



# **Reforming the National Security Services: Mandate, powers and accountability**

## **Briefing Paper**

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### **1. Introduction**

The nature and powers of Security Services are a crucial yardstick of the rule of law and human rights protection in any country. This applies equally in Sudan as recognised in the Comprehensive Peace Agreement (CPA) and the Interim National Constitution (INC). The reform of the Security Law is an important milestone in the current interim period and in the run-up to the general election to be held later in 2009. At the time of writing, an extended session of Parliament is scheduled to be held in February 2009, during which the Security Law is to be considered. The Government of Sudan and the political parties were called upon to finalise respective drafts on the Security Law by the end of January. According to media reports, discussions on a bill between the National Congress Party and the Sudanese Peoples' Liberation Movement stalled in 2008 over differing views on the structure and the powers of the National Security Service to-be.

This Briefing Paper, published by REDRESS and KCHRED as part of the Criminal Law Reform Project in Sudan,<sup>1</sup> seeks to contribute to the current debate on the powers and accountability of the reformed National Security

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<sup>1</sup> The Criminal Law Reform Project is a joint initiative by REDRESS and KCHRED aimed at advancing the process of bringing Sudanese law into conformity with the National Interim Constitution and international standards as stated in article 27 of the Bill of Rights.

**For any information on the project and/or the briefing paper, please contact: Ms. Ishraga Adam, Project Coordinator; Khartoum Center for Human Rights and Environmental Development, Aldeim, South West Corner of the Saha Shaabia, Khartoum, Sudan, Email: ishragha\_adam@yahoo.com, Mobile: + 249 9 122 341652.**

Service. Following a brief overview of the case for reforms, the Paper examines the mandate and powers typically granted to Security Services. It also reviews the mechanisms put in place by states around the world to ensure that security agencies act in accordance with the law. On the basis of article 151 of the INC and comparative best practice, this Paper argues that in order to strengthen the rule of law and human rights protection, the reformed National Security Service should not be vested with the powers of arrest and detention and calls for the establishment of effective oversight mechanisms to ensure accountability and conformity with the rule of law.

## **2. The need for reform of the National Security Service**

The reform of Sudan's National Security Service forms an integral part of the CPA.<sup>2</sup> Articles 150 and 151 of the INC provide for the establishment of a National Security Service that:

Shall be charged with the external and internal security of the country; its mission, mandate, functions, terms and conditions of service shall be prescribed by the National Security Act.

The National Security Service established pursuant to article 151 (3) of the INC shall:

...focus on information gathering, analysis and advice to the appropriate authorities.

These provisions are based on the recognition that a clear mandate and circumscribed powers are essential to make Security Services subject to the rule of law and to minimise the potential for human rights violations that may be committed in the course of operations. This will require the demilitarisation of the structure of the Security Services and its operations as well as transparency and accountability of the institution and its members.

The present National Intelligence and Security Services (NISS) has a wide mandate<sup>3</sup> and broad powers of arrest according to which it can arrest persons and hold them incommunicado for three days. This period can be extended up to 30 days.<sup>4</sup> In cases relating to offences against the state, the period of incommunicado detention can be extended for another month by the Director of the NISS and for another two months with the agreement of

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<sup>2</sup> CPA, Machakos Protocol, 20 July 2002, Chapter II, 2.7.

<sup>3</sup> See article 6&7 of the National Security Forces Act (NSFA) 1999. The mandate is potentially open-ended as article 6 (h) stipulates that "The Organ shall have competence on the following, to: any other functions, as the President of the Republic, or the Council, may assign thereto.

<sup>4</sup> Article 31 (d) of the NSFA.

the Security Council.<sup>5</sup> In exceptional circumstances, the Director may, after six months and with the approval of the Security Council, detain a person for a maximum of nine months without judicial review.<sup>6</sup>

These powers are at odds with the Bill of Rights and a number of bodies have expressed concerns over the broad powers of the NISS and their compatibility with human rights standards and the rule of law. The UN Human Rights Committee responsible for monitoring compliance of states parties, such as Sudan, with their obligations under the International Covenant on Civil and Political Rights, stated that:

the Committee is particularly concerned that the vague and legally undefined concept of “national security,” as applied in the Sudan, is inconsistent with the provisions of article 9 of the Covenant and can be used as a basis for arrest and detention of persons without a more specific charge, creating an atmosphere of fear and oppression for any one critical of the Government.<sup>7</sup>

The Special Rapporteur on Human Rights in the Sudan documented the practical consequences of these broad powers in her recent report:

There is evidence that the National Intelligence and Security Services (NISS), (...) regularly uses arbitrary arrest and detention against political dissidents. According to reports, individuals are frequently picked up and detained by unidentified NISS agents without being told the reason for their arrest. Detainees have in some instances been held for several months without charge and without access to a lawyer or to their families. The locations in which NISS detainees are held are frequently unknown and there are allegations of secret detention facilities being maintained in residential or office premises. Members of several different political and opposition groups from around the country, as well as those associated with such groups, have reported being held by NISS in connection with their public political activities.<sup>8</sup>

The Group of Experts mandated by the Human Rights Council, as part of its detailed study of Sudanese law and practice, advised:

...institutional and legislative reform of the National Intelligence and Security Services in accordance with the CPA and Interim National

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<sup>5</sup> Article 31 (d) and (f) NSFA.

<sup>6</sup> Article 31A (1) NSFA: “The Director, in such cases, as may lead to terrorizing the society and endangering the security and safety of citizens, by practice of armed robbery, religious, or racial sedition, may detain any person, for a period, not exceeding three months, and may renew the period, for another three months, after notifying the competent Prosecution Attorney.”

<sup>7</sup> Concluding observations of the Human Rights Committee: Sudan, UN Doc. CCPR/C/79/Add.85, 19 November 1997, para.13.

<sup>8</sup> Report of the Special Rapporteur on the situation in Sudan, UN Doc. A/HRC/9/13, 2 September 2008, para.32.

Constitution. In particular, broad powers of arrest and detention should be reformed (art. 31 and art. 33 of the national security act) and judicial oversight mechanism established. Emergency laws should not grant security agencies broad powers to arrest and to restrict freedom of movement, assembly and expression.<sup>9</sup>

### 3. Security services' powers in comparative practice

The reform of the security forces is a constant challenge in most if not all countries. Firstly, the notion of security defies clear definition. Is it only the security of the state institutions or should it be defined more broadly as human security that includes 'freedom from want' and 'freedom from fear?' The INC does not define security but appears to be based on the traditional, state-centric understanding of the concept.<sup>10</sup> It takes a process-approach, according to which "The National Security Council shall define the national security strategy based on the analysis of all threats to the security of the Sudan."<sup>11</sup> The ambiguity of the INC is problematic insofar as it might allow the security services to define its role as primarily serving the interests of the state and/or the government in power, which, as mentioned above, has resulted in violations that are detrimental to human security in Sudan.

Secondly, any reform of security services requires a careful balancing between the need to exercise the functions of guaranteeing security as effectively as possible, taking into consideration the changing nature of threats, and of protecting human rights and respecting the rule of law to the greatest extent possible. One of the inherent challenges in this regard is the secrecy of the work of security services. Security services need a degree of secrecy to fulfil their functions. However, this feature is prone to abuse, especially where it is not accompanied by adequate oversight. This is evidenced in the experience of many countries where security services have arrogated and exercised substantial powers with no or minimal external control and have been responsible for serious violations, including arbitrary arrest and detention, torture, disappearances and extra-judicial killings.<sup>12</sup>

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<sup>9</sup> UNHRC, 'Final report on the situation of human rights in Darfur prepared by the United Nations Experts Group on Darfur, presided by the Special Rapporteur on the situation of human rights in Sudan and composed by the Special Representative of the Secretary-General for children and armed conflict, the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Representative of the Secretary-General on the human rights defenders, the Representative of the Secretary-General on human rights internally displaced persons, the Special Rapporteur on the question of torture and the Special Rapporteur on violence against women, its causes and consequences' (28 November 2007) UN Doc A/HRC/6/19, p.70, Recommendation 1.4.4.

<sup>10</sup> Article 151 (1) INC: "National Security Service ... shall be charged with the external and internal security of the country.

<sup>11</sup> Article 150 (2) INC.

<sup>12</sup> See, for example, the following case studies: Philippines: Wigberto E. Tanada, [Ending Extrajudicial Killings and Enforced Disappearances: Reaffirming the National Security Paradigm and Putting Human Rights at the Heart of the Process](#), Philippine Human Rights Information Centre, 2007; Bangladesh:

A comparative review of national security activities, such as the one undertaken by the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar,<sup>13</sup> and an examination of relevant national legislation shows that states have used the following principles when seeking to strike a balance between efficiency and human rights protection:

- (i) Clear mandate
- (ii) Limited and clearly defined powers
- (iii) Accountability

- Clear Mandate

There is no uniform practice or legal framework for the operation of security services as most states have their own system based on particular historical, political and legal factors. However, national systems share broad commonalities. The most important element is the separation of the police services from security / intelligence services. According to this set-up, the police are primarily responsible for law enforcement, sometimes comprising special branches dealing with especially serious offences, such as organised crime and / or acts of terrorism. In contrast, security or intelligence services are responsible for internal and external intelligence. The United Kingdom, for example, has several police forces, including specialised forces, such as the Metropolitan Police Service, the Serious Organised Crime Agency and the Special Branch, which focuses on counter-terrorism. The two intelligence agencies, i.e. the Security Service (MI-5) and the Secret Intelligence Service (MI-6) are mandated to protect internal and external security through intelligence activities.

Article 151 (1) of the INC stipulates clearly that the National Security Service “shall be charged with external and internal security of the country.” Article 151 (3) spells out the core functions of the National Security Services to be used in order to accomplish the objectives of external and internal security, namely “information gathering, analysis and advice to the appropriate authorities.” Read together, these provisions show that the Constitution envisages the new National Security Service to be confined to classical intelligence activities, which necessitates a separation of police forces exercising policing powers on the one hand, and security services exercising intelligence functions on the other. While the police and security services will have to work together, for example the police requesting intelligence information and the security services requesting the exercise of police powers in countering threats, the articles do not mandate the security services with law-enforcement capacities. In addition, to fulfil their tasks, the security services should operate as a civil service agency given the nature of

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[Bangladesh: Stop Killings by Security Forces](#), Human Rights Watch, 2004; Sierra Leone: [Final Report of the Truth and Reconciliation Commission of Sierra Leone](#), 2004, Volume 2, Chapter 2, para. 61.

<sup>13</sup> Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, A New Review Mechanism for the RCMP’s National Security Activities, Ottawa, 2006 [hereinafter Arar].

its powers as envisaged in article 151 of the INC and the need for enhanced civilian oversight.

- Limited and clearly defined powers

Most security and intelligence services are tasked with identifying threats to national security and providing advice to decision-makers.<sup>14</sup> The powers vested in national security and intelligence services are designed to meet this task and commonly encompass intelligence gathering activities, such as the interception of communications, surveillance, the gathering of data and the use of undercover agents to identify threats.<sup>15</sup> These powers should be circumscribed and clearly defined so as to avoid ambiguity and the potential for abuse. These powers are frequently subject to judicial authorisation and review. The types of powers reflect the covert nature of the work of security and intelligence agencies.

Most security and intelligence services do not have the right to use force or exercise powers of arrest and detention. Some states limit the powers of such services because of the recognition that security and intelligence agencies, given the secretive nature of their work and the concomitant lack of accountability this implies, are prone to abuse policing powers.<sup>16</sup> Such agencies often develop into powerful entities that pursue autonomous agendas rather than serving the security of the state or the population at large. It is notable that states as distinct as Germany, Kosovo and South Africa, all of which had experienced security services that abused their powers, either expressly or implicitly stipulated that such services should have no powers of arrest.<sup>17</sup> For example, article 3 of the Law on the Kosovo Intelligence Agency<sup>18</sup> provides that the agency:

shall have no executive functions. Accordingly, [it] shall not have:

- (i) the right to use direct or indirect force;
- (ii) any power of arrest;
- (iii) be able to initiate criminal proceedings; and
- (iv) power to compel persons or companies to cooperate with their activities, though persons or companies may cooperate with [it] on a voluntary basis.

The relevant legislation of several countries worldwide, such as Australia, Canada, Kenya, New Zealand, Norway, Romania and Sweden, similarly confine the powers of security and intelligence agencies to information gathering and expressly exclude the power of arrest.<sup>19</sup>

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<sup>14</sup> Ibid.

<sup>15</sup> Arar, pp.309-424.

<sup>16</sup> Ibid.

<sup>17</sup> Germany, see Arar, pp. 339; Kosovo, see On the Kosovo Intelligence Agency, Law No.03/L-063, 21 May 2008; South Africa, see [White Paper on Intelligence 1994](#), Ministry for Intelligence Services Legislation.

<sup>18</sup> On the Kosovo Intelligence Agency, Law No.03/L-063, 21 May 2008.

<sup>19</sup> Arar, pp.309-424.

Article 151 of the National Interim Constitution does not spell out clearly the powers of the reformed National Security Service but adopts the model of separation of police and security / intelligence functions and limits the mandate of the National Security Service to intelligence gathering. It would be incompatible with the object and purpose of article 151 to vest the National Security Service with executive powers, such as the power of search, arrest and the use of force (the latter entails that the Security Service should not have heavy weaponry at its disposal). Excluding such powers from the remit of the National Security Service is sound legal policy. In light of the potential for abuse inherent in giving security services powers of arrest, such a step would be in line with article 27 (2) of the Bill of Rights, according to which “the State shall protect, promote, guarantee and implement this Bill [to respect and promote human rights and fundamental freedoms enshrined in the Constitution].” Powers of arrest and detention should be vested in the police forces and defined in conformity with fundamental rights, in particular article 39 of the INC, and applicable international standards, in particular article 9 of the ICCPR. These clauses emphasise that there must be reasonable grounds for an arrest and that adequate custodial safeguards must be provided, especially judicial supervision of the legality of detention.

- Accountability

Holding the executive to account for its action is a cornerstone of the rule of law and an important means of preventing abuses or power imbalances. Accountability of the security services should comprise measures that provide justice for past abuses and seek to prevent future violations. In respect of past conduct, many countries have established mechanisms that subject existing members and potential candidates of security services to a vetting procedure and expel those subsequently implicated in human rights violations or other serious misconduct.<sup>20</sup> Immunity for members of security services has fostered impunity and is incompatible with international human rights standards including those recognised in the Bill of Rights.<sup>21</sup>

The National Security Service should be transformed into a civil service that is subject to an institutionalised monitoring mechanism. Other national systems employ a plethora of such mechanisms to address the lack of transparency, limits on judicial oversight resulting from national security exceptions and the potential for rights violations inherent in the exercise of powers of security and intelligence services, such as on the right to privacy. Review or oversight may be effected through judicial, parliamentary, or independent bodies and / or complaints structures.<sup>22</sup>

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<sup>20</sup> See UNDP, [Vetting Public Employees in Post-conflict Settings: Operational Guidelines](#), 2006: Bosnia and Herzegovina, pp. 37; Czech Republic, pp. 43; East Germany, pp. 49; Greece, pp. 57; Hungary, pp. 63.

<sup>21</sup> See in particular articles 27 and 35 of the Bill of Rights. See also UN Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para.18; Concluding observations of the UN Human Rights Committee: Sudan, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para.9.

<sup>22</sup> Arar, pp. 455-481.

Accountability mechanisms may take the form of review or an oversight bodies. The former “assesses the activities of an organisation against standards such as lawfulness and propriety and delivers reports, which often contain recommendations, to those in government who are politically responsible for the organisation” while an oversight body “performs the same functions but plays a more direct role in the management of the organisation.”<sup>23</sup> The objectives of review can be summarised as

- “[ensuring] conformity with law, policy and standards of propriety,
- [fostering] accountability to Government,
- [and fostering] accountability to the public and [facilitating] public trust and confidence.”<sup>24</sup>

In relation to the reformed Security Services in Sudan, a combination of mechanisms might be best suited to enhance accountability. These should consist of an independent review body that seeks to ensure the lawfulness of security services’ conduct through access to secret information for the purpose of review. This body, or a separate body, would ideally also have the power to receive and act on complaints brought by individuals who claim an infringement of their constitutional rights by the security services, for example in the course of surveillance operations. Such a complaint mechanism should have the power to recommend: an end to specific measures, appropriate forms of redress, and systemic reforms needed to prevent future violations. The judiciary should also be able to act an an oversight capacity by exercising investigative measures over violations by members of the services who, in addition, should be subject to the jurisdiction of ordinary courts and any internal disciplinary mechanisms. In cases of serious human rights violations, such as torture, alleged victims should also have recourse to effective judicial remedies.

#### **4. Recommendations**

KCHRED and REDRESS are ready to support the reform process by means of sharing legal expertise and providing advice on the technical aspects of any bill concerning the Security Services.

With regard to the substance of such reforms and in light of the foregoing considerations, we propose that:

##### **I. Mission and general principles**

(i) the objective of the National Security Service should be to seek internal and external security for the people of the Sudan and its legitimate institutions in

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<sup>23</sup> Ibid. pp. 499, 500.

<sup>24</sup> Ibid. p. 502.



conformity with the principles set out in the CPA that should guide the establishment of structures, namely:

“pursuit of good governance, accountability, transparency, democracy and the rule of law at all levels of government to achieve a lasting peace.”<sup>25</sup>

(ii) the new Security Act must be compatible with the fundamental rights enshrined in the Bill of Rights as mandated by article 27 of the Interim National Constitution

(iii) the Security services reflect the principles set out in article 151 of the Interim National Constitution, namely to be ‘representative of the people of the Sudan’ and ‘professional.’

## II. Mandate and functions

(i) the mandate of the National Security Service should be clearly defined in particular in relation to the notion of security and the powers to be conferred on the services to advise governmental bodies on the basis of analysis of information gathered on how best to counter any threats

(ii) the National Security Services should be clearly articulated as a security agency within the civil service confined to gathering intelligence and not law-enforcement activities

## III. Powers

(i) the powers of the National Security Service must be clearly defined and circumscribed in law

(ii) the powers of the National Security Service should be strictly confined to activities related to intelligence gathering, such as surveillance. The powers should not include the use of force, search or arrest and detention, which should only be exercised by authorised law-enforcement agencies.

## IV. Accountability

(i) a mechanism should be set up for vetting current members of the Security Services and would-be personnel in regard to their responsibility for prior human rights violations and other criminal conduct

(ii) immunity for members of the Security Services should be abolished

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<sup>25</sup> Chapter II “Power-Sharing Protocol” (Arts. 1.6, 1.4) Art. 1.4.5

- (iii) an independent oversight body and complaints mechanism, either as one or separate bodies, should be established to enhance transparency and accountability of the services.