



European
University
Institute

Robert Schuman Centre for Advanced Studies

Irregular Migration in Sudan: A Legal Perspective

Mohamed Abdelsalam Babiker

CARIM Analytic and Synthetic Notes 2011/64

Circular Migration Series
Socio-Political Module



CARIM
Euro-Mediterranean Consortium
for Applied Research on International Migration

Analytic and Synthetic Notes – Circular Migration Series
Socio-Political Module
CARIM-AS 2011/64

Irregular Migration in Sudan:
A Legal Perspective

Mohamed Abdelsalam Babiker
Assistant Professor of Law, University of Khartoum, Sudan

© 2011, European University Institute
Robert Schuman Centre for Advanced Studies

This text may be downloaded only for personal research purposes. Any additional reproduction for other purposes, whether in hard copies or electronically, requires the consent of the Robert Schuman Centre for Advanced Studies.

Requests should be addressed to carim@eui.eu

If cited or quoted, reference should be made as follows:

[Full name of the author(s)], [title], CARIM AS [series number], Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole (FI): European University Institute, [year of publication].

THE VIEWS EXPRESSED IN THIS PUBLICATION CANNOT IN ANY CIRCUMSTANCES BE REGARDED AS THE OFFICIAL POSITION OF THE EUROPEAN UNION

European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy

<http://www.eui.eu/RSCAS/Publications/>
<http://www.carim.org/Publications/>
<http://cadmus.eui.eu>

CARIM

The Euro-Mediterranean Consortium for Applied Research on International Migration (CARIM) was created at the European University Institute (EUI, Florence), in February 2004 and co-financed by the European Commission, DG AidCo, currently under the Thematic programme for the cooperation with third countries in the areas of migration and asylum.

Within this framework, CARIM aims, in an academic perspective, to observe, analyse, and forecast migration in Southern & Eastern Mediterranean and Sub-Saharan Countries (hereafter Region).

CARIM is composed of a coordinating unit established at the Robert Schuman Centre for Advanced Studies (RSCAS) of the European University Institute (EUI, Florence), and a network of scientific correspondents based in the 17 countries observed by CARIM: Algeria, Chad, Egypt, Israel, Jordan, Lebanon, Libya, Mali, Mauritania, Morocco, Niger, Palestine, Senegal, Sudan, Syria, Tunisia, and Turkey.

All are studied as origin, transit and immigration countries. External experts from the European Union and countries of the Region also contribute to CARIM activities.

CARIM carries out the following activities:

- Mediterranean and Sub-Saharan migration database;
- Research and publications;
- Meetings of academics and between experts and policy makers;
- Migration Summer School;
- Outreach.

The activities of CARIM cover three aspects of international migration in the Region: economic and demographic, legal, and socio-political.

Results of the above activities are made available for public consultation through the website of the project: www.carim.org

For more information:

Euro-Mediterranean Consortium for Applied Research on International Migration

Robert Schuman Centre for Advanced Studies (EUI)

Convento

Via delle Fontanelle 19

50014 San Domenico di Fiesole

Italy

Tel: +39 055 46 85 878

Fax: + 39 055 46 85 755

Email: carim@eui.eu

Robert Schuman Centre for Advanced Studies

<http://www.eui.eu/RSCAS/>

Abstract

This paper looks at irregular migration in Sudan from a legal perspective by examining the national legal framework related to irregular migration into and through Sudan. It provides analysis of immigration and labour laws, which stipulate certain sanctions against irregular migrants and also sanctions for the facilitation of irregular migration into Sudan. In this context, the paper analyzes national laws from the perspective of international human-rights law and asks whether such laws provide enough guarantees for irregular migrants. It also examines regulation for the migration of Sudanese citizens. The paper further addresses the legal status of three types or categories of migrants in Sudan: (a) irregular labour migrants; (b) transit migrants; and (c) refugees. The paper identifies laws and cases decided by the African Commission on Human and Peoples' Rights related to the protection of asylum seekers and refugees and their rights and duties under national and international human-rights law. It concludes that Sudanese laws dealing with irregular migration are not adequate despite the fact that Sudan receives huge numbers of irregular migrants as well as deports thousands of them each year. Sudan has not taken a proactive role or entered into bilateral agreements with its neighbours to combat irregular migration.

Résumé

Cet article traite de la migration irrégulière au Soudan d'une perspective juridique, en examinant le cadre juridique national relatif à la migration irrégulière à travers et au Soudan. Il fournit une analyse des lois sur l'immigration et le travail, qui prescrivent des sanctions à l'encontre des migrants irréguliers et des personnes qui facilitent leur migration. Dans ce contexte, l'article analyse le cadre juridique soudanais au regard du droit international des droits de l'homme. Il traite également de la réglementation régissant la migration des citoyens soudanais. L'article porte ensuite sur trois catégories de migrants au Soudan : a) les migrants économiques en situation irrégulière ; b) les migrants en transit ; c) les réfugiés. L'article identifie le droit dégagé par la Commission africaine des droits de l'homme et des peuples, relatif à la protection des demandeurs d'asile et des réfugiés. Il conclut que le droit soudanais s'appliquant à la migration irrégulière n'est pas adapté, en dépit de la présence d'un grand nombre de migrants irréguliers et de l'expulsion de milliers d'entre eux chaque année. Enfin, le Soudan n'a pas adopté de rôle proactif ni conclu d'accords bilatéraux avec ses voisins en la matière.

1. Introduction

A pattern of irregular migration has emerged in Sudan over the last decades, confronting the Sudanese State with various challenges. First, Sudan is a vast country with open borders, surrounded by several States. Second, Sudan is a traditional stop-off point on the route for Muslim pilgrims from West Africa who travel annually through Sudan to visit the holy lands in Saudi Arabia in order to perform *Haj*. Third, migrants have entered Sudan *en masse* due to war or armed conflict, in particular from East African countries such as Ethiopia and Eritrea either to seek refuge in Sudan or to stay 'in transit' while attempting to get to Europe or the US. Finally, due to the recent discovery of oil in the country Sudan has become attractive for migration and, as a result, it has received many illegal migrants. In order to cope with irregular migration, the Sudanese immigration authorities and the public authorities more generally have taken various measures to deal with this problem including the deportation of irregular migrants while subjecting others to criminal sanctions for illegally entering the country.¹

Yet Sudan is also an origin country for regular and irregular migration. Official sources indicate that the magnitude of Sudanese migration is between 1.7 to 2 million Sudanese migrated or living abroad: 51% in neighbouring African States, 48.7 in the Gulf States and Europe and North America. Those who have migrated fall into two categories: first, irregular migrants who were forced to leave due to the armed conflicts that have afflicted the country for many decades and which resulted in many Sudanese seeking asylum in many countries.² Second, economic migrants who have migrated since 1973 to the oil Gulf rich countries seeking employment opportunities and better wages.³

As noted above, this Article examines irregular migration to, through and from Sudan from a legal perspective by setting out the national legal framework governing irregular migration. In this respect the Article provides an analysis of the 1994 Passports and Immigration Act which stipulates certain sanctions against irregular migrants including transit migrants and also sanctions for the facilitation of irregular migration into Sudan. This Article also examines the substantive and procedural rights accorded to three types or categories of migrants in Sudan: (a) irregular labour migrants; (b) transit migrants; and (c) refugees.

2. National Regulation of Irregular Migration

Issues of irregularity under Sudan's laws are mainly dealt with by the 1994 Passports and Immigration Act which provides for few provisions for dealing with this phenomenon, though no particular definition or typology of 'irregularity' is used as part of the law. This Act repealed the 1960 Passports and Immigration Act and came into force 17 May 1994.⁴ It regulates admission, stay and the deportation of foreign nationals from the country. It also regulates both foreign and Sudanese nationals as well as imposing criminal sanctions for violating the Act. However, the paper does not address the

¹ The total numbers of irregular migrants deported during 2009-2010 was 2030. Sudan deports weekly 90 irregular immigrants. Between 17 December 2009 and 16 January 2010 Sudan deported 354 irregular migrants from Ethiopia out of 1538 or 22% of the illegal Ethiopian immigrants in Sudan. Nigeria is the second country of illegal immigrants (251 deported) followed by Niger (193 deported). Interview with Major General Abdella Mohamed Hagar, Director of Aliens Department, *Al Rai alam Newspaper*, issue no. 4807, 22 February 2011.

² The Number of Sudanese refugees before the signing of the Comprehensive Peace Agreement in May 2005 was 634,609. After the signing of the Peace Agreement this number fell, in 2010, to 330,382. See *Migration in Sudan: A country profile* cited in Haydiub, Abdelrahman, 'Organized Migration of Sudanese Abroad', published by the Sudanese Body for the Organization of the Affairs of the Sudanese Abroad, Ministry of Council of Ministers, pp. 2-4.

³ According to the statistics, as of March 2010, 81% are in the six Gulf States 65.5% of them in Saudi Arabia. See *Migration in Sudan: A country profile* cited in Haydiub, Abdelrahman, 'Organized Migration of Sudanese Abroad', published by the Sudanese Body for the Organization of the Affairs of the Sudanese Abroad, Ministry of Council of Ministers, pp.2-5.

⁴ Presidential Degree No 17 issued on 18/08/ 1993 and approved by Decision No. 47 of the National Assembly Session No. 59.

issue of human trafficking as the legal concepts of trafficking and smuggling are not integrated into the Sudanese legal order with the exception of some State laws recently enacted to deal with trafficking, particularly those States affected by or receiving massive numbers of irregular migrants.⁵ Although human trafficking does exist in Sudan the present writer is not able to identify any regulations, rules or policies issued at the national level combating this phenomenon.

2.1 The 1994 Passports and Immigration Act

The 1994 Passports and Immigration Act deals with legal consequences and regulation regarding informal, illegal entry into the county. It also regulates 'transit migration' as an illegal form of migration. The Act subjects irregular migrants to certain penalties for contravening immigration laws. Below is an exposition of the Act including an analysis of legal sanctions and the consequences of irregularity provided for under it. This section also focuses on certain types of migrants in Sudan including labour migrants and transit migrants

2.1.1 'Alien' Control

The 1994 Passports and Immigration Act regulates entry, departure and stay in Sudan. Article 9 (points of entry and exit) states that 'no person shall enter or depart from Sudan, except through the points of entry and exit to be prescribed from time to time by the Minister of Interior'. Article 10 focuses in particular on non-Sudanese nationals. It states 'no aliens shall enter the Sudan unless they are in possession of a valid passport and entry visa which shall be granted by a competent authority, and shall where practicable, be endorsed on the alien's passport'.⁶ The Act further requires that the alien be in possession of a valid passport for the whole of the period granted for his or her stay in the Sudan; and entitles them to return to the country issuing their passport or, in case they are without nationality, entitles them to travel to a country other than the Sudan.⁷

The Act accords the Minister of Interior substantial discretion as entry visas may be refused, or, if granted, may be cancelled at the discretion of the Minister without reasons being given.⁸ It further provides for wide grounds for not granting an entry visa to the following groups: (a) any fugitive criminal alien within the meaning of the Criminals Extradition Act, 1957; (b) an alien previously declared to be an undesirable alien or one who has previously been deported from Sudan; (c) an alien registered in the non-entry control list of the Ministry of Interior; (d) an alien who has no apparent means to gaining a living; (e) an alien who is suffering from a contagious disease, mental infirmity or temporary insanity unless entry is for medical treatment; (g) an alien who is not in possession of the valid certificates demanded by the Ministry of Health; or (h) an alien whose presence in Sudan will likely prejudice the law.⁹

For the purpose of legal residence or a stay in Sudan Article 14 provides that an alien may not reside in the Sudan unless in possession of valid residence permit. Article 16 refers to the 'procedures for the control of aliens', however without stipulating any detailed regulations to govern the control of aliens.

⁵ Kassala and Gadaref States, both bordering Ethiopia and Eritrea enacted some laws to combat human trafficking through Sudan's regional borders. Gezira State also enacted similar laws. These laws punish human traffickers with imprisonment for ten years, fines in addition to confiscation of property. Interview with, Major General Abdella Mohamed Hagar, Director of Aliens Department, *Al Rai alam Newspaper*, Issue No. 4807, 22 February 2011.

⁶ Article 10 (1), (2)

⁷ Articles 3 (a) (b)

⁸ Article 11.

⁹ Article 11 (a,b,c,d,e,f, g)

However, Sudanese laws exempt some nationalities from exit requirements. The 1994 Passports and Immigration Act exempted some non-Sudanese citizens. Although Article 10 of the Act provides that foreign nationals cannot enter Sudan without a valid entry visa, the President of the Republic may exempt nationals of any State from obtaining entry visas. The Government may also enter into bilateral agreements related to visa exemptions. For example, Sudan and Egypt signed an agreement in Cairo 4 April 2004 in which citizens of both countries were granted the right to freedom of movement, residence, work and ownership in the other country.¹⁰

Also, for political and religious reasons unprecedented numbers of foreign nationals were exempted from immigration rules and entered Sudan during the past decade from countries such as Saudi Arabia, Syria, Palestine, Yemen, Algeria, Tunisia, Egypt and Libya.¹¹ Their entry was facilitated by the fact that Sudan's Islamic military regime, in place since the coup of 1989, had abolished entry visas for Muslims and Arabs and came to be regarded as a safe haven.

Also, being allowed to access employment there, many non-Sudanese nationals were exempted from immigration rules when entering the country. Access to employment for foreign nationals is governed by the 2000 Regulation of Employment of Non-Sudanese Act. Although non-Sudanese citizens cannot work without a work permit (as stipulated by Article 6) the Act exempts certain categories of persons from getting work permits such as diplomats, non-Sudanese nationals in diplomatic missions or international organizations, individuals exempted according to international agreements to which Sudan is a party, non-Sudanese businessmen and professionals. Also, Chapter II of the Act provides preferential treatment for Arab and African nationals over other nationalities with regard to work permits.

2.1.2 Legal sanctions of Irregular Migration

In order to control irregular or illegal migration the 1994 Passports and Immigration Act stipulates certain sanctions including the deportation of aliens and other criminal punishments for breach of immigration rules.¹² The Minister of Interior, for example, is entrusted with wide powers as he can at his discretion deport any alien who: (a) is declared a *persona non grata*; (b) violates any of the conditions upon which a residence permit is granted; and (c) is recommended, for deportation or convicted, under section 21 of this Act.

Furthermore, the 1994 Passports and Immigration Act identifies immigration offences and prescribes penalties for acts which facilitate irregular migration into Sudan. These offences include obtaining a passport, entry or exit visa, residence permit, or any other documents through illegal means; or the renewal or replacement of such documents and any false statements. These acts are punishable, on conviction, by imprisonment of a term not exceeding two years or with a fine or both.¹³ Also, any person who violates any of the provisions of this Act, or any regulations, commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding six months or with a fine or with both.¹⁴ The Act further introduces tough penalties for persons convicted for a second offence who shall, in addition to any other penalty, have their passports withdrawn or

¹⁰ Article 2 of the Agreement provides that: entry, movement and stay in both Sudan and Egypt only requires a valid passport or any other travel documents agreed by both governments. Article 3 (1) (right to work and ownership) provides that: citizens of both countries have the right to work provided that they observe international and Arab agreements signed by each country. Article 3 (2) provides that: citizens of both countries enjoy ownership rights – land use and estate ownership including the right to dispose properties – and the right to set up companies and partnerships.

¹¹ See Report of the Ministry of Interior, "Seminar of Foreign Existence in the Sudan", pp. 30-31.

¹² See Section 5, Article 18.

¹³ Article 29

¹⁴ Article 29 (b)

cancelled, and these shall be deprived of the right to recover or obtain a new passport for a period of five years or a lesser period as the Minister of Interior sees fit.

The Act further penalizes aliens who enter Sudan ‘without permission’.¹⁵ In such situations, a competent authority or Police may arrest without warrant any alien who enters or remains in the Sudan without permission, and detain him/her in the Police custody or release him/her according to the Criminal Procedures Act, 1991 pending trial.¹⁶ The Police or the concerned authority may also refuse entry to any alien who attempts to enter Sudan without permission, and enforce his/her removal from Sudan at the point of entry, in such a manner as may be deemed appropriate.¹⁷ The Act further stipulates penalties for those who abet or aid others in entering the country illegally: ‘any person who facilitates the illegal entry into the Sudan of an alien or who shelters such a person, commits an offence and shall on conviction, be liable to imprisonment for a term not exceeding six months or fine or with both’.¹⁸

2.1.3 Irregular Exit of Sudanese Nationals

Sudanese immigration laws and policies are based on Article 42 of the Interim National Constitution 2005 which provides that ‘every citizen has the right to move and reside freely and the right to leave his own country in accordance to the law’. However, it seems that Sudanese nationality laws violates this constitutional right and impose certain restrictions on Sudanese citizens exiting the country. The 1994 Passports and Immigration Act restricts the freedom of movement of Sudanese nationals when they intend to exit or leave Sudan as they require exist visas. Article 12 requires any Sudanese national to apply for an exit visa. Also, an exit visa will not be granted to any Sudanese accused of a crime or convicted of the crime of smuggling on multiple occasions or if there is ‘reasonable suspicion’ that a Sudanese national is involved in ‘*hostile acts against Sudan*’. Nor will a visa be given to those Sudanese nationals who do not have means to cover their stay abroad or to a child (i.e. younger than 18) leaving the country without the consent of his or her guardian.

With regard to exit for the purpose of seeking employment abroad, the 1997 Labour Law 1997 provided in Article 14 (Employment of Sudanese abroad) provides that ‘every Sudanese willing to work abroad shall obtain a permit from the Minister of Labour’. This indicates that the policy of the State is to restrict migration. The right to work abroad was further restricted by the 1990 Regulation of the Employment of Sudanese Abroad. According to these pieces of legislation Sudanese migrant workers’ right to migrate is organized through the Ministry of Labour which is entrusted with verifying labour contracts and other measures including the registration of migrants willing to work abroad.

2.1.4 Substantive and Procedural Rights of Irregular Migrants

From the perspective of international law, it should be noted that national laws and regulations cannot be the exclusive source of rights as persons who are in an irregular situation regarding the law are also entitled to fundamental human-rights protection regardless of their nationality or legal status.¹⁹ However, Sudan’s laws dealing with irregular migration in terms of substantive or procedural laws do not provide adequate guarantees on incidents of irregular migration in terms of international law. The pertinent question here is whether the national legal system foresees regularisation procedures or

¹⁵ Article 31

¹⁶ Article 31(a)

¹⁷ Article 31 (b)

¹⁸ Article 30 (2)

¹⁹ See for example, the 1990 UN Convention on the Protection of the Rights of All Migrants Workers, (which was not signed or ratified by Sudan); the 1951 UN Convention on the refugee status and the *non refoulement* principle).

whether they provide adequate protection for irregular migrant. Will their presence in Sudan be tolerated or will their expulsion be enforced in an arbitrary manner?

In terms of constitutional rights, we find that the Bill of Rights of the Interim National Constitution 2005 (INC 2005) provides protective constitutional guarantees to Sudanese citizens but that there is no explicit protection accorded to non-Sudanese Nationals with regard to the ‘principle of equality before the law’. Under this principle ‘all persons are equal before the law and are entitled without discrimination, as to race, colour, sex, language, religious creed, political opinion, or ethnic origin, to the equal protection of the law’.²⁰ However, this Article does not specifically refer to ‘nationality’ as a ground for non-discrimination. This implies that non-nationals or irregular migrants may be discriminated against on the ground of nationality. However, irregular migrants enjoy the right to litigation under Article 35 of the Interim National Constitution for *all persons*. This Article provides that ‘no person shall be denied the right to resort to justice’. It refers to persons rather than ‘citizens’ and hence implies that non-nationals, including migrants, enjoy constitutional rights to resort to the courts to challenge deportation in case where they are faced with irregularity which may warrant deportation.

In terms of substantive national laws, one may refer here to the provisions of the 1994 Passports and Immigration Act, in particular Article 30 which is directly linked to irregular migration and which deals with illegal entry to Sudan. This Article states: ‘any person who enters the Sudan by illegal means commits an offence and shall on conviction be liable to imprisonment for a term not less than one year and not exceeding two years or with fine or both and shall be deported by a court order’. The requirement of a ‘court order’ for the purpose of deportation in this Article indicates that the law foresees some legal guarantees for the deportees against arbitrary executive decisions of deportation for illegal entry. Also, Article 20 of the Act states that a recommendation for deportation of an alien from Sudan may be made by a court of law to the Commissioner of the ‘Aliens Commission’.²¹ The Minister may also refer any such recommendation to the Aliens Commission. It is worth noting here that this Commission was established under the 1994 Passports and Immigration Act and its role is to provide advice to the Minister of Interior on alien matters. The Minister’s decision that an alien is to be deported from Sudan is not only final and conclusive but it is also not subject to judicial review by any court.²² The Act further stipulates certain procedures on deportation. In this respect, the Minister, Court or Prosecutor may issue an arrest warrant against an alien for the purpose of deportation or imprisonment. However, in lieu of imprisonment, the Minister may order an alien to reside in a specified place, to report at a given time and date or to check in continuously to the local Police station till the date of his or her deportation. The Minister may order that any money or property in Sudan belonging to the alien be used for payment of expenses of deportation and, if there are any, the maintenance of his or her dependents.²³

Thus, one might conclude that Sudanese immigration and nationality laws do not provide specific protection for immigrants as vulnerable persons as far as legal regulations and immigration policies are concerned. Apparently there is no general principle of law not to expel migrants when they infringe immigration rules. Migrants are not protected from expulsion and close analysis of the 1994 Passport and Immigration Act indicates that they are not immune from expulsion if they violate immigration rules. Under Chapter 7 of this Act the Minister of Interior has wide discretionary powers to expel or deport any foreign national from Sudan on the following grounds: (a) if he decides that the foreign national is not welcomed in the country; (b) if the foreign national has contravened the legal

²⁰ Article 31 of the INC 2005.

²¹ This body is composed of the following members: Director of the General of Police Forces or his/her appointee (Head); a representative of the Ministry of Justice; a representative of the Ministry of Foreign Affairs, Director of Passports, Nationality and Immigration; a representative of the National Intelligence and Security Service; and any body the Minister elects to represent. See Article 19 of the 1994 Passports and Immigration Act.

²² Article 21.

²³ Article 22

provisions under which he or she was granted residency; and (c) in the case that a court of law recommended deportation from the country. It is worth noting here that Article 21 of the Act does not allow judicial review as the decision of the Minister of Interior is final and is not subject to any appeal. This wide power may be subject to abuse and denies aliens access to the judiciary. Such laws are not in harmony with international human-rights standards protecting migrants because the law does not provide substantive protection against return to face grave violations of human rights outside Sudan as well as procedural safeguards during deportation procedures.²⁴ This issue will be further discussed later in this article in relation to the deportation or repatriation of Ethiopian refugees from Sudan.

3. Types of Irregular Immigrants

This section of the article focuses on three categories of migrants in Sudan: (a) irregular labour migrants; (b) transit migrants; and (c) refugees. Below is an analysis of the relevant applicable laws and practices with regard to the aforementioned categories.

3.1 Irregular Labour Migrants

Sudan's labour laws have dealt with issues of irregular migration in particular the 2000 Act on the Employment of Non-Sudanese. This Act came into force as a response to actual opportunities offered by the labour market in Sudan, particularly after the country witnessed economic boom with oil exploration and export and the emergence of new employment niches. The government, therefore, tried to respond to a formal demand for labour with legislation tailored to the new reality and introduced the legal conditions of entry, stay and employment. Punishment was also legislated for in order to penalize any infraction of the law.

3.1.1 *The 2000 Act on the Employment of Non-Sudanese*

The 2000 Act on the Employment of Non-Sudanese was issued not as an Act of Parliament but as a temporary Decree by the President of the Republic. The Act regulates employment of non-Sudanese in the public, private and mixed sectors. It covers different work sectors including commercial, agricultural, industrial, domestic, professional and skilled work. However, certain categories are exempted: diplomats, non-Sudanese employed by international organizations, individuals exempted under an international agreement to which Sudan is party, non-Sudanese businessmen who have licences granted to them from other government agencies, or any individuals exempted by a decision from the Minister of Labour.²⁵ Article 5 of the Act categorically states 'it is not permitted for non-Sudanese nationals to seek employment unless obtained a work permit from the Minister of labour'.

Priority of employment opportunities are given to Sudanese as a general rule. In this respect, the Act states in Article 6 that a work permit shall not be issued to non-Sudanese workers unless there is no Sudanese worker able to perform the work. This reflects protectionist policies or measures that reserve a number of professions (skilled or unskilled) for nationals in order to alleviate the problem of persisting unemployment. Thus, the Act considered new opportunities for non-nationals to be undesirable.

However, the Act does provide that in the absence of a Sudanese worker priority or preferences shall be given to nationals of African and Arab States over other nationalities. Article 7 of the Act also considers that all non-Sudanese residents who are over 21 years old who obtained 'private' or 'ordinary' residency are entitled to work in accordance with the 1994 Passports and Immigration Act and

²⁴ See OHCHR Discussion paper, *Expulsions of aliens in international human rights law*, OHCHR Discussion paper, Geneva, September 2006.

²⁵ Article 4.

associated regulations. After obtaining work permits, the Act further provides for other conditions to be satisfied such as issuance of a contract of employment with the non-Sudanese worker in accordance with the Labour Act of 1997.²⁶

In order to prevent irregular labour demand and different scenarios of irregularity such as irregular entrance and irregular stay, or regular stay but irregular employment the Act provides certain sanctions for contravention of this Act. Article 15 (punishments) provides that any person contravenes this law will be punished 'for a period not exceeding three months imprisonment or a fine or both'. The Court may double the conviction in case of a repeated or continuous breach and after the offender has been served with a warning. It is noteworthy that the aforementioned punishments have been put in place to deter migrants who had been initially admitted as foreign workers on a legal basis, who subsequently became irregular due to changing labour legislation or because they overstayed their residence permits. In this respect, the 1997 Labour Act prohibits in Article 10 the employment of unregistered persons. It requires employers to not employ any person unless he or she has obtained a certificate of registration. Furthermore, it provides penalties for employers in Article 126 with imprisonment for a term not exceeding six months or with fine or with both for those who provides any wrong information in the worker's record of service with the intention to defraud or for those who permit the introduction of any information or documents to the competent authority knowing that these are not correct.

3.2 Transit Migrants

Transit migration is a new category in the *lexicon* of international migration which refers to people initially heading for regions further away—Europe, North America or the Gulf states— who then remain blocked outside these destinations because they do not meet visa conditions. Those migrants find themselves stranded, and are, therefore, perceived and treated as unwanted newcomers. Sudan has open borders and travel is increasingly easy and affordable due to, proximity and cheap transportation. As indicated elsewhere in this article transit migration is an old phenomenon as Sudan is a traditional route for Muslim pilgrims on their way to Mecca, to perform the religious obligation of *Haj*. However, recently, transit migration through some parts of Sudan has become difficult due to restrictive criminal legislation and reinforced border control on the part of border regions in the east including Kassala and Gadarif; both have enacted legislation penalizing those who are involved in human trafficking. At the National level, the 1994 Passports and Immigration Act deals with the category of transit migrants. Article 31 (c) empowers the Police to arrest without warrant any 'transit passenger' who discontinues his/her journey without permission, and detain him/her in the Police custody or release him or her in accordance with the Criminal Procedures Act, 1991. Pending trial or deportation from Sudan by the representative of the shipping or transport company, or airline on whose ship or aircraft he/she was passing on transit, and in this case, the said representative will be liable to Sudan, for costs incurred as a result of his or her arrest, detention and removal. Although this provision envisages regulation of transit migrants (as persons who stop for some time in a place *en route* between the point of origin and the point of destination without intending to remain there) the distinction between travellers and migrants has to be made in terms of duration. For example, how long should a person have been travelling before he/she becomes an immigrant? In Sudan, due to a lack of this sort of criterion and a lack too of reliable data, transit migration is difficult to observe though it is widely known that many nationalities who enter Sudan, in particular from neighbouring countries aspire to move to Europe or to North America.

The phenomenon of transit migrants poses certain difficulties for legal regulation. It obviously varies according to time as one may be successively irregular and regular, or the other way round and irregularity may differ with regard to entry, stay, employment and visa requirements. What is also

²⁶ Article 8 provides that the employer shall provide training, bear travel expenses of the employee before entering Sudan and after they leave their job.

lacking with regard to the issue of transit migrants is that there are no regulations or guidelines or policies for law enforcement officials to deal with such migrants in accordance with internationally recognized norms of human rights. One here may refer to the UN Resolution on the Protection of Migrants. This resolution urges states to ‘adopt concrete measures to prevent the violation of the human rights of migrants while in transit, including in ports and airports and at borders and migration checkpoints, to train public officials who work in those facilities and in border areas to treat migrants and their families respectfully and in accordance with the law, and to prosecute, in conformity with applicable law, any act of violation of the human rights of migrants and their families, such as arbitrary detention, torture and violations of the right to life, including extrajudicial executions, during their transit from their country of origin to the country of destination and vice versa, including their transit through national borders’.²⁷

3.3 Refugees

Sudan has been one of the most active States in accepting an enormous influx of refugees.²⁸ Sudan has also traditionally a tendency towards the granting of asylum, through which status is granted *en masse* as with mass influxes, it is practically impossible to screen each case individually.²⁹ The purpose of the next section is to examine how Sudan deals with asylum seekers or refugee protection in terms of their rights and duties under its asylum and refugee laws. This section also examines some case law from the African Commission on Human and Peoples’ Rights related to the expulsion and repatriation of refugees from Sudan to their countries.

3.3.1 Expulsion of Refugees

The 1951 Refugee Convention, as the first international instrument to place legal restrictions on a State party’s power to expel foreign nationals, lays down, in Article 33, the prohibition of ‘*refoulement*’ according to which no State party ‘shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’. Furthermore, Article 32 provides that an expulsion can take place only in pursuance of a decision reached in accordance with due process of law, and that the refugee has the right to submit evidence to clear him or herself, to appeal to and be represented before a competent authority. Such procedural safeguards, however, are not available where there are compelling reasons of national security.

While Article 33 of the 1951 Refugee Convention applies only to refugees, Article 3 of the Convention Against Torture has expanded the scope of protection against expulsion since it explicitly prohibits State parties to ‘expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture’. Article 7 of the ICCPR was for the first time interpreted as including a prohibition of expulsion if there is a risk of torture. The Human Rights Committee General Comment on Article 7 states that ‘States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or ‘*refoulemen*’. International human-rights standards generally prohibit collective expulsions and put in place some procedural safeguards against arbitrary expulsions: if each alien is entitled to an individual decision on his or her expulsion, mass or collective expulsions should be prohibited. Moreover, mass expulsions would prevent the proper identification of people entitled to special protection such as asylum seekers, people who might be subject to torture if expelled.

²⁷ Resolution adopted by the General Assembly on Protection of migrants, *report of the Third Committee (A/59/503/Add.2)* 59/194. Fifty-ninth session, Agenda item 105 (b), 18 March 2005.

²⁸ Babiker, Mohamed Abdelsalam, *Legal Framework of Migration in Sudan*, European University Institute, (2010, pp.6-10.

²⁹ Id.

Having examined relevant international human-rights standards against the arbitrary expulsion of asylum seekers and refugees, in the following section I will focus on the case law of the African Commission on Human and Peoples' Rights related to the expulsion and repatriation of Ethiopian refugees from Sudan.

3.3.2 Cases: *The African Commission on Human and Peoples' Rights*

Substantive and procedural safeguards are not available under the 1974 Regulations of Asylum Act and refugees in Sudan face deportation, expulsion or removal. It is pertinent to refer here to a recent decision reached by the African Commission on Human and Peoples' Rights. In this Communication the Complainants submit that the procedure for repatriation of refugees agreed to by UNHCR and Sudan to return more than 14,000 Ethiopian refugees means that these would be deported without due process of law and that they were given no opportunity to make representations during the decision-making process.³⁰ The Complainants, further, have argued that the Respondent State had repeatedly denied the victims access to their legal representative and that it had failed to make facilities available to refugees, even when they were in custody, to contact their legal representative.³¹ Also, the Complainants submitted that there was no domestic remedy that could adequately and effectively protect the human-rights of the victims.

The Respondent State submitted that the repatriation of the refugees followed the principles laid down in the Trilateral Agreement signed between the Government of Sudan, the Government of Ethiopia and UNHCR in August 2000.³² The Respondent State submitted that Complainants neither approached UNHCR, nor, indeed, any Court or administrative body to rule on any allegations of violations committed during the process of repatriation. The Complainants could have submitted an administrative application or referred the matter to the competent Courts available in Sudan and Article 20 of the 1996 Code of Administrative Courts gives the Complainants the right to lodge an appeal against any administrative decision.³³ It, further, submitted that an appeal could have been lodged in the Supreme Court against any administrative decision taken by the President of the Republic, the Federal Council of Ministers, the Government of any region or the Federal or Regional Minister.³⁴

For the reasons argued by the Respondent State the Commission initially declared that the Communication was inadmissible for non-exhaustion of local remedies.³⁵ However, the Commission afterwards agreed to the Complainants request to reconsider its decision on the basis of the submission of the Complainants that the Commission had not addressed itself to its jurisprudence, regarding the exceptions to the exhaustion of local remedies rule, in particular the non-applicability of domestic remedies to situations of massive violation of human rights.³⁶ Significantly, it ruled that

The African Commission is of the view that, even if certain domestic remedies were available, it was not reasonable to expect refugees to seize the Sudanese Courts of their complaints, given their extreme vulnerability and state of deprivation, their fear of being deported to and their lack of adequate means to seek legal representation ...the Commission holds the view, which it has stated often times before, that where the violations involved many victims, it becomes neither practical

³⁰ Dr. Curtis Francis Doebbler v Sudan, *Communication 235/2000*, Banjul, Gambia, during 45th Ordinary Session held between 13 and 27 May 2009., Paragraph 98

³¹ Id. Paragraph 17.

³² Id. Paragraph 115.

³³ Id. Paragraph 76, 77.

³⁴ Id. Paragraph 77.

³⁵ Id. Paragraph 78.

³⁶ Id. Paragraph 79.

nor desirable for the complainants or the victims to pursue such internal remedies in every case of violation of human rights.³⁷

For the above reasons the African Commission declared the Communication admissible. However, on the consideration of merits the Commission examined the allegation that the Respondent State has violated the human rights of an estimated 14,000 Ethiopian refugees, following the invocation by UNHCR of the Cessation Clause under Article 1 (c) of the 1951 UN Refugees Convention. In this respect, the Respondent State, quoting Article 1 (c) paragraphs 1 to 6, of the 1951 UN Refugees Convention which defines the six conditions under which refugee status ceases, argued that in the case of Ethiopian refugees, the conditions no longer justified their stay in Sudan. The Respondent State argued that these six conditions are based on consideration that international protection is not usually granted when it is not justified.³⁸

The Commission's decision on merits turns on issues relating to the application of two important principles in international refugee and human-rights law. The first issue is the effect of the Cessation Clause and its application under the 1951 UN Refugee Convention *vis-à-vis* a State Party to the African Charter. The second issue is the applicability of the *non-refoulement* principle based on the actions taken by the Respondent State as a consequence of the Cessation Clause.³⁹ In this context, the Commission is required to determine whether or not the Respondent State, in applying the Cessation Clause, acted in a manner which amounted to the *refoulement* of the refugees to their country of origin where they feared persecution, and hence whether it constituted a violation of the African Charter.

In this respect the African Commission has not found any substantive reasons to doubt the accounts of the Respondent State by holding that thousands of refugees repatriated voluntarily under the tripartite arrangements and those who remained were accorded refugee status or assumed normal immigrant status upon being granted residence permits.⁴⁰ The Commission has further decided:

The Commission has found no evidence that refugees were repelled as a result of the cessation clause. The Commission has not established any cases of imprisonment, arrest, and forcible repatriation. There was no concrete evidence brought to the attention of the Commission to the effect that such cases, if any, were linked to the promulgation and implementation of the cessation clause. The respondent State demonstrated by providing figures, which were not refuted, if refugees who repatriated voluntarily prior to and after the cessation clause, as well as those who were granted further protection or alternative solution to repatriation.⁴¹

³⁷ Id. Paragraph 117.

³⁸ Id. Paragraph 136.

³⁹ Id. Paragraph 146.

⁴⁰ Id. Paragraph 161.

⁴¹ Id. Paragraph 163.

4. Conclusion

This article has examined legal regulations for irregular migration to, through and from Sudan in terms of applicable laws and practices including case law related to refugees. One may conclude that Sudanese laws dealing with incidents of irregular migration are not adequate despite the fact that Sudan receives huge numbers of irregular migrants while also deporting thousands of migrants each year. Furthermore, the State does not have an identifiable policy on how to deal with irregular migration. Thus, policy-making institutions and the national legislative framework do not adequately address or deal with different types of irregular migrants in Sudan. Immigration rules are not detailed to deal with irregular migration. Also, as explored in this article national laws do not provide judicial guarantees for irregular migrants when these face sanctions. Sudan also did not take a proactive role or enter bilateral agreements with its neighbours to combat irregular migration. Finally, as far as irregular migration is concerned, current Sudan has witnessed changes and a transfer of its territory and sovereignty due to the secession of south Sudan as an independent State, 9 July 2011. As a result, Sudan's immigration laws will inevitably be altered given that Sudan has undergone such profound territorial changes. No doubt, this will trigger massive migration and the adoption of new nationality laws or decrees or new administrative procedures. Consequently, many individuals may be rendered stateless in this context, if north or south Sudan fail to adopt appropriate legislation to prevent the loss of nationality and statelessness. Ultimately, South Sudan's succession may create irregular migration between both parts of the Sudan and beyond.