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## Comments on the 8 October 2014 Draft National Security Service Bill of the Republic of South Sudan

Amnesty International, Community Empowerment for Progress Organization (CEPO), The Enough Project, Human Rights Watch, South Sudan Action Network on Small Arms (SSANSA), and Redress Trust respectfully submit the below comments on the draft National Security Service Bill of 8 October 2014. The Bill was originally tabled before the National Legislative Assembly (NLA) in May 2014. The third reading took place on 8 October 2014. While some positive changes were incorporated into the Bill, we remain concerned that it would give the NSS broad powers, without sufficient oversight and safeguards against abuse.

We call on members of parliament to vote against the Bill during the final reading and to make further amendments to bring it in line with South Sudan's Constitution and with regional and international human rights obligations. If the NLA votes to pass the Bill, the President should withhold assent and return the Bill to the NLA for further consideration of the points outlined below.

This commentary is not intended as a comprehensive review of the NSS Bill; rather it seeks to highlight several key concerns.

### I. The Bill grants the NSS broad powers which exceed its constitutional mandate

#### The Bill grants the NSS broad and unqualified powers

Section 12 of the Bill provides the NSS with unqualified powers to, for example: "request any information, statement, document, or material from any suspect and potential witness"; "monitor, investigate and conduct search of suspect and places"; "seize property connected with an offence concerned with crimes or offences against the state"; "arrest and detain suspects in accordance with the provision of this Bill in crimes related to National Security"; and "monitor frequencies, wireless systems, publications, broadcasting stations and postal services in respect to security interest so as to prevent misuse by users."

The powers contained in Section 12 interfere with a number of rights protected under the Constitution, regional and international human rights law, including the rights to liberty, to freedom from torture and other ill-treatment, to a fair trial and to privacy. We are concerned that these interferences will amount to violations of rights because there is no clarity about the circumstances under which powers can be exercised (contravening the principle of legality); the Bill does not specify that powers should only be exercised when strictly necessary to achieve the legitimate goal of protecting national security; and there is no provision requiring that such interference be proportionate to that goal.

The NLA should ensure that all powers and functions listed in Section 12 can only be exercised where necessary and proportionate to a legitimate aim for example, by requiring warrants based on reasonable cause. The Bill should also make it clear that all rights to judicial protection against abuse will be applied to persons arrested and detained by the NSS as would be applied to persons arrested and detained by the police or law enforcement officers.

Also concerning is the fact that NSS powers are granted in relation to a broad and vague definition of crimes and offences against the state contained in Section 5. The definition of “crimes against the state” includes “any activity directed to undermine...the constitutionally established Government in South Sudan at any level” and “any foreign-influenced activity within or outside which is against or related to South Sudan that is...detrimental to the interest of South Sudan.” According to the Bill, “offences against the state” are provided for under Chapter V of the Penal Code, which criminalizes acts including “causing disaffection among police force or defence forces,” “publishing or communicating false statements prejudicial to Southern Sudan,” and “undermining authority or insulting President.”

The broad scope of crimes and offences against the state could be interpreted as applying to the exercise of freedom of expression, assembly and association, for instance peaceful exercise of political opposition, or public criticism of state policy and actions. The descriptive definition of crimes against the state in particular runs afoul of the principle of legality according to which crimes need to be sufficiently precise so that individuals know what conduct is unlawful and the possible consequences of such conduct. The NLA should remove the descriptive definition of “crimes against the state” and review South Sudan’s Penal Code to ensure that crimes listed are precisely defined and that any limitations on the exercise of rights are narrowly tailored.

#### **Certain powers granted to the NSS exceed its constitutional mandate**

The Transitional Constitution provides in section 159(3) that the NSS should focus on “information gathering, analysis and advice to the relevant authorities.” The Transitional Constitution therefore envisions the role of the NSS to be confined to classic intelligence activities and does not vest the NSS with police powers. The powers granted to the NSS to arrest, detain, conduct searches and seize property fall outside of this limited constitutional mandate. The power to use force, though not explicitly listed in the Bill, is implied in the granting of other police powers, and also falls outside NSS’s constitutional mandate.

While vesting national security agencies with police powers is not in itself a violation of international law, a review of state practice, namely in Sudan, Algeria, Egypt, Jordan, Morocco, Tunisia and Yemen, points at a clear correlation between the exercise of powers of arrest and detention on the one hand, and allegations of violations such as arbitrary arrest and detention as well as of torture at the hands of the respective security services on the other. This is particularly the case where adequate custodial safeguards are lacking, as in the NSS Bill passed by the NLA.

Many states have opted not to give powers of arrest and detention to security agencies because the secretive nature of their work and the concomitant lack of accountability are prone to result in an abuse of policing powers. It is notable that states as distinct as Germany, Kosovo and South Africa, all of which had experienced security services that abused their powers, have either expressly or implicitly stipulated that such services should have no powers of arrest. 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.

We therefore recommend that the NLA amend the NSS Bill to strictly limit the powers of the NSS to intelligence gathering, as envisioned by the Transitional Constitution. Powers to arrest, detain, conduct searches, seize property and use force should be explicitly excluded from their powers and exercised by an appropriate law enforcement agency.

## **II. The Bill fails to provide adequate safeguards against abuse of NSS powers**

#### **The Bill should explicitly guarantee due process rights and custodial safeguards**

While we recommend that the powers to arrest and detain be excluded from NSS’s mandate, it is particularly concerning that the Bill grants these powers while failing to provide explicit guarantees of due process rights and custodial safeguards.

Though the Bill provides that individuals should be brought before a magistrate or judge within 24 hours, it should specify that the individual must appear in court. It should also indicate that the purpose of this hearing would be for the court to decide on the lawfulness and necessity of continued detention, and to either remand the accused person in an ordinary prison or order his or her release. The Bill should explicitly state that the code of criminal procedure will apply to all court proceedings against NSS detainees, and that that state attorneys will take responsibility for prosecuting cases.

The Bill should also expressly provide other due process rights and custodial safeguards required under the Transitional Constitution, regional and international human rights law, including:

- The right to be informed of the reasons for arrest and any charges brought.
- The right to challenge promptly the lawfulness of their arrest before a competent judicial authority.
- The right to apply for release on bail or bond pending investigation or questioning by an investigating authority and/or appearance in court.
- The right to be tried within a reasonable period of time.
- The right to have a relative or other appropriate third person notified of the detention.
- The right of access, without delay, to a lawyer of his or her choice, or if the person cannot afford a lawyer, to a lawyer or other legal service provider provided by state or non-state institutions.
- The right to be free from torture and other cruel, inhuman and degrading treatment and punishment.
- The right to silence and freedom from self-incrimination.
- The right to humane and hygienic conditions during the arrest period, including adequate water, food, sanitation, accommodation and rest.
- The right to contact and access a family member or another person of their choice, and if relevant consular authorities or embassy.
- The right to urgent medical assistance, to request and receive a medical examination and to obtain access to existing medical facilities.
- The right to freely access complaints and oversight mechanisms.

The Bill also fails to specify permissible places of detention. Regional and international human rights law requires that prisoners must always be detained in detention facilities that are officially recognised as such, and with access to lawyers, their families and medical facilities. Given the current practice of NSS to secretly detain individuals in unknown locations, the ambiguity of the Bill encourages violations of rights and in itself constitutes a violation of the right to liberty. If the Bill is not amended to specify officially recognised places of detention, it must be assumed that detention by NSS will be in normal prisons and police holding cells.

#### **The Bill should specify limits for the use of force**

While we recommend that the power to use force be excluded from the NSS's mandate, we are particularly concerned that the Bill fails to specify when the use of force is permitted.

The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials specify that the lawful use of force and firearms should be a measure of last resort and limited to circumstances in which it is strictly necessary, such as when there is imminent threat of death or serious injury or to prevent the perpetration of a serious crime. If the use of force is necessary, the level of force must be strictly proportionate, so as not to breach the right to life or the prohibition of torture and ill-treatment.

If the NLA does not exclude the use of force from the NSS's mandate, it should ensure that the Bill is amended to limit the use of force by the NSS in conformity with recognised international standards.

#### **The Bill should include a provision that criminalizes torture**

In September, President Kiir announced to the UN General Assembly that South Sudan had acceded to the Convention against Torture (CAT). While South Sudan is not formally a state party as instruments of

accession have not yet been deposited, the NLA should ensure that the draft Bill complies with the CAT. Specifically, given that there is no definition of torture in South Sudan's penal code, the NLA should incorporate the definition of torture as provided in article one of CAT in the Bill, and make it subject to appropriate punishments.

#### **The NLA should exclude the death penalty as a form punishment**

The Bill defines a number of offences and penalties applicable to members of the service. The death penalty should be removed as a punishment for criminal offences defined in the Bill.

More generally, South Sudan should place a moratorium on the death penalty with the view to complete abolition and commute all death sentences to terms of imprisonment. In 2012, South Sudan, along with 109 other countries, voted in favor of a UN General Assembly resolution that calls for abolition of the death penalty. Placing a moratorium is especially important given the pervasive failures of South Sudan's justice system to guarantee fair trial rights, including the right to criminal defense of individuals accused of crimes for which capital punishment is applicable.

### **III. The Bill fails to provide adequate oversight of NSS powers**

#### **The NLA should strengthen judicial oversight of NSS powers**

While we recommend that police powers be excluded from the NSS mandate, we are particularly concerned that the Bill does not provide for effective judicial oversight of these powers. Nor does the Bill provide for judicial authorisation and review of intelligence gathering activities such as the interception of communications and surveillance.

While Section 52 describes the process for obtaining a judicial warrant, it does not clearly specify when a warrant is required. It includes a vague provision stating that a warrant should be sought by the NSS when there is "reasonable grounds to believe that a warrant is required to enable the service to perform any of its functions under this act..."

The NLA should amend the Bill to make clear that warrants are required for all acts by the NSS that have an effect on protected rights, such as making arrests (with limited exceptions, if any), conducting searches, seizing property, and carrying out communications surveillance.

#### **The NLA should strengthen the proposed parliamentary oversight mechanism**

While Section 18 provides for parliamentary oversight of the NSS, this provision should be significantly strengthened to ensure that the NLA has sufficient powers and access to security and intelligence information to enable it to exercise adequate oversight. The NLA could consider:

- A requirement that the NSS report to the NLA on a regular basis.
- Providing the NLA with the power to conduct unrestricted and unannounced visits to places of detention.
- Providing the NLA with the power to compel the production of evidence and have access to all files, premises, personnel, archives and registers, as necessary for the exercise of its oversight functions.

#### **The NLA should strengthen the proposed Complaints Board**

Under regional and international human right law, individuals who are victims of illegal or arbitrary arrest and detention, or torture and ill treatment while in custody or whose rights have otherwise been violated have the right to seek and obtain effective remedies. These include for instance, compensation for physical or mental harm, rehabilitation including medical and psychological care, and legal and social services. Victims should also be provided with satisfaction through measures such as effective investigations and prosecution of the perpetrators or public acknowledgement of the facts and acceptance of responsibility, and guarantees of non-repetition through actions or reforms to prevent future abuses.

The South Sudan government has a duty to create a framework that enables fulfilment of victims' right to a remedy. Such a framework should provide for independent investigations into allegations of human rights violations by NSS agents and should ensure accountability for such violations through disciplinary and criminal sanctions.

We are concerned that Section 19 does not adequately provide for the independence of the Complaints Board. The head of the legal department of the NSS is included as member of the Complaints Board. As an employee of the NSS who is also responsible for providing legal advice about the service, the head of legal department would be unable to exercise his role on the Complaints Board with independence of the interests of the NSS. The NLA should therefore amend the Bill to ensure that employees of the NSS do not serve on the Complaints Board, and to specify that the Board will exercise its functions with impartiality and independence of the NSS.

Section 19(6)(5) provides that the Complaints Board may recommend "an appropriate disciplinary action" against individuals complained against, but does not provide for any additional remedies. Disciplinary actions alone may not be sufficient to guarantee the right of an aggrieved person to a remedy. The Complaints Board should be empowered to recommend criminal prosecutions against individuals. It should also have the power to recommend reparation, such as monetary compensation, for example in cases of wrongful arrest and detention.

The Bill should also explicitly specify that the establishment of the Complaints Board does not prejudice the rights of individuals to seek redress through criminal and civil remedies in regular courts.

The Bill should also make provisions for victim and witness protection; specify a timeframe for dealing with complaints; and require publication of an annual report with a summary of complaints and policy recommendations arising from the work of the Complaints Board.

While Section 19(6)(10) provides that a person aggrieved by a decision of the Complaints Board may appeal, we are concerned that Section 19(6)(8) which states that members of the Board shall not be called to give evidence in any court or judicial proceeding about the functions of the board may obstruct the right to appeal. There should be no blanket exclusion of evidence by the courts. The NLA should amend the Bill so members are not prevented from testifying on the substance of an appeal, and that limitations on the ability to give evidence are subject to the determination of the courts of a specified public interest in maintaining the secrecy of evidence balanced against the importance of ensuring the right to appeal.

#### **IV. The Bill in its current form will create a legal framework that facilitates human rights violations**

We are concerned that vesting broad powers in the NSS, while failing to provide appropriate safeguards against abuse of these powers and oversight, will create a legal framework that facilitates human rights violations by NSS agents. These concerns are all too real given the NSS's record to date, as well as the experience of other countries with similar security legislation, including Sudan. The passage of a Bill to define and delimit the NSS' powers is an opportunity to prompt much needed reforms in this institution and to send a signal of South Sudan's commitment to respect human rights. The NLA should not squander this opportunity.