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Litigation before the African Commission on Human and Peoples' Rights and the struggle against torture in Sudan

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Introduction

The infliction of severe physical or mental pain or suffering for a particular purpose – in short, torture – constitutes an extreme abuse of power. Officials committing torture pervert the state's monopoly of power, depriving individuals of the protection that the transfer of such power was meant to entail. They violate the internationally recognised absolute prohibition against torture, a rule that can be seen as an archetype of how law relates to force:

Law is not brutal in its operation; law is not savage; law does not rule through abject fear and terror, or by breaking the will of those whom it confronts. If law is forceful or coercive, it gets its way by methods which respect rather than mutilate the dignity and agency of those who are its subjects.¹

Viewed in this light, the prevalence of torture is a key indicator of the level of respect for the rule of law and human rights in a given country. In Sudan, the methods employed after the 1989 coup made it clear that torture was an integral part of a strategy to establish and maintain power. The so-called ghost houses, in which individuals were subjected to what frequently amounted to sustained and extremely brutal torture, were invisible yet all too well known embodiments of this approach.² The reality of torture in Sudan over the last three decades has been well documented. Multiple testimonies, reports by human rights organisations and human rights defenders, and findings by human rights bodies and others provide detailed evidence.³

From the early days of the current regime, there has been considerable resistance to torture, both in Sudan and abroad. Sudanese torture survivors set up organisations

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1. J. Waldron, *Torture Terror and Trade-Offs: Philosophy for the White House* (OUP, 2010), 232.
2. See in particular Human Rights Watch/Africa, *Behind the Red Line* (1996); A. M. Medani, *Crimes against International Humanitarian Law in Sudan: 1989-2000* (Dar el Mostaqbal el Arabi, 2001); and the Group against Torture in Sudan, ghosthouses.blogspot.co.uk.
3. See a recent report, REDRESS and ACJPS, *Sudan human rights crisis: High time to take article 2 of the Covenant seriously: Submission to the UN Human Rights Committee ahead of its Examination of Sudan's Fourth Periodic Report under the International Covenant on Civil and Political Rights*, June 2014, 21-50, available at www.redress.org/downloads/publications/140613SubmissionSudanHRC.pdf.

in the United Kingdom and the United States and documented violations.⁴ Human rights organisations and rehabilitation centres in Sudan, in so far as they have been able to operate, have equally documented torture and provided rehabilitation.⁵ National and international human rights organisations have monitored Sudan's compliance with its international obligations, issued detailed reports and called for legislative and institutional reforms, as well as accountability and justice.⁶ They have also advocated, unsuccessfully to date, that Sudan ratify the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Sudanese victims of torture and human rights defenders have also litigated cases with a view to obtaining justice and strengthening the prohibition of torture. Cases of torture brought in Sudan have, with few exceptions, failed (some instances of police torture resulted in prosecutions or out of court settlements). Legal barriers shielding the perpetrators include immunities, amnesties and short statutes of limitation. Institutions, that is the law enforcement and security agencies, are not subject to independent and effective oversight, be it judicial or otherwise. The lack of effective protection against threats and harassment further discourages anyone thinking of taking legal action or publicly exposing torture. The net result is that remedies "are inadequate and ineffective".⁷ Victims of torture whose cases failed domestically, or who did not use the inadequate and ineffective remedies in Sudan, and those acting on their behalf, have increasingly taken their cases before the African Commission on Human and Peoples' Rights (African Commission), Africa's main human rights treaty body.⁸

This litigation before the African Commission has generated a growing body of jurisprudence on torture. However, Sudan has largely failed to take action in response, which raises the obvious question of whether and, if so, why, one should use such external avenues. Based on my own experience of litigating several cases and pursuing complementary advocacy strategies,⁹ I argue that,

4. In the UK, Sudan Victims of Torture Group and Sudan Organisation against Torture and in the US, the Group against Torture in Sudan.

5. For most of the 2000s in particular, the Khartoum Centre on Human Rights and Environmental Development and the Amel Centre.

6. In addition to the organisations mentioned in preceding footnotes, see in particular the work of the African Centre for Justice and Peace Studies (ACJPS), (the then) SOAT, Amnesty International, Human Rights Watch and REDRESS.

7. *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan*, Communication 379 /09 (2014), paras. 69,70.

8. Organisations that have brought cases against Sudan include ACJPS, REDRESS, FIDH, OMCT, Interights, Sudan Democracy First Group, Human Rights Watch, and Amnesty International (in the 1990s).

9. In my capacity as the then Programme Advisor, and later Counsel, at REDRESS (2004-14).

for all its apparent limitations, litigation can be highly important for victims of torture. It provides a measure of justice, and forms part of broader strategies to counter the forever present risk of the ‘normalisation’ and ‘forgetting’ of serious violations, both domestically and internationally. Findings by the main regional human rights body that Sudan has been responsible for torture constitute an official record that exposes systemic violations and shortcomings. They also serve as a reminder of the reality of state-inflicted suffering to all those who argue that political imperatives should take precedence over the demands of justice.¹⁰

Litigating torture cases before the African Commission on Human and Peoples’ Rights

A brief overview

The African Commission is at present the only supranational human rights treaty body that can hear complaints brought against Sudan.¹¹ Sudan is subject to the African Commission’s jurisdiction by virtue of having ratified the African Charter on Human and Peoples’ Rights (‘African Charter’).¹² The African Charter gives broad standing, not only to victims but also to organisations, to file a complaint before the African Commission alleging that a state has violated its obligations.¹³ This includes the prohibition against torture under Article 5 of the African Charter:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Anyone bringing a case (‘communication’) must meet the formal admissibility criteria, which include having to exhaust domestic remedies in Sudan, or show that they are not available or effective.¹⁴ This usually means having to lodge a criminal complaint or pursue other avenues, particularly taking legal action before the courts,

10. See on this point more broadly, e.g. M. Mamdani, *Saviors and Survivors: Darfur, Politics, and the War on Terror* (Verso, 2009) and L. Oette, ‘Book Review: Mahmood Mamdani, *Saviors and Survivors, Darfur, Politics and the War on Terror*’, *Journal of African Law* 54(2) (2010), 313–18.

11. Cases concerning a violation of the right to liberty can also, exceptionally, be brought (provided the person concerned is still in detention), and have been brought against Sudan, before the United Nations Working Group on Arbitrary Detention, a UN human rights charter body, see www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx.

12. On 18 February 1986.

13. See articles 55, 56 of the African Charter.

14. *Ibid.* article 56 (5).

unless it is clear that these procedures fail to remedy violations in practice. Upon declaring a communication admissible, the African Commission will consider the merits, i.e. the substance of a case, based on the submissions made by the parties, and, exceptionally, hearings. It will then issue a decision, which includes findings and recommendations (where a complaint is, at least partially, upheld), and is published after its adoption by the Assembly of Heads of State of the African Union.¹⁵

The jurisprudence of the African Commission on torture in Sudan

By late May 2016, the African Commission had published decisions in thirteen communications brought against Sudan, making it one of the states with the highest number of cases against it (after Cameroon, Zimbabwe, Democratic Republic of the Congo and Nigeria).¹⁶ The Commission held, in seven of the thirteen cases, that Sudan had violated its obligations under the African Charter. Eight of the cases concerned torture or other forms of ill-treatment in Sudan (finding of violations in six cases).¹⁷ At least ten cases were pending against Sudan.¹⁸

15. See further REDRESS et al., *Filing a Communication before the African Commission on Human and Peoples' Rights, A complainant's manual* (2013).

16. www.achpr.org/states/sudan/-Sudan/States/ACHPR.

17. One torture related case not considered further is *Curtis Doebbler v. Sudan*, Communication 235/00 (2009), which concerned the forced repatriation of Ethiopian refugees and an alleged violation of the prohibition of refoulement (exposing a person to the risk of being subjected to torture in third country). The Complainant also alleged that Sudan “had mistreated the refugees for protesting their forcible repatriation” but the African Commission, which dismissed the communication on its merits, did not consider these allegations in detail, stating that it had no “substantive reasons to doubt the [very different] account by the Respondent State,” *ibid.*, paras. 160,161.

18. *Abdelrahman Mohammed Gassim and nine others (represented by EHAHRDP, REDRESS, ACJPS and the Darfur Bar Association) v. Sudan*, Communication 391/10; *Sudanese civilians in South Kordofan and Blue Nile (represented by REDRESS, SDFG, HRW and the Enough Project) v. Sudan*, Communication 420/12 (joined with 402/11); *Safia Isbaq Mohammed Issa (represented by REDRESS) v. Sudan*, Communication 443/12; *Ali Askouri and Abdel-Hakeem Nasr (on behalf of persons affected by the construction of the Merowe and Kajbar Dam) v. Sudan*, Communication 452/13; *Magdy Moustafa El-Baghdady (represented by REDRESS) v. Sudan*, Communication 470/14; *Meriam Yabia Ibrahim, Daniel Wani and their two children v. Sudan*, Communication 471/14; *Abdel Moneem Adam Mohammed (represented by REDRESS, ACJPS and EHAHRPD) v. Sudan*, Communication 510/15; *Dr. Amin Mekki Medani and Mr. Farouk Abu Eissa (represented by FIDH, ACJPS, OMCT & REDRESS) v. Sudan*, Communication 551/15; *Dr. Bushra Gamar Hussein Rahma (represented by ACJPS) v. Sudan*, Communication 567/15; and *Hassan Isbaq Ahmed (represented by ACJPS & others) v. Sudan*, Communication 577/15.

Ghost Houses

Two cases relate to torture in the early days of the regime following the coup. In a case brought by Amnesty International and others against Sudan in 1990¹⁹ the complainants alleged:

Widespread torture and ill treatment in the prisons and “ghost houses” in Sudan. These allegations are supported by doctors’ testimonies, personal accounts of alleged victims and a report by the UN Special Rapporteur. A number of individual victims are named. Additionally, it is alleged that many individuals were tortured after being arrested at army checkpoints or in military or war zones. Acts of torture include forcing detainees to lie on the floor and being soaked with cold water; confining four groups of individuals in cells 1.8 metres wide and one metre deep, deliberately flooding cells to prevent detainees from lying down, forcing individuals to face mock executions, and prohibiting them from washing. Other accounts describe burning with cigarettes and the deliberate banging of doors at frequent intervals throughout the night to prevent sleeping. Individuals were bound with rope such that circulation was cut off to parts of their bodies, beaten severely with sticks, and had battery acid poured onto open wounds.²⁰

The African Commission found Sudan to have breached the prohibition of torture: “[t]here is substantial evidence produced by the complainants to the effect that torture is practised,”²¹ and “the acts of torture alleged have not been refuted or explained by the government...”²²

Another, more recent case was filed by Dr. Farouk Mohamed Ibrahim in 2010.²³ He is a well-known former university professor who had been targeted by the National Intelligence and Security Services (NISS) and repeatedly brought public complaints regarding the torture he had suffered. Having unsuccessfully pursued a fundamental rights petition before Sudan’s Constitutional Court, he filed a complaint with the African Commission, in which he alleged that he had been, in November and December 1989, “subjected to repeated kicking and beating; prolonged bath in ice water; threatened with rape, death; and deprived of sleep for up to three

19. *Amnesty International, Comité Loosli Bachelard, Lawyers’ Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan*, Communications 48/90-50/91-52/91-89/93 (1999).

20. *Ibid.*, para. 5.

21. *Ibid.*, para. 54.

22. *Ibid.*, para. 57.

23. *Dr. Farouk Mohamed Ibrahim (represented by REDRESS) v. Sudan*, Communication 386/10 (2013).

days.”²⁴ Further, he alleged to have been “detained in a small and dirty 1 metre by 1.6 metre toilet room flooded with water for three days before being transferred to another bathroom where he was kept with five other detainees for nine days.”²⁵

The African Commission found that local remedies had not been available, adequate and effective. It nonetheless proceeded to dismiss the complaint as inadmissible, holding that it had been filed out of time even though the African Charter does not set a time limit. It thereby left the complainant without a remedy after having stated unequivocally that no effective remedies had been available in Sudan.

National Security and Intelligence Services (NISS) torture 1998, 2008 and 2011

In the case of *Law Offices of Gbazi Suleiman v. Sudan*, brought on behalf of 29 individuals,²⁶ the African Commission upheld the complaint “that in the two months of their detention, the suspects were imprisoned, tortured and deprived of their rights.”²⁷ In addition, “detaining individuals without allowing them contact with their families and refusing to inform the families of the fact and place of the detention of these individuals amount to inhuman treatment both for the detainees and their families.”²⁸

In the case of *Monim Elgak, Osman Hummeida and Amir Suliman v. Sudan*, three prominent human rights defenders were, in November 2008, targeted on account of their alleged crime of spying or colluding with the International Criminal Court.²⁹ The complainants submitted that

Mr. Amir Monim Elgak and Mr. Osman Hummeida were subjected to sustained and severe beatings. The Complainants describe various acts to which they were subjected, including being punched and hit with a pipe and wooden cane on their feet and soles. Mr. Osman Hummeida in particular was allegedly subjected to sleep deprivation and denied access to medical treatment. It is submitted that Mr. Elgak’s lip was split open as a result of the beatings while Mr. Osman had severe pain and difficulties in walking.³⁰

In addition,

all three Complainants were subjected to credible threats and a pervasive climate of fear that caused anxiety in them. Monim Elgak was for example threatened with rape and putting out a cigarette in his eye;

24. *Ibid.*, para. 8.

25. *Ibid.*, para. 9.

26. *Law Offices of Gbazi Suleiman v. Sudan*, Communication 228/99 and 229/99 (2003).

27. *Ibid.*, para. 43.

28. *Ibid.*, para. 44.

29. *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan*, Communication 379/09 (2014).

30. *Ibid.*, para. 75.

Osman Hummeida was threatened with execution, having a gun pointed at his head, as well as being exposed to torture instruments. He was also subjected to death threats and made to witness the torture of his colleague and friend. Amir Suliman was threatened with torture, his glasses were removed, the room darkened and the interrogating officers brandished sticks and hoses known to be used for the purposes of torture...³¹

The African Commission, finding that the complainants had adduced evidence to prove the alleged facts, which had not been contested, held that Sudan was responsible for the torture inflicted and the lack of prompt, impartial and effective investigation into the alleged violations.³² After finding that a series of other rights had been violated, the African Commission also held that Sudan has an inadequate legal framework in place to protect several rights guaranteed in the African Charter.³³

In the case of *Hawa Abdallah v. Sudan*, a Darfurian community activist, the authors of the complaint submitted that she was tortured while “in the custody of the NISS in El Fashir and in Khartoum”:

Ms. Abdallah was subjected to sustained severe beatings that amounted to torture. It is submitted that during her arrest, she was repeatedly slapped and beaten by the arresting officers with the butts of their guns. She was also allegedly punched, whipped and beaten with various objects including an iron rod and metal wires and subjected to other physical forms of abuse.³⁴

The African Commission dismissed the communication on the merits because the complainants had not provided sufficient evidence “to substantiate the allegations”.³⁵

Conflict-related torture

The case of *Sudan Human Rights Organisation & Centre on Housing Rights v. Sudan* concerned violations alleged to have been committed in the Darfur conflict since 2003 (the case was decided in 2009).³⁶ The complainants,

submitted that the various incidences of armed attacks by the military forces of the Respondent State, using military helicopters and the *Janjawid* militia, on the civilian population, forced eviction of the population from their homes and villages, destruction of their properties, houses,

31. *Ibid.*, para. 76.

32. *Ibid.*, paras. 96-101.

33. *Ibid.*, paras. 138-141.

34. *Hawa Abdallah (represented by ACJPS) v. Sudan*, Communication 401/11 (2015), para.72.

35. *Ibid.*, paras. 89-91.

36. *Sudan Human Rights Organisation & Centre on Housing Rights and Eviction (COHRE) v. Sudan*, Communication 279/03-296/05 (2009).

water wells, food crops and livestock, and social infrastructure, the rape of women and girls and displacement internally and outside national borders of the Respondent State [Sudan], constitute violations ... [amounting] to both psychological and physical torture, degrading and inhuman treatment, involving intimidation, coercion and violence.³⁷

The African Commission found that Sudan,

and its agents, the *Janjanvid* militia, actively participated in the forced eviction of the civilian population from their homes and villages. It failed to protect the victims against the said violations. [Sudan], while fighting the armed groups, targeted the civilian population, as part of its counter insurgency strategy. In the opinion of the Commission this kind of treatment was cruel and inhuman and threatened the very essence of human dignity.³⁸

It held that Sudan had violated the prohibition against torture, as well as a number of other rights guaranteed under the African Charter,³⁹ and recommended that Sudan take a series of measures.⁴⁰

Police torture

The case of *Abdel Hadi, Ali Radi & Others v. Republic of Sudan* was brought on behalf of 88 victims in 2009.⁴¹ In May 2005, internally displaced persons (IDPs) had protested against their forced relocation from the Soba Aradi camp in the southeast of Khartoum. In the ensuing riots, 15 policemen and five IDPs were killed. In response, the police arbitrarily arrested, detained and tortured a large number of IDPs.⁴² According to the African Commission:

The Complainants have submitted that the victims went through various forms of physical torture during their detention ranging from severe beating with whips and sticks, doing the *Arannabb Nut* (rabbit jump), heavy beating with water hoses on all parts of their bodies, death threats, forcing them to kneel with their feet facing backwards in order to be beaten on their feet and asked to jump immediately after, as well

37. *Ibid.*, para. 158.

38. *Ibid.*, para. 164.

39. *Ibid.*, para. 228.

40. *Ibid.*, para. 229, including investigations, prosecutions, restitution and compensation for victims, major legislative and judicial reforms, rehabilitation of the economic and social infrastructure in order to enable the return of IDPs, establishing a national reconciliation forum, non-application of amnesty laws and consolidation and finalisation of pending peace agreements.

41. *Abdel Hadi, Ali Radi & others v. Republic of Sudan*, Communication 368/09 (2013).

42. *Ibid.*, paras. 1-10.

as other forms of ill-treatment. These facts have not been contested.⁴³

This treatment, which was inflicted “with the aim of extracting confessions from the victims and as punishment for the killing of policemen at the Soba Aradi IDP camp... resulted to [sic] serious physical injuries and psychological trauma”⁴⁴ and therefore amounted to torture.⁴⁵ The African Commission held that “incommunicado detention, death threats, denial of medical care and adequate toilet facilities... [is] not in keeping with [a person’s] dignity and pose a threat to his health [and] amounts to cruel, inhuman and degrading treatment or punishment.”⁴⁶ In addition, it found a series of other violations of the African Charter, including on account of Sudan’s failure to effectively investigate the allegations of torture and to provide an adequate legal framework for the protection of rights.⁴⁷

Corporal punishment

The case of *Curtis Francis Doebbler v. Sudan* concerned the lashing of eight students in 1998,⁴⁸ following their conviction in June 1999 for having violated public order (article 152 of the 1991 Criminal Act) by not being properly dressed and acting immorally (having a picnic in Burri, Khartoum, “girls kissing, wearing trousers, dancing with men, crossing legs with men, sitting with boys and talking with boys”).⁴⁹ The African Commission held that

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 Charter and contrary to the very nature of this human rights treaty.⁵⁰

Significantly, “[t]he law under which the victims in this communication were punished has been applied to other individuals. This continues despite the government being aware of its clear incompatibility with international human rights law.”⁵¹ The ruling dates back to 2003 but these words could have easily and equally been written today.⁵²

43. *Ibid.*, para. 72.

44. *Ibid.*

45. *Ibid.*, para. 73.

46. *Ibid.*, para. 74.

47. *Ibid.*, para. 93.

48. *Curtis Francis Doebbler v. Sudan*, Communication 236/00 (2003).

49. *Ibid.*, paras. 1-8, particularly para. 3.

50. *Ibid.*, para. 42.

51. *Ibid.*, para. 44.

52. See further REDRESS, *No more cracking of the whip: Time to end corporal punishment in Sudan* (March 2012).

A brief evaluation of jurisprudence to date

While their number is limited, the cases decided and published by May 2016 offer some important findings. The cases resulting in a ruling against Sudan provide detailed evidence of state responsibility for multiple instances of torture in various contexts. The government of Sudan has responded to most complaints against it before the African Commission. In many cases, it did not contest the factual allegations made. Instead, it focused primarily but largely unsuccessfully on formal admissibility criteria, particularly the failure to exhaust domestic remedies. The Commission's decisions constitute public and formally validated records of the torture practice of various agencies. The identity of perpetrators and methods of torture point to a systematic use of torture over several decades, particularly by the NISS, and a readiness by the police to resort to torture methods. The findings concerning Sudan's responsibility for torture and other ill-treatment in the early phase of the Darfur conflict reflects, and reinforces the finding of other bodies, such as the UN Commission of Inquiry on Darfur in 2005. In addition, finding Sudan's laws on corporal punishment incompatible with its obligations under the African Charter set a major precedent and clear marker for the lack of acceptability of this aspect of Sudan's criminal justice system under international standards. Finally, the jurisprudence has underscored the failure of Sudan's legal system adequately to protect the right to be free from torture and to provide victims with the right to an effective remedy. This includes the failure to investigate allegations of torture promptly, impartially and effectively.

There are, nonetheless, significant gaps in the type of cases and issues brought before, and decided by, the African Commission. The cases focus primarily on 'political' and 'conflict related' torture. They also predominantly address the torture of men. This means that the cases reflect only certain experiences of victimisation. Importantly, torture in the context of the criminal justice system and as an element of social control remains largely unaddressed, other than in the particular circumstances of the Soba Aradi (Abdel Hadi et al.) case and, to some extent, the Curtis Francis Doebbler case. Most cases concern torture committed in Khartoum, with the exception of the Darfur and the Hawa Abdallah case. Torture, committed in the course of other armed conflicts and other regions of Sudan, including as protest against development projects, is notable by its absence. The decisions published to date are also largely silent on rape and sexual violence as a method of torture. These gaps are not the result of a strategy of deliberate omission but rather the outcome of choices made by complainants, and the difficulty of litigating certain cases, such as violations committed outside Khartoum and cases of sexual violence. Nonetheless, the gaps also reflected, to some extent, the focus of actors that have made use of the African Commission as an avenue for litigation.

This situation has changed considerably because a number of cases currently

pending before the African Commission provide for a broader spectrum of violations. This includes cases of social control in the broadest sense, such as the prosecution for adultery and apostasy, imposition of the death penalty and detention in inhuman conditions in *Meriam Yabia Ibrahim, Daniel Wani and their two children v. Sudan*. It also comprises torture and other ill-treatment alleged to have been committed in the conflict in South Kordofan and Blue Nile (where the African Commission indicated provisional measures requesting Sudan to refrain from violating the Charter, which Sudan has ignored to date), and in the context of protests against the Kajbar and Merowe dams. A number of cases concern ill-treatment and other violations committed against human rights defenders, several of whom are from Darfur. A case of alleged rape at the hands of the NISS, namely *Safia Ishaq Mohammed Issa v. Sudan*, is also pending.⁵³

Beyond the finding of violations, what has been the actual outcome of cases? The African Commission made a series of recommendations against Sudan, including investigations with a view to prosecuting and punishing the perpetrators, compensation, and a number of legislative and institutional reforms.⁵⁴ Sudan has not acted on these recommendations. There are no laws providing for their recognition and enforcement. While a unit has been established within the Ministry of Justice tasked with dealing with the issue of implementation, little is known about its work, and there is no evidence that it has proactively sought to take measures aimed at partially or fully implementing the decisions made. While limited implementation of the African Commission's decisions is not confined to Sudan, it is widely acknowledged that it undermines the utility of the complaint procedure as a supranational remedy.⁵⁵

Assessment: The advantages and limitations of litigation before the African Commission

At first sight, it would be easy to be dismissive about the process of litigating torture cases against Sudan. Yes, there have been a number of decisions in important cases, but victims have still not achieved tangible justice. There is scant evidence of any strategic impact, i.e. that the jurisprudence has brought about changes and contributed to greater human rights protection in Sudan. The procedure before the African Commission is not particularly efficient, being cumbersome and slow (at times taking more than five years from complaint to publication of decision). It is also seen as weak and ineffective, as the African Commission has

53. See case references above note 18.

54. See further REDRESS, *Reaching for justice. The Right to Reparation in the African System* (October 2013).

55. See further R. Murray and D. Long, *The Implementation of the Findings of the African Commission on Human and Peoples' Rights* (CUP, 2015).

no enforcement powers. Is such litigation therefore an exercise in futility, which puts too much trust in human rights and legal processes, and is it time to focus on other modes of engagement instead, such as the politics of resistance?⁵⁶ Calling for such a turn seems tempting but it rests on a false dichotomy and would be ill-conceived. It would ignore the various ways in which litigation before the African Commission has provided a vindication for victims and a tool for human rights advocacy. For a torture victim, a positive decision by the African Commission constitutes a validation of his or her account, and a recognition of the state's responsibility for the wrong inflicted. It therefore vests victims with a voice, and with acknowledgment, which they are denied in Sudan's legal system and public discourse. It helps them to set the record straight and is seen as providing them with a measure of satisfaction (though, without implementation, no full reparation).

The growing number of decisions also provides strong evidence of systematic practices and shortcomings. The evidence-based, factual exposure of how Sudan treats its citizens and others within its jurisdiction, including its responses to alleged violations, provides an anatomy of the multiple failings of its legal and institutional system. It shows that torture is not random but an integral tool of exercising power against anyone who actively opposes the regime (or is seen to do so), who does not conform to norms imposed on social, religious or cultural grounds, or is otherwise viewed as an outsider with an inferior status. As found in most cases by the African Commission, torture frequently goes hand in hand with other violations, such as freedom of expression and assembly, particularly, as is often the case, where it is used to deter protests, opposition or non-conformism. Torture is also embedded in the legal system as it is facilitated by the extremely broad powers given to the NISS, which typically result in arbitrary arrests and detention. The legal system enshrines impunity of law enforcement and security agencies, particularly by virtue of immunity laws, and violates key tenets of the rule of law.⁵⁷

The quasi-judicial findings of the African Commission are important for advocacy purposes, as they help to inform law campaigns, such as on the reform of the National Security Act and immunity laws.⁵⁸ They also help in countering state narratives before regional and international bodies, as they limit

56. A number of scholars have critically interrogated the supposed shortcomings of human rights discourse and strategies, including litigation, as a means for political change. See for a brief overview, I. Bantekas and L. Oette, *International human rights law and practice*, 2nd edition. (CUP, 2016, forthcoming), Chapter 1, 1.4.2.

57. See M. A. Babiker and L. Oette, *The Rule of Law and Human Rights in Sudan: challenges and prospects for reform* (2014), www.democracyfirstgroup.com/News/Rule%20of%20Law%20and%20Human%20Rights%20ENGLISH_FINAL.pdf.

58. See further www.pclrs.com.

the scope for denial.⁵⁹ The litigation provides the African Commission with crucial information about the reality of violations, which allows it to challenge the version put forward by Sudan's delegation when attending the Commission's ordinary sessions. The role of the African Commission is particularly important in this context, given efforts by the Government of Sudan to use regional mechanisms, particularly the African Union, as part of its broader efforts to ward off accountability and justice. This has contributed to Sudan agreeing to a mission by the Commission to Sudan in May 2015, thereby showing a level of engagement though with limited tangible outcomes to date. A formally validated counter-narrative is also critical, to challenge the nature and consequences of collaboration between 'Western' states and Sudan based on security and/or anti-immigration paradigms, in which human rights concerns are invariably downplayed.

Looking ahead, a detailed record of violations and systemic shortcomings is highly valuable for any future transition and demands for justice and reforms made in such a context. The cases before the African Commission, including those pending, already give strong indications of key perpetrators, at least institutions, victims and problematic laws and practices, which will need to be addressed when the time comes.

Ultimately, it is clear that bodies such as the African Commission can only be a poor substitute for a functioning domestic legal system. In respect of a state such as Sudan, the complaints procedure before the African Commission constitutes but one of the many avenues that victims and others have used to obtain accountability and justice, albeit with limited effect to date. If used in respect of a state that is generally committed to the rule of law, regional human rights treaty bodies can provide an important forum to correct shortcomings, and for judicial dialogue. In the absence of such commitment, litigants and the African Commission act to hold up a mirror, exposing deep-seated legal, institutional and structural problems and showing what the state should be doing to address them. Cases concerning torture in Sudan have highlighted a number of these challenges already; as indicated above, there is considerable scope to shine further light on remaining gaps. This applies particularly to the workings of the criminal justice and public order system, and the nexus between social inequality, exclusion, marginalisation and various forms of ill-treatment and impunity.

Outlook

Two important theories have been developed better to understand how international advocacy works and what factors influence states' compliance with their human rights obligations. The 'boomerang effect' focuses on local actors, particularly those who lack national space for effective advocacy, joining forces

59. See further S. Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Polity Press, 2001).

with transnational networks to use international fora in order to put pressure on their government.⁶⁰ According to the so-called spiral model, ideally advocacy and international engagement follows a trajectory characterised by initial denial by the target state, here Sudan, followed by accommodation and ultimately compliance.⁶¹ Litigation forms part of these broader processes of engagement. In the case of Sudan, a number of national, regional and international actors have engaged in joint advocacy and litigation. However, there is limited evidence that regional and international actors have been able to bring about enhanced compliance. The reasons for this are complex, including repression of domestic civil society, a weak judiciary and rule of law more generally, and contradictory policy objectives of regional and international actors. There are also high stakes for accountability and justice in a country such as Sudan that is facing deep-seated governance problems, multiple conflicts and external accountability threats (particularly the International Criminal Court in respect of individuals subject to arrest warrants). Is litigation useless, or a means to camouflage lawyers' helplessness in the face of power? It would be if one takes a narrow, realist view. It certainly is not if one sees litigation as an important element of a broader, multifaceted struggle for truth and justice, and acts of resistance against abuse of power.

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60. M. E. Keck and K. Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, 1998).

61. T. Risse, S. C. Ropp and K. Sikkink (eds.), *The Persistent Power of Human Rights: From Commitment to Compliance* (CUP, 2013).

The African Commission on Human and Peoples' Rights is composed of eleven members "chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality, and competence in matters of human and peoples' rights." Members of the Commission serve in their individual capacities and are, therefore, expected to.