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Security for all

Reforming Sudan's National Security Services

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1. Introduction

The nature and powers of security services are a crucial yardstick for 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 scheduled to be held in 2010. At the time of writing, discussions on a bill were ongoing between the National Congress Party and the Sudanese Peoples' Liberation Movement, centring on diverging views on the structure and the powers of the new National Security Service (hereinafter NSS).

This Report, published by the Criminal Law Reform Project in Sudan,[1] seeks to contribute to the current debate on the powers and accountability and other key aspects of the reformed NSS by identifying and analysing:

- shortcomings of current legislation in respect of its compatibility with the Bill of Rights and international standards binding on Sudan, as well as its role in facilitating human rights violations;

- principles governing the operations of security services;

- mission, mandate, functions and powers of security services, as well as institutional integrity, accountability and oversight, drawing on international and comparative standards and practices.

This analysis is undertaken with a view to developing a set of recommendations to guide the drafting of the new National Security Law. We hope this Report will be useful to the Government of Sudan and others actors in addressing pertinent questions and welcome the opportunity to further discuss any issues raised in this paper.

2. Development of national security in Sudan

Dating back to the colonial period of the Anglo-Egyptian Condominium of 1899-1956, the so-called Special Branch responsible for intelligence and security continued to operate as an integral part of the police forces under the Ministry of

[1] The Criminal Law Reform Project is a joint initiative of REDRESS and SORD 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 Report, please visit our website at http://www.pclrs.org/ or contact: Khansaa Elkarib, Project Coordinator, SORD, at sord2lawreform@gmail.com, Tel: 00249 91174 1850, or Abdelsalam Hassan, Sudan Legal Advisor, REDRESS, at Abdelsalam@redress.org, Tel: 0044 20 7793 1777.

Interior after independence in 1956.[2] The military regime under Abbud (1958-1964) declared a state of emergency and enacted repressive legislation, such as the 1958 Sudan Defence Act and the Sudan Defence Bylaw. The structure of the Special Branch remained largely intact. This state of affairs continued under the second democracy (1964-1969) during which a National Security Act was passed in 1967 but not implemented subsequently.

The national security system underwent fundamental changes during the regime of Numeiri (1969-1985), which, except for a brief interim period, have remained the basis for national security legislation since. In late 1969, the regime formed the National Security Organ out of the army's intelligence section. The independent security section in the special branch became the General Security Organ. Significantly, the latter became independent of the police in 1973 but were still vested with executive powers of search, arrest and detention. In August 1978, the two organs were merged to form the State Security Organ, which was subsequently accused of having committed serious violations against alleged or genuine political opponents until its dissolution in 1985. The security organs operated on the basis of Republican Order No.4 of May 1970 and thereafter the 1973 National Security Act and the 1978 State Security Organ Act. The latter vested the security services with broad powers. It also included a series of offences against the state subject to draconian punishments and established State Security Special Courts.

The State Security Organ was dissolved following the collapse of the Numeiri regime. The security laws of 1973 and 1978 were abrogated in the course of the changes reflected in the 1985 Constitution and the 1986 parliamentary elections. Subsequently, in times of growing political instability, the government declared a state of emergency in 1987. In 1988, it adopted the State Security Act and formed new security forces which were given broad powers, including the power of arrest and detention.

In the immediate period following the 1989 coup, the security services operated under emergency laws which the African Commission on Human and Peoples' Rights (hereinafter African Commission) found to be incompatible with several rights guaranteed in the African Charter on Human and Peoples' Rights.[3] The security services were then regulated by the 1990 National Security Act, which was subsequently replaced by the National Security Act of 1995.[4]

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[2] The account of the national security services and pertinent legislative developments up to 1989 is based on: A. H. Abdelsalam, 'Constitutional Challenges of the Transition' in A.H. Abdesalam and Alex de Waal (eds.), The Phoenix State: Civil Society and the Future of Sudan (Justice Africa/Committee of the Civil Project, The Red Sea Press, Asmara, 2001), pp. 1-32: Advocate Adil Abbas Salih, *The National Security Act of 1999 in the Light of Constitution and International Treaties* (unpublished, on file with REDRESS); and Mohamed Abdelaziz and Hashim Abu Rannat, *The Secrets of the Organ of Secrets; the Sudanese Security Organ 1969-1985* (Azza for Publishing and Distribution, Second Edition, Khartoum, 2008).

[3] African Commission on Human and Peoples' Rights, Communications 48/90, 50/91, 52/91 and 89/93 (1999), *Amnesty International and others v. Sudan.*

[4] Human Rights Watch/Africa, *Behind the red line: Political repression in Sudan*, (New York, Washington, London, Brussels, May 1996), pp.33-38.

In *Amnesty International v Sudan*, the applicants characterised the 1990 National Security Act as follows

> Under this Act, the security forces have powers of arrest, entry and search. Persons can be detained under this Act, without access to family, or lawyers for up to 72 hours, renewable for up to one month. Detention can be for up to three months if for the "maintenance of public security" and on approval of the Security Council and a magistrate. Appeal to a magistrate is permitted. In 1994 this Act was amended, enabling the National Security Council to renew a three-month order without reference to any persons. Further renewals require approval by a judge. There is no right to challenge detention under this Act and no reasons need be given for such detention.[5]

The African Commission found that

> the remedies provided for under the 1990 national security law do not conform to the demands of protection of the right to a good administration of justice, to the extent that the appeals provided for in this law cannot be brought before a judge. It is evident that this appeal procedure, as provided for in the 1990 national security law, cannot be considered as fulfilling the criteria of effectiveness.
>
> The 1994 [1995] law, which repeals and replaces that of 1990, brings up the principle of the inexistence of remedies, as well as the retroactivity of its provisions. Indeed, under the 1990 law, accused persons could always file an appeal before a judge. This new law stipulates that “no legal action, no appeal is provided for against any decision issued under this law”. This manifestly makes the procedure less protective of the accused and is tantamount to inexistence of appeal procedure.[6]

The 1990 and 1995 National Security Act established the framework for a regime of exceptionalism of the National Intelligence and Security Services (hereinafter NISS). This was marked by extremely broad powers of “preventive detention” for up to six month without judicial authorisation or review and immunity for NISS members for any acts or omission committed in the course of their work.[7] The 1995 National Security Act was on the face of it incompatible with the right to personal liberty and the right to fair trial and facilitated arbitrary arrests and other serious human rights violations such as torture and ill-treatment. The UN Special Rapporteur on the human rights situation in Sudan found that

[5] African Commission on Human and Peoples’ Rights, Communications 48/90, 50/91, 52/91 and 89/93, *Amnesty International and others v. Sudan,* para.3.
[6] Ibid., paras. 34, 35.
[7] Articles 37 and 38 National Security Forces Act 1995.

> It is now widely believed, and the Special Rapporteur endorses this conclusion based on his findings described in his earlier reports to the Commission and the General Assembly, that anyone detained in the Sudan by the security authorities is at risk of ill-treatment, in particular those detained in the secret detention centres, known in the Sudan as "ghost houses.[8]

The 1999 National Security Forces Act (NSFA), rather than addressing the shortcomings of the 1995 Act identified by regional and international human rights treaty bodies and various observers, perpetuated the system of exceptional powers and lack of accountability and oversight that has come to define the NISS.

As highlighted in a recent UN report

> The human rights concerns related to the NISS are longstanding and institutionalized problems that could be addressed through institutional reform.[9]

3. The National Security Forces Act 1999 and its compatibility with the Bill of Rights and international human rights standards

3. 1. The right to liberty and security under international human rights law and the 1999 National Security Forces Act

3.1.1. Right to Liberty and Security

Article 9 of the International Convention on Civil and Political Rights (ICCPR) and article 6 of the African Charter on Human and Peoples' Rights (ACHPR), to which Sudan is a State party, guarantee the fundamental right to liberty and security of the person.

Article 9 ICCPR explicitly provides that the following rights must be guaranteed: (a) deprivation of liberty must be lawful; (b) the right to be informed about the reasons for the arrest; (c) the right to trial within a reasonable time or to release; (d) the right to have the legality of one's detention reviewed by a court; and (e) the right to compensation for unlawful arrest and detention. Similar rights are

[8] Interim Report on the situation of human rights in the Sudan, prepared by Mr. Gáspár Bíró, Special Rapporteur of the Commission on Human Rights, UN Doc. A/49/539, 19 October 1994, para.27.

[9] Tenth periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan, *Arbitrary arrest and detention committed by national security, military and* police, Geneva, 28 November 2008, p.3.

reflected in articles 6 and 7 ACHPR, and elaborated in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.[10]

Article 29 of the Bill of Rights of the INC reads "*Every person has the right to liberty and security of person; no person shall be subjected to arrest, detention, deprivation or restriction of his/her liberty except for reasons and in accordance with procedures prescribed by law*."

3.1.2. Lawfulness of arrest and detention

Deprivation of liberty is only permissible on grounds defined and established by law. Even if an arrest or detention is lawful under national law, it may still violate human rights if it is arbitrary. This will be the case where it encompasses "elements of inappropriateness, injustice, lack of predictability and due process of law."[11] Significantly, there is a close nexus between arbitrary deprivation of liberty and other human rights. The UN Working Group on Arbitrary Detention, in determining "arbitrariness," has considered whether the arrest or detention is intended to deny the exercise of fundamental rights such as the right to freedom of opinion and of expression, as well as the right of association guaranteed in the ICCPR.[12]

Article 30 (d) NSFA,[13] according to which a person may be detained for three days, renewable for a period of up to 30 days, is silent on the grounds for arrest and detention. The detention period may be renewed by the Director of the NISS (DNISS) for up to another 30 days on such grounds as "*indications, evidence or suspicions of committing an offence against the State"* (with notification of the competent prosecution attorney). In cases that "*may lead to terrorizing the society and endangering the security and safety of citizens by practice of armed robbery, religious or racial sedition"* the DNISS may detain a person for up to six months (the renewal after three month is subject to a notification requirement).[14]

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[10] African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, DOC/OS (xxx) 247 (2001).

[11] Human Rights Committee, Communication 458/1991, *Albert Mukong v Cameroon*, 10 August 1994, para.9.8.

[12] Report of the Working Group on Arbitrary Detention, Decision No. 45/1993 (SUDAN), E/CN.4/1994/27, 17 December 1993, p. 133.

[13] Article 30 NSFA on Powers of search, arrest and detention provides members of the National Security and Intelligence Service with: "(b) the powers of search, after obtaining a written order from the Director;
(c) the powers of a policeman provided for in the police force law and the Criminal Procedure Act;
(d) the power of detention of any person, for a period not exceeding three days, for interrogation and inquiry, together with showing of the charge; provided that the Director may issue an order extending the period of detention for a period not exceeding thirty days, together with notifying the competent prosecution attorney;
(e) the Director, in accordance with the requirements of national security, may order renewal of the detention of the person, where there have been established against him, indications, evidence or suspicions of committing an offence against the State, for a period not exceeding other thirty days, together with notifying the competent Prosecution Attorney; (f) the Director shall submit to the Council, in any other case, as he may deem therein for requirements of national security, the necessity of extending the period of detention of the person for a period more than is provided for in paragraphs (d) and (e) and Council may extend the period of detention, for a period not exceeding two months; provided that he shall forthwith be released thereafter."

[14] Article 31 (1) NSFA.

Articles 30 and 31 NSFA do not specify with sufficient precision the grounds for arrest and detention. The DNISS is given wide discretion in determining whether any of the grounds justifying arrest, detention or renewal thereof are present. The provisions render the process of arrest and detention unpredictable, lacking adequate safeguards and, on the whole, inappropriate.

3.1.3. The right to be informed of the reasons for arrest and any charges brought

The ICCPR stipulates hat every person deprived of personal liberty must be informed of the reasons for his or her arrest and detention and be promptly informed of the charges against him or her.[15] This obligation has been equally recognised by the African Commission.[16] The right to be informed of the reasons for arrest is granted in article 32 (1) NSFA but not the right to be informed promptly of any charges brought.

3.1.4. The right to be brought promptly before a judge and to be tried within a reasonable time

(a) Custody

Anyone arrested and taken into custody has the right to be brought promptly before a judge or other officer authorized by law to exercise judicial power.[17] The right to habeas corpus (produce the body) is a crucial safeguard to minimise the inherent risk that arrest or detention are unlawful and/or arbitrary and may facilitate other violations. According to the United Nations Human Rights Committee's general comment No. 29, the right to habeas corpus is non-derogable even during a state of emergency.[18]

Detention on reasonable suspicion of having committed a specific criminal offence without bringing charges is permitted only for a "few days," i.e. usually not longer than 48 to 72 hours, and must end either with the release or remand by a judge or judicial officer to pre-trial detention.[19] Detaining a person for more than a few days without charges being brought and without judicial review amounts to a violation of the prohibition of arbitrary detention and the guarantees laid down in article 9 (2) and (3) ICCPR. The African Commission made clear that

[15] Article 9 (2) ICCPR.
[16] African Commission on Human and Peoples' Rights, Communication No. 224/1998 (2000), *Media Rights Agenda v. Nigeria,* paras.43, 44.
[17] Article 9 (3) ICCPR and article 7 (1) (d) ACHPR.
[18] UN Human Rights Committee, General Comment No.29: States of Emergency, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16.
[19] UN Human Rights Committee, General Comment N. 8: Right to liberty and security of persons (Art. 9), 30 June 1982, (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994).

> Persons suspected of committing any crime must be promptly charged with legitimate criminal offences and the State should initiate legal proceedings that should comply with fair trial standards as stipulated by the African Commission in its *Resolution on the Right to Recourse and Fair Trial* and elaborated upon in its *Guidelines on the Right to Fair Trial and Legal Assistance in Africa*.[20]

The right to have one's case heard should be understood as the right to have a judge issuing a decision

> after a substantive, not merely formal, analysis of each case. The decision should be taken by the judge himself after hearing the detainee in person (...). The suspect should be notified of the decision by the judge in person, not by the prison or police authorities.[21]

(b) Pre-trial detention

Anyone charged with criminal offences and detained pending trial has the right to be tried within a reasonable time.[22] As a general rule, the accused is to be released pending a trial unless the state can demonstrate that continued detention is necessary. The exceptional nature of pre-trial detention and the right of the accused to be presumed innocent make it imperative that the principles of reasonableness and necessity are applied in deciding on remand and the time limit for pre-trial detention.

The Human Rights Committee has observed that

> remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Remand in custody must further be necessary in all the circumstances, for example to prevent flight, interference with evidence or the recurrence of crime.[23]

Similarly, the African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa stipulate that

> Unless there is sufficient evidence that deems it necessary to prevent a person arrested on a criminal charge from fleeing, interfering with witnesses or posing a clear and serious risk to others, States must ensure that they are not kept in custody pending their trial. However,

[20] African Commission on Human and Peoples' Rights, Communication No. 250/2002 (2003), *Liesbeth Zegveld and Messie Ephrem v. Eritrea*.
[21] UN Working Group on Arbitrary Detention, UN Doc. E/CN.4/2004/3/Add.3, 23 December 2003, para 65.
[22] Article 9 (3) ICCPR and article 7 (1) (d) ACHPR.
[23] *Mukong v Cameroon,* supra note 11, para. 9.8.

> release may be subject to certain conditions or guarantees, including the payment of bail.[24]

Conversely, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism expressed concern about:

> Situations where persons are detained for a long period of time for the sole purpose of intelligence-gathering or on broad grounds in the name of prevention. These situations constitute arbitrary deprivation of liberty.[25]

- **1999 National Security Forces Act**

According to Article 30 NSFA, NISS officials may arrest and detain a person without arrest warrant for up to three days, for interrogation and inquiry. No judge or prosecutor has to be informed about the arrest. The DNISS can extend the detention by up to 30 days at his or her own discretion. If he or she suspects the detainee of having committed an offence against the state he or she can extend the detention for an additional 30 days. The extension does not require judicial permission; the DNISS only has to notify the competent prosecutor.

Effectively, article 30 NSFA permits a person to be detained for up to four months without ever being charged and brought before a judge. Review and renewal of the detention lie exclusively with the DNISS (after notification of the prosecution attorney and, after two months, of the Council of the Organ), i.e. an executive authority. Going even further, Article 31 NSFA allows detention for six months without judicial review where the DNISS finds "circumstances which lead to panic in society and threaten the peace and security of citizens, namely, armed robbery, or religious or racial discord."[26] After six months of detention, the National Security Council, a body composed of senior government officials, can extend the detention period again for up to three months and the detained person obtains the legal right to petition a magistrate for his or her release.

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[24] African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, DOC/OS (xxx) 247 (2001).

[25] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, UN Doc. A/HRC/10/3, 4 February 2009, para.38.

[26] Article 31(1) of the Act reads "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, for a period not exceeding three months and may renew the period for another three months, after notifying the competent Prosecution Attorney; (2) The Director, in such cases as he may deem necessary to extend the period of detention, besides as provided by subsection (1) may submit the matter to the Council and the Council may extend the period of detention for a period not exceeding three months; and the detainee may present a grievance by petition to the competent Magistrate, against the order of renewal of his detention, and the Magistrate may pass such as he may deem fit, after knowing the grounds of detention."

In sum, article 31 NSFA allows a person to be detained for up to nine months without charge and without any judicial review of the legality of the detention for the first six months. This is in clear violation of article 9(3) ICCPR, which requires judicial supervision of the reasons for the arrest and/or detention "without delay."

3.1.5. The right to compensation and to an effective remedy

Persons who have been unlawfully deprived of their liberty are entitled to compensation. Article 9 (5) of the ICCPR provides a right that shall be enforceable before a domestic authority. The Human Rights Committee has noted that the compensation provision is applicable to all detainees held unlawfully, whether or not they were arrested in connection with criminal charges.[27]

Compensation and the right to an effective remedy are rendered virtually impossible under the NSFA. Its article 33 grants immunity to members of the NISS and their "collaborators." According to article 33(b), no civil or criminal action shall be instituted against members or collaborators for any acts they may have committed in connection with the official work, except with the approval of the Director if the action is unrelated to their duties. The right to institute action for compensation against the State is preserved.[28] However, no cases are known in which individuals have obtained compensation for having been arbitrarily arrested or detained at the hands of the NISS. This can be attributed to the fact that most arrests that would have to be judged as arbitrary according to international standards will be lawful under the sweeping powers provided in the NSFA. In addition, there is a complete lack of investigations into wrongdoing of NISS members, which undermines any reasonable prospect of taking successful legal action.

Article 2 (3) ICCPR establishes the right to "an effective remedy" for any violations of the rights guaranteed in the Covenant. In addition to the right to compensation, the right to an effective remedy entails a corresponding duty of the state to investigate human rights violations, to hold those responsible to account, and to take effective measures to prevent recurrence. The right to an effective remedy against members of the NISS is rendered futile in practice; the procedural immunity is routinely upheld, resulting in a culture of impunity.

[27] Human Rights Committee, General Comment 8 (Right to Liberty and Security), para.1.
[28] UNSC, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council resolution 1564 of 18 September 2004 (Geneva 25 January 2005), para. 454.

3.2. Custodial safeguards

Persons in detention are at a heightened risk of violations, not only of their right to liberty and security but also other serious violations such as torture and other cruel, inhuman or degrading treatment or punishment. A series of custodial safeguards have been fashioned by international and regional bodies, as well as several national courts and authorities, with a view to preventing such violations, or at least reducing the risk of their occurrence.

The importance of procedural safeguards is reflected in international covenants such as the ICCPR. It has also been enshrined in such instruments as the *UN Body of Principles Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* and the *UN Standard Minimum Rules for the Treatment of Prisoners*.[29]

Regional instruments such as the ACHPR *Robben Island Guidelines for the Prevention of Torture* equally recognise the importance of custodial safeguards. According to article 20 of the Robben Island Guidelines:

> All persons who are deprived of their liberty by public order or authorities should have that detention controlled by properly and legally constructed regulations. Such regulations should provide a number of basic safeguards, all of which shall apply from the moment when they are first deprived of their liberty. These include:
> a) The right that a relative or other appropriate third person is notified of the detention;
> b) The right to an independent medical examination;
> c) The right of access to a lawyer;
> d) Notification of the above rights in a language, which the person deprived of their liberty understands.

Article 32(2) NSFA allows a detainee to communicate with his or her family "where the same does not prejudice the progress of the interrogation, inquiry and investigation of the case." The International Commission of Inquiry found that "These qualifying phrases negate clarity and only succeed in bringing vagueness and inferiority into the law."[30]

The NSFA contains no provisions providing for the right of prompt access to a lawyer or another legal representative of one's choice as established under

[29] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173 of 9 December 1988 and Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, Economic and Social Council Res. 663 C (XXIV) (31 July 1957) and 2076 (LXII) (13 May 1977)

[30] Report of the International Commission of Inquiry on Darfur, supra note 28, para 453.

article 14 (3) (b) and (d) ICCPR and article 7(1) ACHPR.[31] Equally, the Act has no provision providing access to medical examination in line with international standards, such as those contained in the Istanbul Protocol.[32]

The arbitrary nature of arrest and detention coupled with the almost complete lack of custodial safeguards enhances the vulnerability of detained persons and greatly facilitates human rights violations.

In a recent report the United Nations noted that

> […] the National Intelligence and Security Services (NISS) systematically use arbitrary arrest and detention against political dissidents. According to allegations received by United Nations human rights officers, NISS detention can typically be accompanied by additional serious human rights violations such as *incommunicado* detention, ill-treatment, torture or detention in unofficial places of detention.[33]

These concerns were echoed by the Special Rapporteur on the situation of human rights in the Sudan who stated that:

> Reports of torture and ill-treatment are frequent. In some cases, torture is practised to force confessions that are later used to implicate those detained in criminal cases in court. These violations of the right to liberty and security and to a fair trial are directly related to the fact that the National Security Forces Act, under which individuals are arrested and detained, contravenes human rights guarantees contained in the Interim National Constitution and international human rights law and standards.[34]

3.3. Immunity of members and collaborators

Article 33 (b) NSFA provides that "*no civil or criminal action shall be instituted against members or collaborators for any acts they may have committed in connection with the official work, except with the approval of the Director if the action is unrelated to their duties*". Immunity granted to officials pursuant to this article has fostered a climate of impunity and lack of protection as NISS members do not have to fear any adverse consequences, even for serious violations, in the normal course of events.

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[31] See also UN Special Rapporteur on Torture, E/CN.4/1995/34, para. 926 (d) according to which "Legal provisions should ensure that detainees be given access to legal counsel within 24 hours of detention."

[32] Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), Adopted by General Assembly resolution 55/89 Annex, 4 December 2000.

[33] Tenth periodic report, supra note 9, p.3.

[34] Report of the Special Rapporteur on Sudan to the Human Rights Council, UN Doc. A/HRC/7/22, 3 March 2008, para 20.

Such immunity legislation is contrary to Sudan's obligations under the ICCPR. As held by the UN Human Rights Committee:

> Where the investigations … reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7).

Moreover

> …where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility. Other impediments to the establishment of legal responsibility should also be removed […].[35]

The UN Human Rights Committee has repeatedly found that immunity legislation is incompatible with the right to an effective remedy and the concomitant duty to investigate and prosecute serious violations.[36] In considering Sudan's state party report, the Committee was:

> particularly concerned at the immunity provided for in Sudanese law and untransparent procedure for waiving immunity in the event of criminal proceedings against state agents. [37]

In light of these findings, the Committee urged Sudan to:

> Undertake to abolish all immunity in the new legislation.[38]

[35] 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.
[36] Concluding observations of the UN Human Rights Committee: India, UN Doc.CCPR/C/79/Add.81, 4 August 1997, para.21.
[37] Concluding observations of the UN Human Rights Committee: Sudan, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para.9.
[38] Ibid., para. 9 (e).

4. Principles governing reform of Sudan's security services

The CPA explicitly mandates the reform of legislation governing the NISS.[39] In furthering the implementation of the CPA, 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.

The envisaged reform of the Sudanese security services is part of the broader process commonly referred to as "democratic transformation." They take place at a time of growing recognition of the importance of reforming security services, in particular in times of transition. The UN Security Council stressed that

> reforming the security sector[40] in post-conflict environments is critical to the consolidation of peace and stability, promoting poverty reduction, rule of law and good governance, extending legitimate state authority, and preventing countries from relapsing into conflict. In that regard, a professional, effective and accountable security sector, and accessible and impartial law-enforcement and justice sectors are equally necessary to laying the foundations for peace and sustainable development.[41]

Several UN bodies and others have recently addressed the reform of the security sector, not least in recognition of its importance for respect of human rights and the rule of law. According to the United Nations Development Programme (UNDP)

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[39] CPA, Machakos Protocol, 20 July 2002, Chapter II, 2.7.

[40] According to a recent report by the UN Secretary-General: '"Security sector" is a broad term often used to describe the structures, institutions and personnel responsible for the management, provision and oversight of security in a country. It is generally accepted that the security sector includes defence, law enforcement, corrections, intelligence services and institutions responsible for border management, customs and civil emergencies…' Report of the Secretary-General on 'Securing peace and development: the role of the United Nations in supporting security sector reform,' UN Doc. A/62/59-S/2008/39, 23 January 2008, para.14.

[41] 'The maintenance of international peace and security: role of the Security Council in supporting security sector reform,' UN Doc. S/PRST/2007/3, 21 February 2007.

> Security policies- both internal and external – are at the centre of power relations within and among societies. Yet they are also usually the area where civil society, the government and its oversight institutions have the least say.[42]

Further, the UNDP identified a set of principles of democratic governance in the security sector that are vital in strengthening democratic control over security institutions by the state and civil society.[43] These principles comprise:

(i) the authority of elected representatives;
(ii) operating within the confines of law and adherence to human rights standards;
(iii) transparency in form of making information available;
(iv) demarcation of mutual rights and obligations between agencies;
(v) political and financial control by civil authorities;
(vi) monitoring by civil society;
(vii) professional training of security services; and
(viii) prioritising of fostering regional and local peace.

Many of these principles are remarkably similar to the best practice in security sector reform identified by the UN Secretary-General in a recent report. [44] The latter report emphasised that a successful reform is critical for sustainable peace and the protection of human rights. It also recognised the importance of the reform process itself, in particular the need for broad consultation and involvement of various sectors of society, including civil society:

> Security sector reform is, therefore, a highly political process that must be placed in its specific national and regional context… Successful reform of the security sector needs political commitment, basic consensus and coordination among national actors. Broad national consultation lies at the heart of national ownership. Ultimately, however, security sector reform can succeed only if it is a nationally led and inclusive process in which national and local authorities, parliaments and civil society, including traditional leaders, women's groups and others, are actively engaged.[45]

[42] UNDP, *Human Development Report 2002: Deepening Democracy in a Fragmented World*, New York, Oxford: Oxford University Press, 2002, p.89.
[43] Ibid., p. 90.
[44] Report of the Secretary-General, supra note 40, para.15.
[45] Ibid., para.36.

5. A new National Security Act: Key areas for reform

Sudanese policy- and lawmakers can draw on a wealth of experience, both from Sudan's history and the practice of other countries, when deliberating and drafting the new National Security Act. This chapter seeks to provide an overview of practices in respect of pertinent law and practical operations worldwide. This is with a view to identifying how best to respect human rights and the rule of law in legislation pertaining to security services. It is based on the premise that a clear legal framework is needed and best suited to govern the operations of the reformed security services. As noted by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

> A crucial first element in ensuring that States and their intelligence agencies are accountable for their actions is the establishment of a specific and comprehensive legislative framework that defines the mandate of any intelligence agency and clarifies its special powers. Without such framework States are likely not to meet their obligation under human rights treaties to respect and ensure the effective enjoyment of human rights [footnotes omitted].[46]

Any such legislation should spell out the key elements of national security, the services and its operations in sufficient detail, including questions of executive direction and control, degree of independence and oversight of the services. Transparency and accountability entail that crucial aspects of national security, in particular the creation of new security services, should at all times be subject to parliamentary approval by means of legislation.

5.1. Mission and Mandate

The reform of the security services is a constant challenge in most if not all countries. Firstly, legislation should reflect a broadly shared consensus on the nature and objective of such services. The INC defines the role of the NSS but entrusts the national assembly with the task of determining the place of the security services in the governance and public life of Sudan. National security services are by definition a 'double-edged sword': they play a vital role in providing security but are often at the centre of violations. The experience in Sudan is no exception in this respect. It is for these reasons that there needs to be a broader debate and understanding of the ultimate objective of the national security services. Ideally, this would result in a mission statement that makes the NSS an integral part of democratic governance, which, while having to act covertly, are constituted to serve the people of Sudan and are to this end accountable to their elected representatives.

[46] Scheinin report, supra note 25, para.27.

The South African experience is instructive in this regard. In its White Paper on Intelligence of 1995, the South African government elaborated on the philosophy of intelligence as follows:

> Reshaping and transforming intelligence in South Africa is not only a matter of organisational restructuring. It should start with clarifying the philosophy, and redefining the mission, focus and priorities of intelligence in order to establish a new culture of intelligence.
>
> Prior to the election of a democratic government, security policy was formulated by a minority government. Its ability to detail what was in the national interest, was therefore flawed…
>
> A further consequence was that the role of the state's security apparatus was over-accentuated with virtually no institutional checks and balances.
>
> The challenge of creating a secure environment for all South Africans has not abated with the establishment of a democratic Government of National Unity. Security is a goal that can only be gained and sustained through consistent effort, and must remain high on the list of national priorities, alongside the goals of reconstruction, development and reconciliation.[47]

A crucial task in delineating the powers and functions of the NSS is to clarify the meaning of security, a notion that defies easy definition. The INC does not define security but appears to be based on the traditional, state-centric understanding of the concept.[48] 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."[49] This ambiguity of the INC is problematic. If national security is defined as open-ended, it may leave the NSS with wide discretion and may result in abuse for political ends. It is therefore important to develop a broader understanding of national security, which reaches beyond the notion of security of the state and encompasses other areas, such as the economic well-being of the population and freedom from organised crime. Again, the South African approach on security is noteworthy and hereinafter quoted at some length:

> The traditional and more narrow approach to security has emphasized military threats and the need for strong counter-action. Emphasis was accordingly placed on the ability of the state to secure its physical

[47] http://www.info.gov.za/whitepapers/1995/intelligence.htm
[48] Article 151 (1) INC: " National Security Service … shall be charged with the external and internal security of the country."
[49] Article 150 (2) INC.

survival, territorial integrity and independence, as well as its ability to maintain law and order within its boundaries. In this framework, the classic function of intelligence has been the identification of military and paramilitary threats or potential threats endangering these core interests, as well as the evaluation of enemy intentions and capabilities.

In recent years, there has been a shift away from a narrow and almost exclusive military-strategic approach to security. Security in the modern idiom should be understood in more comprehensive terms to correspond with new realities since the end of the bipolar Cold War era. These realities include the importance of non-military elements of security, the complex nature of threats to stability and development, and the reality of international interdependence.

This more comprehensive approach to security is also endorsed by organisations like the UN and the OAU. This approach is inter alia reflected in the Kampala document of the OAU (19th May 1991) where a process was set in motion known as the Conference on Security, Stability, Development and Cooperation in Africa (CSSDEA). The purpose of this document was "providing a comprehensive framework for Africa's security and stability and measures for accelerated continental economic integration for socio-economic transformation".

The intermingling and transnational character of modern-day security issues furthermore indicate that solutions to the problems of insecurity are beyond the direct control of any single country and cannot be rectified by purely military means. The international security agenda is shifting to the full range of political, economic, military, social, religious, technological, ethnic and ethical factors that shape security issues around the world. The main threat to the well-being of individuals and the interests of nations across the world do not primarily come from a neighbouring army, but from other internal and external challenges such as economic collapse, overpopulation, mass-migration, ethnic rivalry, political oppression, terrorism, crime and disease, to mention but a few. Consequently, "security is defined less in military terms and more in the broader sense of freedom from vulnerability of modern society", in the words of an American scholar.

New thinking on security has the following key features, which should form an integral part of the philosophical outlook on intelligence:
Security is conceived as a holistic phenomenon and incorporates political, social, economic and environmental issues. The objectives of security policy go beyond achieving an absence of war to encompass the pursuit of democracy, sustainable economic development and social justice. Regional security policy seeks to advance the principles

of collective security, non-aggression and Peaceful settlement of disputes.

The broader and modern interpretation of the nature and scope of security leads to the conclusion that security policy must deal effectively with the broader and more complex questions relating to the vulnerability of society. National security objectives should therefore encompass the basic principles and core values associated with a better quality of life, freedom, social justice, prosperity and development.[50]

5.2. Functions and powers

Article 151 (1) INC stipulates clearly that the National Security Service "shall be charged with external and internal security of the country." Article 151 (3) INC 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 INC envisages the NSS to be confined to classic intelligence activities. This role 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 NSS requesting the exercise of police powers in countering threats, the articles do not vest the security services with law-enforcement capacities.

Most security and intelligence services are tasked with identifying threats to national security and providing advice to decision-makers. The powers vested in national security and intelligence services are designed to meet this task. They 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.[51] Powers to this end are circumscribed and should be clearly defined so as to avoid ambiguity and the potential for abuse. In addition, such powers should be subject to judicial authorisation and review. The types of powers reflect the covert nature of the work of security and intelligence agencies. As noted by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism in relation to terrorist threats

> In general terms the main function of intelligence agencies is to detect potential national security threats, including terrorist threats, by

[50] http://www.info.gov.za/whitepapers/1995/intelligence.htm
[51] 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,* 2006, pp.309-424.

> gathering data and information in such a way as not to alert those targeted, through a range of special investigative techniques such as secret surveillance, interception and monitoring of (electronic) communications, secret searches of premises and objects, and the use of infiltrators. These investigative techniques are effective measures that States may utilize to counter international terrorism. Their justification can be seen in the positive obligation of States under international human rights law to take preventive measures in order to protect individuals whose life or security is known or suspected to be at risk from the criminal acts of another individual, including terrorists. [footnotes omitted].[52]

In addition,

> Although no general norm exists in international law expressly prohibiting or limiting acts of intelligence gathering, it is crucial that States clarify "threshold criteria" that might trigger a whole range of human rights intrusive actions by an intelligence agency, which can range from data mining or covert action. Clear legislated powers for intelligence agencies also help to distinguish between the tasks of intelligence and law enforcement agencies. Failure to make these clear distinctions will lead to blurred lines of accountability and to the risk that special powers are used in routine situations where there is no pre-eminent threat to the population. [footnotes omitted][53]

Power of arrest and detention

The power of the NISS to arrest and detain individuals has been particularly controversial in the Sudanese context and in debates about reforms of the security services. Some have argued for the retention of broad powers whereas others have called for their complete abolition. A proposed compromise solution would confine the power of detention, without judicial oversight, to a one-month time limit.

Vesting national security services with the power of arrest and detention is not in itself a violation of international law. However, a selected review of state practice, namely 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.[54] This is particularly the case where adequate custodial safeguards are lacking. The

[52] Scheinin report, supra note 25, para.27.
[53] Ibid., para.31.
[54] Ibid., paras. 39, 40 and research undertaken by the Project on Criminal Law Reform in Sudan (unpublished, on file).

impunity that prevails in the absence of effective oversight fosters such violations, as highlighted by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism who

> is gravely concerned about situations in which intelligence agencies wield arrest and detention powers, but where there is no effective judicial oversight over the actions of the intelligence services, resulting in impunity.[55]

He also expressed concerns about intelligence agencies' use of functions traditionally pertaining to law enforcement "precisely to circumvent such necessary safeguards in a democratic society, abusing thereby the usually legitimate secrecy of intelligence operations."[56]

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. In such a climate, security services easily develop into powerful entities that pursue autonomous agendas rather than serve the security of the state or the public interest. The Geneva Centre for the Democratic Reform of Armed Forces, in a landmark study on the accountability of intelligence agencies and best practices, recently found that

> In post-authoritarian societies there are often strong memories of security and intelligence services endowed with broad mandates and sweeping powers used to protect dictatorial regimes against rebellions from their own people. Services were used by such regimes to suppress political opposition, to prevent any kind of demonstration and to eliminate leaders of labour unions, the media, political parties and other civil society organisations. In doing so, the services intervened deeply in the political and daily life of the citizens. After the transition to democracy, the new leaders were determined to curtail the mandate and powers of the services and to guarantee its political neutrality. A clear example of this practice is given by the Argentine National Intelligence Law of 2001. The law includes, amongst other things, institutional and legal safeguards to prevent the use of services by government officials against political opponents.[57]

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

[55] Scheinin report, supra note 25, para.39.
[56] Ibid., para.37.
[57] Hans Born and Ian Leigh, *Making Intelligence Accountable: Legal standards and best practice for oversight of intelligence agencies*, Geneva Centre for the Democratic Reform of Armed Forces, 2005, p. 32.

arrest.[58] For example, article 3 of the Law on the Kosovo Intelligence Agency[59] 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.[60]

Article 151 INC does not spell out clearly the powers of the reformed National Security Service (NSS) but adopts the model of separation of police and security / intelligence functions and limits the mandate of the NSS to intelligence gathering. It would be incompatible with the object and purpose of article 151 INC to vest the NSS with executive powers, such as the power of search, arrest, detention and the use of force. Excluding such powers from its remit is sound legal policy.

The same rationale applies to the suggested compromise solution of limiting powers of detention to one month. This power would prevent a clean break and separation of functions between law enforcement and intelligence agencies. It would provide the security services with sufficient time to detain and interrogate individuals, and, crucially, would leave considerable room for violations, particularly if not accompanied by custodial safeguards and effective judicial supervision. Experiences in other countries, far from serving to validate the suggested one-month compromise solution, corroborate this finding. In the United Kingdom, for example, a broad cross-section of society, including the House of Lords, successfully raised concerns about the length of *police detention* (emphasis added) without charges brought (even though some custodial safeguards were provided for) in anti-terrorism legislation.[61]

In light of the potential for abuse inherent in giving security services powers of arrest and detention, a clear separation of functions would be in line with article 27 (2) of the Bill of Rights, according to which “the State shall protect, promote,

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[58] Germany, see Maher Arar Inquiry, supra note 51, pp.309-424., pp. 339; On the Kosovo Intelligence Agency, Law No.03/L-063, 21 May 2008; South Africa, see White Paper on Intelligence, Ministry for Intelligence Services Legislation.
[59] On the Kosovo Intelligence Agency, Law No.03/L-063, 21 May 2008.
[60] Maher Arar Inquiry, supra note 51, pp.309-424.
[61] *Peers throw out 42-day detention*, BBC News, 13 October 2008, http://news.bbc.co.uk/1/hi/uk_politics/7666022.stm

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.

5.3. Institutional integrity

Security and intelligence services and its members are placed in a position of special responsibility. This stems from the secrecy of their operations, the importance of information obtained for the security of the state, and the (potential) impact of their work on the rights of individuals and the exercise of political power. The personnel of such services need to be highly skilled and adequately trained in order to attain the requisite degree of professional competence. The latter should be reflected in the level of pay, not only to attract professionals of the highest calibre but also in order to avoid corruption and the dependency it entails. Moreover, and perhaps most importantly, members should be, and understand themselves to be, public servants committed to the core values of the Constitution, including the Bill of Rights.

One of the key requirements for service should be adherence to human rights recognised in the Bill of Rights. For current and future NSS members, such adherence can be requested by means of a pledge, promoted through training, and enforced through disciplinary and criminal sanctions. In order to ensure the integrity of the service, current NSS members should be subject to vetting where there is prima facie evidence that they have abused the office and/or committed human rights violations. As highlighted by the UNDP

> In post-conflict settings, vetting has the specific aim of transforming institutions involved in serious abuses during the conflict into public bodies that enjoy civic trust and protect human rights. The public, and particularly victims of abuses, are unlikely to rely on institutions that retain or hire individuals with serious integrity deficits. Vetting processes aim at excluding from public service persons with serious integrity deficits in order to re-establish civic trust and re-legitimize public institutions, and to disable structures within which individuals carried out serious abuses. Vetting public employees, in particular in the security and justice sectors, is now widely recognized as an important measure of governance reform in countries emerging from conflict.[62]

Several countries, such as the Czech Republic and Hungary, have adopted so-called lustration laws aimed at excluding security services personnel

[62] UNDP, *Vetting Public Employees in Post-Conflict Settings: Operational Guidelines,* 2006, p.9.

implicated in violations or political abuse from office.[63] These experiences, which raise complex rule of law questions, are valuable in the Sudanese context and merit further debate as a means of ensuring that the NSS truly serve the people and democracy and are of the highest personal integrity.

Another important aspect is the freedom of the services and its members from political interference, the relevance of which is readily apparent in the Sudanese context. Legislation of several states as different as Bosnia and Herzegovina, Hungary and the United Kingdom seeks to establish, and to ensure the application of, the principle of the apolitical nature of the agency. For example, the Law on the Intelligence and Security Agency of Bosnia and Herzegovina, 2004, provides

> Article 39
> Employees shall not be members of political parties, take instructions from political parties or perform any remunerative activity or other public or professional duties incompatible with work in the Agency.
>
> Article 56
> 1. The Agency shall be apolitical, and shall not be involved in furthering, protecting or undermining the interests of any political party, lawful political organisation or any constituent people.
> 2. The Agency may not investigate acts of protest, advocacy or dissent that are organised and carried out in a lawful manner.

Such provisions constitute best practice in emphasising the apolitical nature and demarcating spheres of influence. This is in recognition of the fact that security and intelligence services are to serve the public at large and not any interest groups or political parties.

5.4. Accountability and oversight

Holding the executive to account for its conduct is a cornerstone of the rule of law and an important means of preventing abuse of power. Accountability of the security services should comprise measures that provide justice for past abuses, including vetting, disciplinary and criminal sanctions as well as reparation, and seek to prevent future violations. 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.[64] In this respect, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism stressed the importance of the

[63] Ibid, pp.43-47 and 63-67.
[64] See in particular articles 27 and 35 of the Bill of Rights. See also UN Human Rights Committee, General Comment 31, supra note 35, para.18; Concluding observations of the UN Human Rights Committee: Sudan, supra note 37, para.9.

> duty of the State to create a framework that enables an independent investigation into human rights violations by intelligence agencies after a complaint has been received in order firstly, to establish the facts and, secondly, to hold intelligence agencies and the executive accountable for their actions. The Special Rapporteur is concerned in this context about the adoption of indemnity/impunity clauses which result in impunity for intelligence agents. Such indemnity clauses can bar effective access to court and violate the human right to an effective remedy.[65]

Effective oversight mechanisms are at the heart of ensuring professional integrity and accountability of security services. National systems worldwide 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 security services' powers.

Oversight operates at several levels, beginning with the executive itself:

> As the main beneficiary of intelligence information, the executive must effectively supervise and direct the actions of the intelligence agency. These directions should be put in writing, and outline in detail which actions the agencies may and must not carry out vis-à-vis which persons. At stake is not only the oversight and control of the intelligence services but also preventing so-called "plausible deniability" on behalf of the executive and holding the latter accountable for potential abuses.[66]

To this end, the NSS should have adequate systems and disciplinary mechanisms in place to ensure that its members operate in accordance with the law. An important aspect of such internal procedures is the possibility or even duty to report improper or unlawful conduct of members in confidence (and without facing adverse consequences) to internal units or mechanisms that examine any such information.[67] Conversely, members should have the right to refuse to carry out an illegal order.[68]

Review or oversight may be effectuated through judicial, parliamentary, or independent bodies and / or complaints structures[69] and may take the form of review or oversight bodies. A review body

> assesses the activities of an organisation against standards such as lawfulness and propriety and delivers reports, which often contain

[65] Scheinin report, supra note 25, para.58.
[66] Ibid., para.42.
[67] Born and Leigh, Making Intelligence Accountable, supra note 57, pp. 46, 47.
[68] Article 41 Bosnian Law on the Intelligence and Security Agency.
[69] Maher Arar Inquiry, supra note 51, pp. 455-481.

> 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."[70]

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."[71]

Many countries, such as Argentina, Germany or the United States to name but a few, have parliamentary oversight bodies. Drawing on best practices, the Geneva Centre for the Democratic Reform of Armed Forces argues that such bodies need a broad mandate and must be bi-partisan. They should have sufficient powers and access to security and intelligence information that enable it to exercise adequate oversight. The preferred model for oversight is functional (for all security and intelligence agencies) as compared to institutional (several bodies for separate agencies). Oversight bodies should also be able to exercise some budget control in order to scrutinise the use of public money. A parliamentary body should be duty-bound to report to parliament regularly, at least once a year.[72]

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism singled out the Norwegian system as an example of best practice

> as it has an explicit human rights purpose, namely "to ascertain and prevent any exercise of injustice against any person" and to "ensure that activities are kept within the framework of statute law, administrative or military directives and non-statutory law". Furthermore, the parliamentary oversight committee is composed of seven members, who are appointed by Parliament but who don't necessarily have political affiliations. In this way the committee cannot be abused for party political games, a high level of expertise is guaranteed and the credibility of the expert-members is assured. The members are supported by a secretariat of three lawyers and one secretary who all have security clearance. The members have the power to compel the production of evidence to the committee concerning all matters experienced in the course of their duties. In pursuing its duties, the committee has access to the archives and

[70] Ibid. pp. 499, 500.
[71] Ibid. p. 502.
[72] Born and Leigh, Making Intelligence Accountable, supra note 57, pp. 80-97.

> registers, premises, and installations of all branches of the executive and the intelligence agency.[73]

Oversight may also be exercised by an independent body, such as an Inspector-General, Ombudsmen or Commissioners, which may have a review function or, in addition, act as complaints body.

As noted by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

> Several States have devised independent permanent offices, such as inspectors-general, judicial commissioners or auditors, through statutes or administrative arrangements which review whether intelligence agencies comply with their duties. They can act as proactive early warning mechanisms to signal potential problems to the executive, thereby improving accountability. These offices can be required for instance to report at least every six months to the relevant executive bodies on developments and actions of the agencies. To fulfil this function properly such offices must have unrestricted access to all files, premises and personnel of the agency; this is the case for instance in Canada, South Africa and various countries in Europe. Specialized and continuous supervision has clear merits compared to ad hoc investigations by general supervisory authorities.[74]

Effective remedies and access to justice is a right of those whose rights have been violated by the acts or omissions of the security services. Judicial oversight may be exercised through courts or special tribunals. However, care must be taken that any such tribunals have sufficient independence and powers to vindicate rights and award adequate forms of reparation where due.

Articles 150 and 151 INC are silent on the question of oversight of the NSS. However, such oversight is arguably mandated by article 4 (a) INC, which stipulates the principle of supremacy of the rule of law, accountability and respect for justice and article 27 (2) INC according to which 'the state shall protect, promote, guarantee and implement the Bill [of Rights].' The type(s) of oversight body should be the subject of debate, aimed at establishing bodies that are guided by the principles of accountability, integrity and respect for human rights and capable of exercising their mandate effectively.

[73] Scheinin report, supra note 25, para.45.
[74] Ibid., para.44.

6. Recommendations

Based on the findings of this Report, the Project for Criminal Law Reform in Sudan proposes a fundamental reform of Sudan's security and intelligence services. This is with a view to fulfilling the promise of the CPA and the NIC and to making the new services one that serves the public interest and respects the human rights of all those subject to its jurisdiction. To this end, the following suggestions should be deliberated fully inside and outside Parliament, with the legislative reform process itself being an important first marker of the nature of the security services to be, and with any new legislation enacted spelling out in the clearest possible terms:

- Mission and Mandate

- Formulating a new mission and mandate reflective of a new philosophy and understanding of security, and the role of the new services in protecting it;

- Defining national security objectives as encompassing broader principles and values integral to the CPA, the INC and international standards, and including notions such as livelihood, freedom, development and human rights.

- Functions and powers

- Defining clearly the role, functions and powers of the NSS, including financing of the services;

- Separating security/intelligence functions from policing functions;

- Limiting the powers of the NSS to intelligence gathering and, in so doing, explicitly excluding the powers to arrest and detain individuals, as well as the power to use force.

- Institutional Integrity

- Defining the core values governing the NSS in the Act, to be further defined in a Code of Conduct made accessible to the public;

- Identifying criteria for the recruitment and continued employment of NSS members, including regional and gender-representation as well as lack of implication in human rights violations or other criminal conduct;

- Institutionalising professional training, including on respect for human rights;

- Providing NSS members with the adequate equipment and salaries to minimise the risk of corruption and other violations.

- Accountability

- Establishing a system of disciplinary accountability comprising proportionate disciplinary sanctions in cases of misconduct and suspension of members alleged to have committed a crime;

- Commencing a full investigation and, where sufficient evidence is found, prosecuting and punishing the members accordingly; to this end, members should not benefit from immunity provisions, which should be abolished altogether;

- Providing victims of violations for which members of the security services are responsible with effective avenues for legal redress and reparation.

- Oversight

- Establishing an effective monitoring body, either as parliamentary or separate body, or both;

- Providing effective judicial review for decisions made by NSS members that impinge on individual rights.