AI Index Number: AFR 65/7048/2023

July 27, 2023

Joint Open Letter to the Revitalized Transitional National Legislative Assembly (RTNLA)

To: The Revitalized Transitional National Legislative Assembly (RTNLA)
Cc: Hon Simon Kun Puoch, Chairperson, Security and Defence Committee, RTNLA
Cc: Hon Jemma Nunu Kumba, Speaker, RTNLA
Cc: Hon. Martin Elia Lomuro, Minister of Cabinet Affairs, Revitalized Transitional Government of National Unity, South Sudan
Cc: H.E Riek Machar Teny, First Vice President/Head of Governance Cluster, Revitalized Transitional Government of National Unity, South Sudan

Re: Strengthen Gaps in Amendments to South Sudan’s Abusive National Security Service Act

Dear Honourables,

Amnesty International and Human Rights Watch write to you regarding South Sudan’s National Security Service Act Amendment Bill 2023. In this letter we outline weaknesses in the amendments that need to be addressed to guarantee full protection of rights. We hope that you will ensure transparency and broad public participation in the rest of this amendment process. We also urge you to call on the National Security Service (NSS), in the interim, to end its practices of arbitrary arrests and detentions while its governing law is undergoing review.

Honourables, we recognize the tremendous efforts made by the National Constitutional Amendment Committee, the Ministry of Justice and Constitutional Affairs, the Council of Ministers, and the Presidency to take steps to bring the NSS Act in line with international
human rights law and the 2011 Transitional Constitution.¹

The Bill before you includes several positive provisions including:

- Introducing guiding principles founded on a respect for human rights, constitutionalism, gender equality, and democratic principles;
- Prohibiting detention or confinement by NSS members;
- Prohibiting torture, cruel, inhumane, and degrading treatment;
- Opening up the NSS budget and spending to be independently audited by the audit chamber;
- Ensuring at least 35% recruits are female;
- Outlawing recruitment and use of children by any organized armed groups;
- Making sexual harassment a criminal offence; and
- Empowering courts to inspect suspected places of detention and that NSS violations be subject to determination by ordinary courts.

However, we are concerned that the Amendment Bill still contains vague and broad provisions that would allow the agency broad and unqualified powers which are contrary to the object and purpose of the amendment itself. We urge parliament to consider the following:

- Exclude powers of arrest in the Bill;
- Clarify powers of detention and detention sites;
- Broad definition of crimes against the state;
- Retention of broad and unqualified powers;
- Need for stronger parliamentary oversight;
- Need for stronger redress and witness protection measures;
- Clarify NSS issuing of permissions for public events;
- Strengthen judicial oversight; and
- Ensure public participation in the amendment process of the bill.

Our organizations have extensively documented how the NSS has used its broad powers in the 2014 Act to commit abuses with impunity.² Ensuring that the NSS powers are

---

¹ The NSS Act has been under review since 2015. The Agreement on the Resolution of Conflict in South Sudan signed in 2015 and the “revitalized” agreement of 2018 (R-ARCSS) both provide that the National Constitutional Amendment Committee (NCAC) should conduct a review of security sector laws including the SPLA Act, the Police Act and the NSS Act, See Art 1.18 R-ARCSS

genuinely restricted in law and that those restrictions are promptly implemented to the letter and will contribute to creating a rights-respecting state. These reforms to the NSS are also critical in ensuring a guarantee of non-repetition as provided for in the Revitalized Agreement of 2018.

Honourable s, as the Bill is discussed and reviewed within your committee, we recommend that you address the following concerns:

1. **Exclude Powers of Arrest in the Bill**

We recommend that parliament excludes this power of arrest.

The amendment Bill revokes sections 54 and 55 of the NSS Act which gave the NSS power to arrest with or without a warrant. The Amended section 13(15) replaces the NSS power to ‘arrest and detain’ and gives them the power to ‘arrest under emergency circumstance and hand over to the nearest police station suspects in accordance with the provisions of this Act in crimes related to National Security as provided for under section 7 of this Act, in accordance with the Constitution and applicable law.’

The current Bill, in a step backwards, gives the NSS powers of arrest without a warrant in section 57, to be exercised where an individual is suspected of broad “crimes against the state” (see below) and in accordance with section 13. This provision is vague and reinforces the NSS powers to arrest in the 2014 Act and could be subject to abuse.

Sections 57 subsections (2) and (3) provide that a suspect should be produced within 24 hours and that they can challenge their arrest in a court of law including through a lawyer after the expiration of 24 hours. However, our documentation shows that the NSS has never upheld constitutional safeguards or fair trial rights and believe the NSS will still abuse this power.

As the RTNLA considers the powers of arrest and detention, it will be important to consider: on what basis will the NSS arrest suspects? What qualifies as an emergency circumstance? What happens between the moment of arrest and the moment the NSS hands over the person to the police station? Does the NSS have powers of interrogation and where does that take place? How can a suspect challenge the lawfulness of their arrest if the NSS can arrest without any warrant based on broad and unqualified powers? Where the NSS fails to hand over a suspect to the police, how do the courts

---

monitor the fate or whereabouts of the arrested person when there will most likely not be a record of their arrest? Why is it necessary for the NSS to be provided a power of arrest when the police can exercise usual powers of arrest on their behalf?

2. Clarify NSS Powers of Detention and Fate of Detention Sites

We urge parliament to make it explicitly clear that the NSS cannot hold any civilians in custody.

The bill excludes powers of detention from NSS powers but by giving any magistrate powers to visit any detention site, section 57 infers that NSS detention sites will continue to exist. This section read together with section 13(15), which gives the NSS powers to arrest, suggests that the NSS can hold people in custody. It should be noted that the NSS in exercising powers under the 2014 Act did not respect custodial safeguards including right to liberty and fair trial in South Sudanese and international law.3

The NSS operates numerous illegal and ungazetted detention sites4 – some known, some secret – around the country which include the notorious detention facility in their Juba headquarters known as “Blue House,” detention facilities in the NSS’s operations divisions office in central Juba known as “Riverside,” their training facility in Luri,5 underground cells below the NSS Central Equatoria State division’s office next to the Egyptian clinic diagonally opposite the embassies of the Netherlands, Canada, the United Kingdom,6 and at least one detention facility in each capital of the 10 states.7 NSS also continues to hold detainees in a shipping container in Malakia, a neighbourhood in Juba.8

Conditions in these detention centers, where detainees are held incommunicado and for long periods, often subjected to torture and other forms of ill-treatment, are poor.9 In

---

4 National Security Service Act, Section 12: gives the NSS the unconstitutional powers of arrest and detention, but it does not specify locations of detention facilities.
7 Human Rights Watch, What Crime was I paying for?, p.22.
8 Human Rights Watch has called for these places of detention to be shut down or gazette neither of which has happened to date; Human Rights Watch, What Crime was I paying for?; Amnesty International, “Chilling Effect of Surveillance.”
December 2020, Human Rights Watch reported methods of torture and other ill-treatment to include “beatings with sticks, whips, and cable wires, dripping hot melted plastic on skin, cutting with knives and glass, being electrocuted, piercing testicles and skin with needles and other sharp objects.”

Human Rights Watch also documented sexual violence, including rape and forced nudity of male detainees by NSS officers. Detainees have died in NSS custody as the result of illness or unlawful killing.

3. Broad Definition of Crimes Against the State

We urge parliament to remove the descriptive definition of “crimes against the state” in section 7 of the NSS Act and review South Sudan’s 2008 Penal Code to ensure that crimes listed are precisely defined and that any limitations on the exercise of rights go no further than what is permitted under international human rights law.

The broad and vague definition of crimes and offences against the state in section 7, give the agency powers counterproductive to the goal of the amendment which was to bring the NSS Act in line with the 2011 Transitional Constitution and international human rights law. The definition of “crimes against the state” includes “any activity directed at undermining ... the constitutionally established system of the Government by unlawful means” and “any foreign-influenced activity within or outside which is related to South Sudan that is [...] detrimental to the interest of South Sudan.” According to the Act, “offences against the state” are provided for in the 2008 Penal Code, which criminalizes acts including “causing disaffection among police force or defence forces,” “publishing or communicating false statements prejudicial to South Sudan,” and “undermining authority of or insulting the President.” This is also reinforced by the definition of the word enemy in amended section 5(i)(b), which includes any person “threatening the security of South Sudan.”

The government has in the past used trumped-up charges of crimes against the state to restrict the rights to freedom of expression, peaceful 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 afoot of


10 Human Rights Watch, What Crime was I paying for?, p. 26
12 Human Rights Watch, What Crime was I paying for?, p. 35 – 36.

the principle of legality which requires crimes to be sufficiently precise so that individuals know what conduct is unlawful and the possible consequences of such conduct.

4. The Bill Still Gives the NSS Broad and Unqualified Powers

The Bill provides the NSS with unqualified powers to, for example: “conduct search of suspect and places” (amended sect. 13(3)); “seize property connected with an offence concerned with crimes or offences against the state (amended sect 13(14))”; and “monitor frequencies, wireless systems, publications, broadcasting stations, and postal services in respect to security interest so as to prevent misuse by users” (amended sect 13(11)).

The powers contained in section 13 interfere with some rights protected under the Constitution, regional and international human rights treaties, including the rights to liberty, 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 RTNLA should ensure that all powers and functions listed in section 13 can only be exercised where necessary and proportionate to a legitimate aim for example, by requiring warrants based on reasonable cause.

We note that new section 13(18) specifies that the NSS has the power to “obtain court warrant to conduct surveillance by employing lawful mechanisms on any suspected person or place” – implying a restriction on how the NSS is to conduct surveillance. In addition, new section 14 also lists two restrictions to NSS powers: “(1) no personnel of the service shall summon any person, search or seize any property following intelligence gathered pursuant to section 13 unless that action has been sanctioned by the Minister or such other authority as the Minister may direct and (2) no personnel of the service shall have power to search or seize any property, summon, arrest, detain, or confine any person by virtue only of being personnel of the service.”

These restrictions would, however, still fall short of the need to define and limit NSS powers more precisely and make sure that they can only be exercised where necessary and proportionate to a legitimate aim. Ministerial authorization does not provide appropriate judicial safeguards.

5. **Strengthen Parliamentary Oversight**

While section 19 provides for parliamentary oversight of the NSS, this provision should be strengthened to ensure that parliament has sufficient powers and access to security and intelligence information to enable it to exercise adequate oversight. Parliament should consider:

- A requirement that the NSS report to parliament on a more regular basis than annually.
- Providing the parliament with the power to conduct unrestricted and unannounced visits to NSS facilities including suspected places of detention.
- Providing the parliament 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.
- Ensuring members of committees responsible for reviewing and overseeing NSS operations are provided with adequate training and resources.

6. **Strengthen Redress and Witness Protection Measures**

We urge parliament to ensure the complaints board can guarantee victims of abuses the right to a remedy beyond disciplinary action of errant officers, and to put in place victim and witness protection measures in the Bill.

The complaints board should also have the power to recommend reparation, such as compensation, for example in cases of wrongful arrest. The proposed amendments in a step forward specify that bringing a complaint to the Complaints Board does not prejudice the rights of victims to seek redress through criminal and civil remedies in regular courts.

While sections 34 and 35 of the Bill outline protection for informants and how the NSS can disclose protected information, it fails to provide for victims and witnesses of NSS abuse. The Bill should 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 board.

Parliament should also direct the minister for national security to put in place a whistle blowing policy that would protect officers who speak out against abuse, misconduct, or
other activity.

7. Clarify that the Public Does Not Require NSS Permission to Hold Public Gatherings

The NSS has over the years developed a practice of requiring event organizers including civil society groups, media, and political parties to seek permission before holding any public events. Amnesty International has documented how NSS agents have also attended some of these events and used them to conduct physical surveillance on attendees and participants. This has included workshops and conferences, press conferences, and political rallies. This is in violation of the right to freedom of peaceful assembly, freedom of opinion, expression, and association.

In light of this, we urge you to explicitly state in the amendment bill that one only needs to notify the NSS, but not seek permission, about their intention to hold any public gathering.

8. Strengthen Judicial Oversight over NSS Powers

Parliament should amend the Bill to clarify that warrants are required for all acts by the NSS that impact on fundamental rights, such as conducting searches, seizing property, and carrying out communications surveillance.

We are particularly concerned that the Bill does not provide for effective judicial oversight over the powers and functions of the NSS as outlined in Section 13. Nor does the Bill provide for judicial authorisation and review of intelligence gathering activities such as the interception of communications and surveillance.

The bill includes a new provision in section 13(18) which says the NSS has powers to obtain court warrants to conduct surveillance, implying it needs judicial authorisation. It does not explicitly state that this is a requirement since it is included in the list of powers of the NSS.

While the 2014 bill envisaged arrests with and without warrant but was unclear on when a warrant is required, the 2023 bill implies in section 57 that a warrant is never required for the NSS to proceed to arrest.

New section 14 in the bill introduces the requirement that any search or seizure of property be authorized by the Minister, but this is different from having to request a

---

14 Amnesty International, "Chilling Effect of Surveillance."
judicial warrant. We propose strengthening judicial safeguards rather than executive safeguards since the latter could be prone to abuse and politicization.

The bill seems to strengthen accountability for NSS agents including a new explicit mention of new offences related to dignity/physical integrity and other rights of arrested people and detainees; the fact that ordinary courts would be competent to investigate and prosecute those; and the explicit mention that those who commit such offences shall be punished and be excluded from NSS. However, it does not sufficiently strengthen judicial oversight before or during the conduct of NSS activities.

The new section 35, which includes the possibility for the NSS to “disclose information ... where the information may be used in the investigation of an alleged offence” to “any public officer having jurisdiction to investigate the alleged offence and to the director of public prosecution or the prosecuting attorney concerned”, improves cooperation and information sharing between the NSS and judicial authorities but does not constitute judicial oversight. Further, section 35 (b) that grants the Minister powers to authorize disclosure of any information held by NSS could be prone to abuse and politicization. We propose that any such disclosure be subject to judicial oversight.

9. The need for transparency, accountability, and participation

The draft amendment bill has significant implications for the protection and promotion of human rights in South Sudan. We urge you to ensure the passage of amendments to the 2014 NSS Act, conforms with the obligations of South Sudan under international human rights law, and to do so in accordance with the key principles of any human rights compliant law-making process, namely: transparency, accountability, and participation.

The public should be provided with an adequate opportunity to comment on the content of the amendment bill prior to its passage and to submit any information, analysis, and opinions on the draft amendment bill directly to the relevant body. Public participation of rights holders, who are likely to be directly or indirectly affected by the outcome of the amendment of the 2014 NSS Act, is key to ensuring viewpoints are reflected in the review process. Any revised, new, or updated draft version should be made public as soon as it is available. Furthermore, the media should be allowed to freely report on the amendment process to keep the public well informed.

Conclusion

Honourables, the imminent removal of the offending clauses in the 2014 NSS Act brings hope that a repressive and fearsome agency will be subject to the rule of law and civilian authority.
To this end, we urge you to strengthen weak gaps and enforcement mechanisms so that the NSS can no longer violate human rights and to ensure that the public can meaningfully engage in discussions around the amendment of this law.