutions of democratic rule were dissolved and replaced by a military junta, in addition to dissolving political parties, trade unions, associations and societies, preventing courts from hearing any suits filed against any of these decisions and forming special courts and specifying their procedures.⁽¹⁾ Following that, a series of laws and practices ensued, targeting the suppression of rivals, silencing all, imposing a one sided view and harassing the political opposition, trade union leaders, civil society activists and even ordinary citizens. In addition, conditions of historical marginalization suffered by millions of people belonging to different ethnicities were only to worsen, as the regime opted for armed suppression of their mobility – particularly in the south, west, east and south eastern regions of the country.

As a result, methodical operations of killing, hunting down, dismissals, administrative detention, solitary jailing, enforced disappearance and depriving people of means of livelihood abounded. Other forms of violation of public liberties and basic rights and gross violations of the International Human Rights Law and the International Humanitarian Law were spreading as well. Chief among these was methodic torture, physically and spiritually, which not rarely lead to death. Much of this torture was practiced in unknown locations that people came to call "Ghost Houses" wherein victims were subjected to different forms of abuse and inhuman treatment, degrading and depriving them of dignity, without being brought before a court or even having specified charges brought against them.⁽²⁾

احترام، المجلة السودانية لثقافة حقوق الإنسان وقضايا التعدد الثقافي، العدد الخامس، يوليو - أكتوبر 2007

Respect, Sudanese Journal for Human Rights' Culture and Issues of Cultural Diversity, 5th Issue, July-October 2007



Instead of achieving their expected results and because of the regime's incorrect calculations, opposition to the regime was broadened, from within the country and aboard, political polarization and social fragmentation was aggravated, civil war in the south, south east and Nuba mountains became fiercer and even extended to the east and Darfur in the west, in addition to a state of public discontent among the widest strata in the centre and Nilotic north – a matter that posed a threat to the unity of the homeland itself and safety of its territories.

Finally, on 9.1.2005, with a push from the states and partners of the IGAD, The Government concluded a Comprehensive Peace Agreement (CPA) with the SPLM/SPLA. The Agreement stipulates for a transitional period of six and a half years, within which democratic elections are to be held (after the first three and half years) and, by the end of this transitional period a referendum (for southerners) is to be held on self determination. On basis of this, the interim constitution of 2005 was issued. Despite criticism raised on the shortcomings of these two important documents, and their being drafted in exclusion of the participation of most other political forces, all parties and organizations have initially given them their blessing, in the hope that the two would, if sufficient political will was availed, pave a smooth path towards Comprehensive Peace and Democratic Transformation.

However, and despite of the flourishing of hopes that things were on their way to positive change, the Interim Constitution remained *transitional* only on paper, without reflecting any of such hoped *transition* on the ground! More than a year and a half has passed since its issuance, without a serious move from the state to settle that heavy legacy, by reforming legislation, changing policies or addressing injustices. On the contrary, the state has marched on, pushing further its repression patterns of the past, with torture at the heart thereof, especially in Darfur. It carried on the same in the field of freedoms of the press, conscience, expression, organization, and the right to protection against cruel, inhumane or degrading to human dignity treatment; relying in this on the National Security Service, the National Security Forces Act of 1999 and some other criminal legislation of relevance.

Therefore, and since the basic hypothesis of this paper is that the desired Democratic Transformation is impossible to be made without clearance of that heavy legacy, and such clearance, in turn, can not be realized without meeting the requirements of criminal justice which is considered the most significant tool of healing the hurt resultant of that legacy; we will attempt, in light of the huge volume of injustices still awaiting remedy, to limit available options for achieving this goal to three options (to which we could not find a fourth other



than to continue ignoring these grievances or sweeping them under the carpet of the old futile slogan: "Let's grant pardon to acts of the past" – a matter which, should the regime opt for, would not be accepted by victims and therefore makes it impossible to surpass the current situation of social tension or to cross over to where we can look out for the dawning of the post-transition era). These options are as follows:

1. litigation before Sudanese courts, which requires removal of all the hindrances the Government placed to prevent holding its members and employees, especially the staff of the Government's security services, accountable for their acts; or
2. resorting to international criminal judicial system, an option that our experience as lawyers shows it does not represent a priority for most victims unless forced to, and only after exhausting all other options of seeking justice in the homeland; or
3. using transitional justice, as a modern mechanism that may lead to eliminating tension and remedying injustices if taken seriously, by disclosing the truth, apologizing, doing justice by compensating victims and then effecting reciprocal healing in the same order and sequence.

The paper will tackle all problems associated with all these options and then concludes with practical recommendations on a method of criminal justice that will do justice to victims and all those seeking a day when the state and its officials responsible for these violations will be brought before justice. Otherwise, the *transitional* period will mean nothing more than a miserable *transition* to the worse!

First Option: Litigation before Sudanese Courts

1. The Criminal Act & The Criminal Procedures Act (1991):

a. Theoretically, torture is considered an act that the Criminal Act of 1991 incriminates and punishes for. It is also prohibited pursuant to the Criminal Procedures Act of 1991. Article 89 of the Criminal Act (1991) states that each public official who violates what the law orders in terms of conduct he must follow, with the intent of causing harm to any person, is subject to imprisonment of a period not exceeding two years, a fine or both penalties. What the law orders in this regard is stated in Article 4.D of the Criminal Procedures Act of 1991 which prohibits attack on the soul of the accused, including of course torturing him. By analogy, it would be more appropriate,



with even greater reason, to prohibit, incriminate and penalize torturing a suspect/detainee who has not yet had charges brought against him.

b. Even if Article 89 referred to was not there, Article 90 of the Criminal Act (1991) incriminates and punishes for each act carried out by a public official who the law authorizes to refer individuals to courts, arrest them or keep them in custody; if he abuses such authority, with imprisonment of a period not exceeding three year as well as providing for a fine.

2. The National Security Act 1999 and its Regulations:

This Act also prohibits, in a particular manner, torture of a detainee. Article 47 of the act incriminates and holds punishable any staff member of the security service who abuses the exercising of the powers entrusted with him pursuant to the provisions of this Act, with the intent of causing harm to others by imprisonment of ten years, a fine, or both penalties. Article 9.1 of the Regulations of this Act stipulates the rights of detainees, including that they are to "be treated in a manner that preserves the dignity of human beings and that they may not be harmed bodily or spiritually."

3. Hindrances to Application on Persons Who Have Authority:

a. Despite all the forgoing, these laws, and the National Security Act (1999) in particular, also include other provisions which explicitly hinder their application onto members of the security service. This is what the International Committee of Investigation into the incidents of Darfur has particularly noted.⁽³⁾ Article 31 of the National Security Act 1999 allows a staff member of the service to arrest, search, detain and interrogate any person. Article 9 authorizes this staff member to seize property of the detained. Article 31, additionally, allows staff a period of three days to inform the detained person of the causes of such detention. It also authorizes the Director of the service to extend the said period to three months and to renew it, with the approval of the Prosecutor General, for another three months. The Security chief may also request the National Security Council to renew the same for further three months. Although a detainee is theoretically entitled to appeal such decisions before the courts, yet there are no guarantees for his enlisting of assistance of a lawyer. In addition, his right to contact with family is practically denied pursuant to Article 32.2 that includes a phrase which empties this right of content, by stipulating that a detainee may exercise such right only where this "does not prejudice interrogation and investigation into the case".



b. Although the Criminal Procedures Act (1991) includes, in general, provisions that prevent litigation against persons with authority in an effective manner; the National Security Act (1999) hinders such litigation, in particular. Article 33 states that 'No civil or criminal procedures may be taken against a staff member or informant in relation to any act related to member's official business unless per the approval of the Director. Thus, if we consider that the Director is not legally bound to approve unless the subject of such accountability is not related to official business, the provision actually grants immunity to members of the service and informants collaborating with them against binding them to give any information about any alleged torture; let alone holding them accountable for it as 'defendants'. The Director will definitely not agree if the matter is related to 'official business'. This is an overly elastic form of words which allows him to adapt it as he wishes. Even if the Director does approve, the accused staff member will then be brought before a special court within the security service itself, i.e. a secret court, in violation of the provisions of Article 41.1 of the International Convention on Civil and Political Rights which stipulate the holding of a public trial as one of the internationally approved standards for a fair trial. This article, in fact, enables a staff member, based on this immunity, to torture any person to the extent of killing him - a matter which broadens the range of impunity; in contradiction to international standards, too. Therefore, and since the approval of the Director is subject only to his own discretion: is he expected to grant approval against those who work under his orders and implement his instructions, Let alone if the matter is against him in person or those of the same rank?! The service used to brag about a case or two wherein some staff were tried and penalized. What value does this have in an ocean of injustices, grievances and complaints that amount to thousands? The most significant question yet is how such authority, in principle, is placed in the hand of the Director of the service to render him the opposing party and the referee at the same time?

c. To make things worse, two temporary Presidential Decrees were issued by the President of the Republic on 10.4.2005, effecting two vital amendments to the Criminal Procedures Act (1991) and the People's Armed Forces Act (1986). Both amendments targeted the granting of immunity to members of the police and armed forces against any criminal liability for committing even premeditated murder (forget about torture against unarmed civilians) and hence impunity, so that the matter will not exceed the threshold of compensation or payment of blood money! Even the burden of compensation or blood money



will be shouldered, not by the perpetrators, but the state; pursuant to Article 73.3 of the first amendment and 79.a.3 of the second. The fact that both decrees failed to pass at the National Assembly is no cause for celebration, judging by what they provided in terms of immunity and opportunity for impunity in a number of cases, during the period they were in force by virtue of the force of the two Temporary Presidential Decrees. In addition, and judging by their general orientation, there is no guarantee that a similar legislation will not be issued in the future.

d. On the other hand, there is the issue of “prescription”, i.e. lapse of time quashing a complaint (statutory limitation), which is considered one of the most significant hindrances of criminal justice. Although this was not in place in the country prior to 1991, Article 38.1 of the Criminal Procedures Act (1991) stated, for the first time, that a criminal suit with Ta'zeer (castigation) penalty is quashed if there is a lapse of time of ten years from the date a crime, punishable with the death penalty or imprisonment of ten or more years, is committed. The provisions of Article 38 are in force retroactively, based on the rule of opting for the legislation deemed best for the interests of the accused. The same provisions apply for the National Security Act (1999) although it is void of any provision of prescription, because Article 3 of the Criminal Procedures Act (1991) states that its provisions shall apply to crimes stated for in the Criminal Act *and any other* legislation. This means that the lapse of ten years after alleged acts of torture were committed automatically quashes any criminal suit arising thereof by virtue of statutory limitation. In addition, lapse of time quashes, as well, any civil compensation suit arising from the said acts, as Article 159 of the Civil Dealings Act (1984) stipulates against hearing of such cases after the lapse of five years from the date in which the harmed party learned of the matter or fifteen years from the date in which the harmful act took place.

4. Legal Position Under Sudan Constitution (1998):

a. After nine years of the 1989 coup, the Sudan Constitution of 1998 was issued. Article 30 of that Constitution stated that man is free and shall not be arrested or detained unless per legislation which stipulates declaration of charge and time limit: facilitating release and respect of dignity in treatment. The Constitution also laid the foundation for establishment of Constitutional Court. Article 34 of that Constitution authorized the said Court to exercise its powers in good faith, in repealing any legislation or order which contradicts with the



Constitution, and to reinstate rights to harmed party or compensate him for damages.

b. The Constitutional Court Act 1998 was issued the same year. Article 11.b of that Act authorized the Court to hear suits filed by harmed parties in protection of their liberties, privacy or constitutional rights, in contestation of legislation. Article 105.b authorized the Court also to hear and decide on suits filed by harmed parties, in protection of these liberties, privacy and rights.

c. The following year, the National Security Act (1999) was issued including the articles referred to: Article 47 of the Act and Article 9.1 of its Regulations. It was apparent, therefore, that there was no room to contest the fact that the Act and its Regulations contradicted the provisions of Article 30 of that Constitution.

d. As to contestation before the Constitutional Court to protect a constitutional liberty or right against violation, the most serious of which is committed by the security services, as in the case of torture, such contestation primarily required exhausting all means of litigation - a matter which dictated that contest was to be filed against the highest stage of such litigation (pursuant to the provisions of Article 11.f of the previous Constitutional Court Act). Legislators, however, repealed the Article in the last days of that Court – a matter that can only be interpreted as the so-called “legislative violation”, which legally hindered the Constitutional Court from intervening to protect liberties and rights when violated, or actually provided legitimacy for such violation through effecting judicial procedures - which is not an option unlikely to be undertaken.

e. Even in cases which permit administrative contestation of the security service's decisions and procedures, this requires exhausting means of grievances set out in the Regulations, then waiting for the passage of thirty days without a response to the complaint, then filing grievances within sixty days of that date. If they are not filed for one reason or another, even if such cause was not constitutional or legal as much as pertaining to the country's political situation whose logical significations are quite clear judging by the way things go by in every day life; any attempt at further challenge shall be ruled out on a purely technical legal basis, blocked by the rules of prescription, i.e. the statutory limitation period quashing such suit.⁽⁴⁾ We are, therefore, faced with a classic case of a possible contradiction between justice (as a high value) and law (as technical arrangement not necessarily fair). Perhaps this is the same issue which William Temple, Archbishop of Canterbury meant when addressing judges in the UK: "I cannot claim that I know much about the law but I am, primarily, concerned with justice".⁽⁵⁾



5. Legal Position Under Sudan Interim Constitution (2005):

a. Article 151.3 of the Constitution renders the whole of the National Security Act of 1999 an unconstitutional legislative text; by explicitly stating that the service's mission is to be limited to gathering and analyzing information and advising authorities concerned. Nevertheless, the service still continues with the same practices of the past – undeterred by the new constitutional arrangement. Perhaps this is what made Ms Louis Arbour, the UN High Commissioner for Human Rights, express her concern, during a press conference on 5.5.2006 at the end of a visit to Sudan, with the “security service's gross violations of human rights, including summary arrests and torture in locations belonging to the security agency”. She goes on to demand that the service be re-arranged and reformed promptly as it does not comply with the international standards of human rights having regard to the failure to try officials, the vast immunity granted to them and the powers granted to the service, which should be exercised by a civil authority. She also went on to say that the state of emergency should be reviewed to meet aspirations of human rights, and that there is a need for a complete change in the system of national security in the country.⁽⁶⁾

b. The 2005 Constitution grants the new Constitutional Court the power to examine any violation of liberties or rights, whether committed by the legislative, executive or the judiciary, pursuant to a series of articles (without prejudice to the provisions of Article 211 pertaining to the powers of the President of the Republic in an emergency situation) such as Article 48 (prohibiting violation of liberties and rights), Article 35 (guaranteeing right to litigation) and Article 122.1 (establishing the Constitutional Court a guardian of the Constitution). Nevertheless, the Constitutional Court Act of 2005 came with a provision (Article 15.D) that makes an exception to decisions, judgments, procedures and orders issued by courts from being reviewed by the constitutional court. This recalls the repeal of Article 11.f of the previous act – a matter which confirms the intent of the legislator to use “legislative violation” to hinder the Constitutional Court from protecting liberties and rights when violated through judicial procedures, or provide legitimacy to such violation.

c. In another context, Article 21 of the Interim Constitution directs the state to initiate a comprehensive process of national reconciliation and healing of wounds in order to achieve harmony and peaceful coexistence amongst all Sudanese. Despite the fact that this vague provision came within directive but non-binding Articles, it clearly goes in line with the general tendency of the



drive to dissolve the heavy legacy during the transitional period – in terms of reforming legislation, changing policies and addressing injustices. This is in absolute contradiction with the National Security Service continuing to perform the same role it played during the period preceding the CPA and the Constitution.

Option 2: International Criminal Cognizance:

1. International law and International Criminal Competence:

a. Article 1 of the Convention Against Torture adopted by the General Assembly of the UN as per Resolution No. 39.46 on 10.12.1984 and which came into force on 26.6.1987, defines torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third party information or a confession, punishing him for an act he or a third party has committed or is suspected of having committed, or intimidating or coercing him or a third party, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

b. This Convention came in a context of a series of international conventions that prohibit torture: e.g. the Universal Declaration of Human Rights which, over time, obtained the force of international common law, and the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, Article 2 of which defines genocide as a collection of acts with the intent to destroy, in whole or in part, a national, ethnic, racial or religious groups, such as: causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group of another group. Article 3 of the convention incriminates such acts and Article 4 states that perpetrators of such acts are to be penalized, whoever they are. Article 5 binds state parties to include provisions stating these penalties in their national legislation. Article 6 stipulates that perpetrators must be tried before competent national or international courts. In addition, there are the four Geneva Conventions on the International Human Rights (1949). Article 3, a provision common to them all, prohibits torture, cruel treatment and infringement of personal dignity, especially degrading treatment. There are also the Convention



on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Article 7 of which prohibits torture. Article 10 of the same requires humane treatment and respect for dignity of all person deprived of their freedom. Article 9 stipulates that such deprivation is not to be summarily conducted, that information must be provided on the reasons for any such deprivation, and that those detained on grounds of public security must be granted the right to refer to a court for a decision on the legitimacy of any such detention and to obtain compensation in the case of any violation. In its comments on Article 9, Para 4, the Committee on Human Rights stated that the guarantees preventing violations of international law are the provisions which prevent solitary confinement and which grant detainees the right of access to physicians, lawyers and family members. The Committee also emphasized the importance of provisions requiring that those arrested are detained in locations known to the public, and that their names and location of detention are recorded appropriately. There is also the International Convention for the Protection of All Persons from Enforced Disappearance, Article 1 of which considers each act of enforced disappearance a crime against human dignity and a violation of rules of international law which guarantee, in a particular manner, the right that humans are not subjected to torture, inhuman and degrading treatment.

c. There are several principles in place, governing trial of those accused of committing international crimes. The conventional method relies on the principle of territory, when a crime is committed in the territories of the state conducting the trial, or the principle of nationality, when the crime is committed abroad but the one accused of committing it is a national of such state. In addition, competence to conduct trial is based on the principle of passive personality when the victim is a national of the state conducting trial. Competence and jurisdiction to trial is granted to any state, irrespective of presence of any of these three principles, on basis of the principle of universality whereby international crimes are deemed crimes against the whole international community and violation of values shared amongst its members.⁽⁷⁾ In this context, the judgment by the House of Lords, the highest British judicial authority, on the case against former Chilean dictator, Augusto Pinochet, has added yet another dimension to the international Humanitarian Law and opened a door to what came to be known as universal jurisdiction of or international criminal competence - i.e. the right of national courts in any country to try violators of international humanitarian law in their country or any other country they flee to, irrespective of their nationality or post assumed: be they



former heads of state, or members of security services, armed forces or the executive.⁽⁸⁾

While rights of victims are faced with principles introduced by Article 38 of the Sudan Criminal Procedures Act regarding lapse of time quashing suits, modern trends in legislation worldwide dictate that crimes against humanity and human rights, such as torture, are not subject to un-suiting by lapse of time for any reason. The UN General Assembly has passed, on 2.11.1968 the convention on the Non applicability of statutory limitations to War Crimes and Crimes Against Humanity, Article 1 of which states that no statutory limitation shall apply to against direct perpetrators, instigators or those who order them committed, be they leaders or heads. This fact, in itself, opens doors, in case they are shut in relation to national legislation and judiciary due to principle of lapse of time, for the option of resorting to universal jurisdiction, whether in courts of states whose legislation provides for such, or before the international Criminal Court (ICC).

2. International Criminal Court (ICC):

a. The practice in the past was to bring perpetrators of war crimes and crimes against humanity, in the aftermath of tragic incidents, before ad hoc tribunals specially formed for the purpose, such as the Nuremberg and Tokyo tribunals, after World War II, or the tribunals of former Yugoslavia and Arusha, still carrying on since the first part of the 1990s.

b. However, and under pressures from international calls protesting the aggravation of violations, the UN diplomatic conference (15 June – 17 July 1998) adopted the Rome statute of 1998 to establish the ICC, which came into action on 1.7.2002 as a permanent court with competence on trying four crimes classified as the most dangerous crimes of international concern. “some scholars of international law attribute limiting the competence of the ICC to this apparently few number of crimes to difference between two types of international crimes: those arising of international customary law and those pertaining to international conventions”.⁽⁹⁾

Bassiouni is of the opinion that these four crimes are those threatening humanity peace and security and alarm human conscience, compared to other crimes (plane hijacking, holding of hostages, drug trafficking and illegitimate use of mail) which do not command the same degree of attention of international community.⁽¹⁰⁾ These four crimes are: aggression, war crimes, genocide and crimes against humanity of which torture is part.



- c. The Rome statute defines this act as, the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions. It is a parent that the Rome Statute relies, in such definition, on the same that is established in previous international documents. Article 1 of the Convention Against Torture (1984), previously mentioned.
- d. The Rome Statute includes, inter alia, that criminal accountability for any crime which falls under the ICC jurisdiction is a personal responsibility and that the accused is subject to penalty in relation thereto only in his personal capacity and that crimes under ICC jurisdiction are not subject to lapse of time quashing suits.
- e. Sudan has signed, though not ratified, the Rome statute, on 8.9.2000, during the UN celebration of the Third Millennium.

3. Sudan and International Criminal Law:

- a. Sudan's heritage of legislation and judiciary has been developing all through the past century in line with the English Common Law. Within this context, and contrary to practice in other countries, application of the English judiciary does not automatically respond to what binds the state in terms of international conventions. Therefore, international agreements or conventions the UK becomes party thereto are still not included in the national legislation unless the Parliament codifies them. Lord Denning expresses that: 'Treaties and declarations do not become part of our law until they are made'. In a precedence in 1976, an English court of law did not respond to a request, established in the suit on base of the provisions of Article 8 of the European Convention on Human Rights (the right to family life), because the parliament has not made it into a law, Consequently, the English migration legislation was applied. In the aforementioned case of Pinochet, the House of Lords stated that the obligations established by the Convention Against Torture on the UK were included in the Kingdoms legislation, pursuant to Article 138 of the Criminal Justice Act (1988) which came into force on 29.9.1988, whereby a new crime was established in the Kingdom's legislation, in compliance with the Convention whereby torture became, irrespective of the country where in it was committed, a crime, subject to trial in the Kingdom.⁽¹¹⁾
- b. However, the degree to which our courts comply with the automatic application of the provisions of human rights conventions is still controversial.⁽¹²⁾ In a precedence (Abdul Rahman Abdullah Nugdallah and



Others Vs. the Public Security Agency, (1998) in which the contesters primarily requested the application of some human rights conventions; the constitutional circuit of the supreme Court opted for the principle of inclusion in the constitution and legislation of obligations resultant of international conventions on protection of liberties and civil rights as a condition for their application by the courts. "The Circuit therefore issued a judgment that ' the application of these provisions is to be carried out through internal legislation; in this case the criminal procedures Act and the National security Act and its Regulations, (Sudan Law Journal, Review judgments and judgments on Constitutional Cases – 1995-1998, p. 157). In Ibrahim vs. Tunisian Airlines): illustrates a differing view as to the extent to of 1929 and the Hague Protocol of 1955, which Sudan ratified in 1974 and 1986, respectively. The court adopted a view that convention, once concluded and come into force, are binding on all parties. Therefore, the Warsaw convention and the Hague Protocol, together with all international convention Sudan ratifies, become part of internal legislation and are binding on judges who implement them on their own and give them preference over internal legislation preceding them, in case of contradiction (Sudan Law Journal, 1987, p. 305).

c. Although the Sudan has signed the Convention Against Torture on 24.6.1986, it has not yet ratified it. It should be in the interest of the country that the cause behind such failure is merely legislation stumbling! Any other interpretation would not be fathomable in light of the state's signing, on 8.9.2000 on the Rome statute, the basic law of the ICC whose pivotal intent is to eliminate impunity for perpetrators of crimes as cause of concern for the whole international community – including the crime of torture. Arguing that Sudan has not ratified the Rome Statute, albeit permissible, is out weighed by the fact that Sudan is party to other international conventions (e.g. the international convention on civil and Political Rights) not merely by signing them but also through ratification (on 18.3.1986, in the ICCPR case), bearing in mind that the convention also prohibits, in Article 7, subjecting any individual to torture, penalty, cruel treatment or inhumane, degrading treatment, et cetera).

d. Torture is, therefore, prohibited by several declarations and conventions binding on Sudan, by virtue of its signing and ratification thereon. Sudan is also bound by even those agreements it did sign but has not ratified yet: convention against Torture (1984) and the Rome statute (1998). For Sudan is bound, pursuant to the Vienna Agreement on International Conventions (1969), to not hinder their implementation. Consequently, whether the matter is looked at from the perspective of obligation due to signing and ratification of convention



or from obligation to refrain from hindering their implementation (as per the Vienna Agreement); there is no justification for evading obligation to prohibit and combat torture. Thus, if the GOS does not interpret failure to ratify the Convention Against Torture and the Rome statute as merely legislative stumbling, it is left with nothing other than clearly declaring that the reason is that it deliberately advocates (rather than combats) torture! In addition, this spells an overt retreat from international convention – a matter which, irrational as it is, begets on the state the curse of going against mainstream of international community regarding this serious crime which does not only contradict with international law/customary law but with religion and ethics as well!

e. Based on the forgoing and in light of agreement of goals of the convention against Torture, the Rome Statute, the Universal Declaration of Human Rights and the International Convention on Civil and Political Rights in connection with prohibition of torture and disavowing these conventions; and in light of classification of the crime of torture as an international crime against humanity whereby the competence of interrogating, trial or extraditing of the accused (if present outside domain of competence of his country) was assigned to the state wherein the accused is present; the provisions of Article 29 (of Rome statute) which legalizes the rights of the party harmed by the act of torture to litigate against perpetrators, subject to no lapse of time, does prevail over the wording of Article 38 of the Sudan Criminal Procedures Act (1991) which specifies a period of ten years after which a criminal suit is quashed by lapse of time.

Option Three: Transitional Justice Arrangements:

1. Constitutional Basis:

a. It is indisputable that the two declared objectives of the CPA and the Interim constitution (2005) are the establishment of peace and the achievement of democratic transformation during the transitional period.

b. In line therewith, Article 21 of the constitution states a clear directive to the state to initiate a comprehensive process of national reconciliation and healing that shall promote national harmony and peaceful coexistence among all Sudanese. Although the primary criticism for wording is that it comes, in overflowing wording, among the directing, rather than binding, articles; but the presence of a necessary degree of political will is sufficient to interpret it as an urgent demand, irrespective of its position in the constitution, technically.



2. International Concept and Experience of Transitional Justice:

a. The dispensing of justice through an independent judiciary, in normal circumstances, is considered an original duty of any state. But a state in transition from a non-democratic system of governance to a democratic one, (whether such transition is radical or reformatory in nature) is in need for specific arrangements during the transitional period. The most important of such arrangements is the healing of wounds resultant of the previous oppressive practices with the intent of removing all obstacles that may hinder desired transition. This arrangement is not matched by the existing Sudanese legal and judicial systems, with their inherited situation-especially in light of aggravation of the situation of immunities, judgments of lapse of time quashing rights to litigation and many more factors previously discussed, which broadens opportunities of impunity.

b. Although experience accumulated by people in this field, in more than forty countries up to now (in Africa, Asia, Latin America and even in Europe) in relation to what came to be globally called transitional justice; yet the disclosure of truth, being the only way leading to national reconciliation, is almost the basic root in all these experiences and the common factors in all of them. This disclosing of truth might take the form of confession which perpetrators convey to their victims or statements provided by victims in public. Regardless of form, this is conducted during public hearings which the media (press, radio and television) publish or broadcast. In addition almost of these countries, a system of addressing of cases of violation, or what is known as reparation, as an integral part of the arrangements of transitional justice. This system may take the form of cash compensation, physical, psychological. Therapy, assistance to reinstatement in work, provision of means of livelihood that was denied, study or suitable housing and the like. Such addressing might target individual victims, groups or regions; with forms of positive discrimination in development, reconstruction, services and the like.

c. The state forms a mechanism or modality, pursuant to special legislation, which enjoys a necessary degree of independence, to organize and supervise these arrangements. In most cases, this takes the form of “the Truth and Reconciliation commission” or “the Truth, Equity and Reconciliation Commission”, in accordance with the Paris Principles (1993).

d. The logic behind effecting such arrangements stems from the fact that normal litigation before criminal courts, it home or abroad, is in principle



restricted by a set of strict rules, chief amongst them is the rule of proof beyond reasonable doubt, which dictates a degree of deliberateness and non-acceleration of procedures. Normal litigation also fails to disclose a wide range of crimes allegedly committed during the many years preceding the transitional period. In addition, there are the complications likely to arise of the collision that is more than likely to happen is such type of litigation between certain procedures that are inevitable (e.g. granting pardon for some of the accused in exchange for informing on their accomplices, as well as acting as kings evidence) and some principles of the international law which deems the granting of pardon unacceptable in cases of serious violations of human rights and the international humanitarian Law – which is the UN persisting stance in this regard. That is without prejudice to the immunity of usage which guarantees to witnesses before public hearings that the information they provide shall not be used in any suits to be filed against them – as the information was required to disclose truth, in the first place.

e. It was also the practice in such arrangements of transitional justice that criminal and civil responsibility for some non – serious crimes are discharged, provided that perpetrators themselves disclose all details of crimes they committed, present public apologies for victims and agree to compensate them and provide specified services for local community. This is meant as a form of accountability that guarantees the disclosure of the largest number of violations in addition to making perpetrators pay the price to victims and society.

f. The experience of Equity and Reconciliation (IER) of Morocco and the Truth and Reconciliation (TRC) of South Africa are perhaps the closest to our situation. While the South African exercise resulted in the realization of complete severance with the Apartheid regime of the past, the Moroccan conflict between civil society and the monarchy led to a different pattern, in the aftermath of which the early signs of Democratic Transformation appeared within the build of the regime itself and continued developing, despite shortcomings held by a broad sector of public opinion in the country within context of Transitional Justice arrangements: from the Arbitration Commission devoted to cash compensation to the IER of relative independence, due to pressures from civil society, and broader powers to disclose truth in relation to some 16861 dossiers of violation covering the period from 1956 to 1999. Addressing these did not only take the form of cash settlement but included physical and psychological rehabilitation, social reintegration, settlement of legal job, administrative, educational issues, issues of seizure of property – for individual reparation. Communal reparation took the forms of extending



economic development to regions marginalized in the past and integrating approaches to gender issues by catering to women grievances.⁽¹³⁾

g. Focusing on these two experiences, the Moroccan in particular, does not aim at belittling the value and significance of some forty global experiences resulting in the establishment of “the International Center for Transitional Justice”, based in New York, due to efforts exerted by the South African Professor **Alex Burin** who, together with Archbishop **Desmond Tutu**, are considered to be the real engineers of the exercise in that country. The totality of these exercises culminated into upgrading the discourse of international community from merely demanding facilitating access to justice (in the 1970s and 80s) to reinforcing principle of accountability and emphasis on disallowance of impunity (since early 1990s). these experience form a turning point in the history of mankind and provide guidance and inspire the innovation of new forms to enrich if out of our nation is likely to provide its own initiative in this regard.

h. Both Moroccan and South African experiences adopted public hearings to extract truth. In South Africa, perpetrators faced victims, in public and confessed publicly of what they committed. Moroccan victims managed to make their voices heard at an official public forum – establishing a national narrative about the suffering and pains of the past.⁽¹⁴⁾ Both experiences render themselves for sharing, through close involvement of civil society (political parties, associations and active forces) in a process of transformation or, in the Moroccan terminology, the surpassing of the “*years of the bullet*”, revenge, relying rather on democratic means to seeking the truth, performing “*duty of memory*” as per social psychology, effecting reparation by paying due respect, materially or otherwise, to victims, transferring the whole population from position of subjects to that of citizens of equal rights and duties, crating structural reform that guarantees, at executive, legislative and judicial powers levels as well as the civil service, armed forces and relations of politics and habitation (among others) , the elimination of ways to violate human rights in the future, and guarantees that this shall not be repeated i.e. effecting true and complete reconciliation, not with the regime (as many would mistakenly understand) but with the very national history, in first place.

i. Although the South African experience was based on Church teachings, what makes its applications sound in environments of Islamic culture is the fact that Islam teachings themselves are leased, in this regard, on the furtherance of the value of pardoning sham capable. For sure, the mechanism of public hearings (and the like) guarantees such capability to make the perpetrators (and



their state) publicly confess to the truth, or, at least, enables victims to narrate what happened – in public too.

2. Impediments to Application of Transitional Justice in Sudan:

a. Our country is supposedly witnessing, pursuant to the CPA and the interim constitution, a transitional period toward a democratic situation where by public liberties and human rights are catered to as per international standards, after the passage of two decades of embitterment due to excess methodic policies of oppressions most common pattern of which is torture and bodily abuse.

b. However, reality bears witness to the contrary, almost two years past the signing of the CPA and issuance of the interim constitution, for both CPA and constitution lack any apparent effect, especially in the realm of justice – except at the level of propaganda which does not reinstate a right nor does it retribute any harm! The image does not exceed a few formalities, with a radiant Bill of Rights in this constitution –yet with no transition being witnessed. For the legislations colliding with the constitution are still in force and the security service has not yet moved to assume its task constitutionally limited to gathering information, analyzing it and advising the authorities concerned. It confines to perform its previous tasks of standing guard to and empowering the one party rule by all means and methods all institutions of public service, including the judiciary, civil service and regular services, are still the way they were staffed by persons of political loyalty, with the continued absence of any addressing of causes of thousands of people with qualification who were unfairly dismissed in name of public interest. Media organs of the utmost effect (the radios and televisions), expected to disseminate the new spirit of transition, are still a monopoly of the one-sided vision, clinging to the essential joints of rule as in the old days. This is just the tip of the iceberg; the entire reality is in contradiction of the spirit of both the CPA and the late interim constitution.

Conclusion and Recommendations:

1. Conclusion:

a. Reading a suitable formula to realize justice during the transitional period with the aim of relieving embitterment of past years is an essential demand unavoidable and key to the future of the nation.



Weighing the conventional mechanisms of national and international justice, the wisest we can come up with is that realizing justice via local legislation and courts of law embodies a great morale value, whereby the nation itself is provided an opportunity to bear whiteness there to: Justice must not only be done, it must also be seen to be done.⁽¹⁵⁾ Furthermore, there are lessons to be learnt and sufficiently deter any attempt to repeat such crime in the future.

b. However, this way can only be made passable after removing all impediments making it a merely theoretical (if not totally impossible) option. This requires:

b.1: presence of sufficient governmental political will.

b.2: conducting comprehensive reforms at both legislative and judicial levels.

b.3: removal of people with authority, against whom serious charges are raised, from office, so all are equal before the courts. Power is undoubtedly a barrier to requirements of justice and equity.

c. Since torture is prohibited, pursuant to the universal Declaration of Human Rights and the International Convention on Civil & Political Rights Sudan is party there to by signing and ratification (on 18.3.1986). There is no sound legal logic to support disengagement from obligation to prohibit this abominable practice under pretext of not ratifying the Convention Against Torture. Consequently, all alleged acts of torture of the provisions of conventions binding on the Sudan and globally enforceable. Effecting prevalence of international convention over local legislation, so the national legislation will comply with international obligations, it is imperative not to adhere to the wording of Article 38 of the Sudan Criminal Procedures Act. This is, of course, if enough political will is availed to the executive as well as the desire and ability on the part of other the executive and the judiciary. Otherwise, doors will open to the second option of resourcing to international criminal courante and jurisdiction, whether before courts of law in counties who legislation so permit or before the ICC.

d. Whereas the effecting of the first option requires the conducting of comprehensive legislative and judicial reform which take relatively long time (even if started today), in addition to the time it takes to hear such huge volume of cases – a matter which will not be reasonable to ask victims to bear up, albeit of high significance and inevitable for the future, and whereas the second option does not command a priority, though feasible, due to its lacking the element of morale value which can only be realized, with desired caliber, justice, the third option of transitional justice appears to be the most appropriate, in this case, and the most realistic and feasible under the surrounding circumstances. Yet this



option, in turn requires that the state must embark on keen activation of the processes of democratic transition. Furthermore, these arrangements of transitional justice are not possible without that democratic transition. It goes without saying that both form the two primary elements required for establishing the Comprehensive Peace hoped for.

e. However, there is a real problem facing any required step towards a democratic transition or transformation, in deed not in word, especially in the field of structural constitutional and legal reforms, required for making justice, of its international standards, the real safely fuse to enable or country and nation enjoy constitutional liberties and rights. This problem is in our view in a nutshell: the lack of political will the part of the regime.

2. Recommendations:

It is imperative that the political and civil forces of society should mobilize all their energies, with the solidarity and support of all the democratic international community, to push for creating sufficient political will within the governing parties to embark immediately on a way out of the present tense situation that justice in Sudan suffers from, as follows:

a. to effect the option of Transitional Justice, topped by issuing a law on establishing and forming a “Sudanese Truth , Equity & Reconciliation Commission” as an authority of wide political and social representation, administrative and financial independence, credibility and transparency. In addition, an examination of other peoples’ expertise is advisable, especially the Moroccan and South African experiences, without indulging in unquestioning adoption thereof.

b. To effect immediate, comprehensive legal and judicial reform in terms of:

b.1. Reviewing, repealing or amending all legislation not complying with the interim constitution or the international criminal law, in wording or in spirit, which do not incriminate nor penalize the most serious crimes of international concern, such as crimes against humanity war crimes and genocide, or those laws which grant unfair impunity to persons with authority or hinder, in any form, the rule of law – headed by the National Security Forces Act (1999), Criminal Act (1991), Criminal Procedures Act (1991) and Article 15. (d) of the Constitutional Court Act (2005) and the like.

b.2. Affirming the independence and impartiality of the judiciary, starting with reconsideration and addressing of the effects of all procedures of firing and replacement the judiciary was subjected to during past years. This has resulted



in the judiciary losing many qualified staffers who were replaced by elements whose only qualification is loyalty to the regime and its political party. This is to be carried out in absolute transparency, with wide participation of the public opinion (especially the professional), all political parties and forces and civil society organizations (including the committee of dismissed judges); in complete adherence with the UN basic Principles on Independence of the Judiciary (1985).

b.3. Accelerating the process of ratification of all international conventions pertaining to the International Human Rights Law, the International Humanitarian Law and the International Criminal Law, topped by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Rome Statute.

Notes:

1. First and Second Constitutional Decrees issued on 30.6.1989.
2. See Ameen Makki Madani: Jaraem Sudaniyah Bil – Mukhalfah Lil-Ganoon. Al Insani Al Duwali (1989-2000), 1st edition, Dar Al Mustaghal Al Arabi, 2001; also Ali Al Mahi Al Sakhi, Shihadati Lil-Tarikh: Biyoot Sayiat Al Suma'a, edited by Hassan El Gizouli, 1st edition, Sudanese Group for Victims of Torture, 2000.
3. Kamal El Gizouli, Al Hageegah Fi Darfur, A Review of, with an Introduction to the Report of the UNSC International Commission of Enquiry, 1st edition, Cairo Center for Human Rights Studies, 2006, Gadhaya Harakiya series, No. 22, pp. 184-186.
4. Mahmood Al Sheikh (Advocate): Legal advice presented, on 28.1.2001, to Dr. Faroug Mohamed Ibrahim who had been subjected to torture in one of the notorious Ghost Houses in Khartoum, immediately after the 1989 coupe .
5. Lord Denning: Tareeg Nahwal-Adalah, translated in Arabic by Kunnoon and Mishawi, 1st ed. , Dar Al Jeel, Beirut, 1982.
6. Newspapers, news agencies, radio and television broadcasts on 5-6 May 2006.
7. Mahmood Al Sheikh (advocate), *ibid*.



8. Ameen Makki Madani, *ibid*, pp. 175-181.
9. Yitiha Simbeye; *Immunity and International Criminal Law*, Ashgate, England-USA (2004), p. 36.
10. Paust, Bassiouni, Scharf, Sadat, Zagaris and Williams; *International Criminal Law Cases and Materials* (2000), pp.13-14, in Y. Simbeye, *ibid*.
11. *Civil Liberties Cases and Materials* 2nd Ed.S.H. Bailey. D. J. Harris B.L., Jones, page 5 – *The Times: Law Report*, March 25, 1999, in (Mohmood Al Sheikh, *ibid*).
12. *ibid*.
13. Kingdom of Morocco, Hayaat al Inssaf Wal-Mussalaha, Final Report, 30 November 2005.
14. *Ibid*.
15. Ameen Makki Madani, *ibid*, p. 185.

* Presented at the Seminar of the (Legal Reforms), organized by Al Ahfad University in collaboration with the American Institute of Peace, Khartoum, September 2006, and at the Workshop of the Bar Human Rights Committee of England and Wales, held within the Conference of the Bar Association in London, November 4th 2006.

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