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UTILIZATION OF THE OUTCOMES OF SPECIAL INVESTIGATIVE ACTIVITIES IN SOUTH SUDAN: AN ANALYSIS BETWEEN OPERATIONAL REALITY AND EUROPEAN HUMAN RIGHTS STANDARDS[1]

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Abstract

South Sudan is the last country globally to declare its independence, on July 9, 2011. Constantly situated within the context of interstate civil wars and interethnic and intertribal conflicts, its legislative progress advances slowly, characteristic of a state at the beginning of its journey, with normative gaps and, often, with violations of fundamental human rights.

Like any state seeking to protect national security against terrorism, organized crime, espionage, and other such threats, South Sudan established, in 2014, the National Security Service (NSS), granting it extensive powers to conduct special investigative activities for the prevention and combating of offenses against the state. Although the NSS Act authorizes the conduct of such special activities, including undercover investigations, the execution of searches, the monitoring of correspondence, and the gathering of information for the protection of the state, the utilization of their outcomes remains constrained by limited coordination with the National Police Service and other judicial authorities. These institutions, in addition to having insufficient professional training, lack bilateral protocols or other instruments of interinstitutional cooperation, which frequently leads to violations of fundamental human rights and of the right to a fair trial.

This research aims to reflect on the convergence between the operational reality regarding the special investigative activities in South Sudan and European jurisprudence on human rights guarantees.

Keywords: special investigative activities, National Security Service, interinstitutional cooperation, human rights, fair trial, national security.

VALORIFICAREA REZULTATELOR ACTIVITĂȚII SPECIALE DE INVESTIGAȚII ÎN SUDANUL DE SUD: O ANALIZĂ ÎNTRE REALITATEA OPERAȚIONALĂ ȘI STANDARDELE EUROPENE ALE DREPTURILOR OMULUI

Abstract

Sudanul de Sud este ultima țară la nivel global care și-a declarat independența, la 9 iulie 2011. Aflat în mod constant în contextul războaielor civile interstatale și al conflictelor interetnice și intertribale, parcursul

[1] The author's practical experience gained during international missions in Africa, including in South Sudan, guided the choice of the topic, without relying on any information that is not already publicly available.

său legislativ avansează lent, caracteristic unui stat aflat la început de drum, cu lacune normative și, de multe ori, cu încălcări ale drepturilor fundamentale ale omului.

Ca orice stat care urmărește protejarea securității naționale împotriva terorismului, a criminalității organizate,spionaj, etc., Sudanul de Sud a înființat, în anul 2014, Serviciul de Securitate Națională (SSN), conferindu-i competențe extinse în desfășurarea activităților speciale de investigații pentru prevenirea și combaterea infracțiunilor împotriva statului. Deși Legea SSN autorizează derularea unor astfel de activități speciale, inclusiv investigații sub acoperire, efectuarea de percheziții, monitorizarea corespondenței și obținerea de informații în vederea protecției statului, valorificarea rezultatelor acestora rămâne constrânsă de coordonarea limitată cu Serviciul Național de Poliție și cu celelalte autorități judiciare. Aceste instituții, pe lângă faptul că dispun de o pregătire profesională insuficientă, nu beneficiază de protocoale bilaterale sau alte instrumente de cooperare interinstituțională, ceea ce conduce frecvent la încălcări ale drepturilor fundamentale ale omului și ale dreptului la un proces echitabil.

Prezenta cercetare își propune să reflecte asupra convergenței dintre realitatea operațională privind activitățile speciale de investigații în Sudanul de Sud și jurisprudența europeană în materie de garanții ale drepturilor omului.

Cuvinte-cheie: activități speciale de investigații, Serviciul de Securitate Națională, cooperare interinstituțională, drepturile omului, proces echitabil, securitate națională.

Introduction. In 2011, after decades of prolonged intrastate conflicts, South Sudan declared its independence on July 9, becoming the newest state on the world map. Born under democratic auspices, this young state aimed to build its own legal system, largely taking over the legislative heritage of the state from which it separated, while also integrating fundamental principles of international law intended to consolidate its democratic profile.

The reality on the ground, however, paints a profoundly different picture. South Sudan faces major challenges regarding internal security and the functioning of the rule of law. The relationship between the central government and the opposition has remained tense, frequently degenerating into violence, killings, kidnappings, and accusations of conspiracy, all of which seriously affect the fundamental values of human rights, as enshrined in international instruments in the field.

On July 14, 2011, shortly after the proclamation of independence, South Sudan became a member of the United Nations, thereby committing to promote national security, equality and international peace, as well as sustainable development. In the same logic, the state included in its Constitution [20] the provisions of the Universal Declaration of Human Rights of 1948 [1], which it formally assumed. In practice, however, this recognition remains largely declaratory, the effective exercise of fundamental rights being strongly affected by political instability and recurrent violence.

Although the state should provide solid guarantees for the respect of fundamental human rights and freedoms, principles that are provided for in the Code of Criminal Procedure, in Article 6 [24], reality shows a constant violation of these rights. There are, sporadically, isolated cases in which convictions have been pronounced for such abuses, but the vast majority of incidents are not investigated, remaining either unresolved or closed without identifying the perpetrators [3, p.2].

Like other states in post-conflict or even intra-conflict situations, South Sudan has established a National Security Service, whose main task is to maintain state security, including through the use of special investigative techniques. Although these activities represent a fundamental tool for preventing and combating threats to national security, the manner in which they are carried out in practice raises numerous questions. Thus, investigations are often conducted within an insufficiently structured legal framework, without a clear purpose to allow the transfer of files to the courts, and not least, with serious human rights violations.

This research aims to analyze how South Sudanese legislation regulates these investigative activities and to assess its degree of compatibility with European standards regarding the respect for human rights guarantees.

Methods and materials applied. In South Sudan, because working procedures are not public or are classified as secret information, there is no clear definition of special investigative measures. These are synthesized, in a simplified manner, in a single word "investigation", as provided for in the Penal Code or in the South Sudanese Police Law. Consequently, the authors of this study have faced considerable difficulties in collecting the data necessary for analyzing the legal framework applicable to these special investigative measures.

The main primary sources that formed the basis of this research are the Criminal Procedure Code, the Criminal Code, the Police Law, the National Security Law, and the Anti-Corruption Law, all in force in South Sudan, corroborated with comparative materials from European legislation in the field of human rights. Secondary sources include studies carried out by authors, expert reports on human rights abuses in South Sudan, press articles, individual research, as well as discussions with relevant persons in the field. The research is therefore largely based on publicly available sources, having no access to internal working procedures or other documents classified as inaccessible to the public.

Discussions and results obtained. I. South Sudanese Legislation on Special Investigative Activities. The concept of special investigative activity is not a legislative novelty that appeared overnight, but rather the result of a long evolutionary process, determined by the emergence of increasingly complex forms of crime with a serious impact on the rule of law. What differentiates special investigative measures from simple criminal research activities is not only their secret nature or technical complexity, but especially the combination of the heightened degree of intrusion into private life and the exceptional procedural capacity they confer upon authorities [4, pp. 74-76]. Precisely for this reason, their use requires rigorous legal guarantees and effective oversight within the framework of a rule of law state [5, vol. 51, issue 2, pp. 394-412].

If we were to attempt a legal definition, we could say that special investigative activity represents "a procedure of a secret and/or public nature, carried out by competent authorities, with or without the use of special technical equipment, for the purpose of gathering information necessary for the prevention and combating of crime, ensuring state security, public order, defending the rights and legitimate interests of individuals, and the discovery and investigation of crimes" [6, Art. 1].

Paradoxically, although South Sudan has a National Police Law (NPL), a National Security Service Law (NSSL), and a Code of Criminal Procedure (CCPSS), we have not succeeded in identifying a clear definition of this concept in its legislation. What we find instead is the general definition of "investigation" [24, Art. 5], understood as the act or process of discovering relevant facts concerning an offense, including all procedures carried out by the police under the authority of the Prosecutor, Judge, or court of law, for the purpose of gathering evidence.

For example, the investigation of corruption offenses in South Sudan follows ordinary procedures, and the possibility of resorting to special investigative measures is strongly limited by existing legal constraints [7, p. 147], which considerably reduces the capacity of institutions to effectively prevent and combat the phenomenon of corruption.

Although the Code of Criminal Procedure of South Sudan constitutes the foundation of inquiries and investigations in the judicial system, investigations may be carried out by the police either with the consent of the Public Prosecutor or, in his absence, with the approval of the Magistrate. Moreover, the magistrate may take over the inquiry whenever the situation requires it [24, Art. 52]. This flexibility seems, at first glance, beneficial, given the superior legal training of prosecutors and magistrates. However, it raises serious issues regarding the separation of duties between the police and the prosecutor's office concerning the inquiry and criminal prosecution, a fundamental principle of any fair judicial system.

The South Sudanese National Police Law provides, in Article 7, that police officers may carry out investigations or any other criminal procedures in accordance with the CCPSS and may conduct criminal investigations under the authority of the prosecutor, including searches, interrogations, and even operative surveillance activities [22, Art. 8].

On the other hand, the National Security Service enjoys much broader powers [23]. According to Article 13, Chapter 3, it may: "*monitor, investigate, and conduct searches of suspects and places related to crimes or offenses against the state; gather internal and external information regarding national security; undertake investigations to discover any situation, fact, or activity that could jeopardize national security; monitor frequencies, wireless systems, publications, broadcasting stations, and postal services; as well as arrest or detain any person suspected of committing an offense against national security*" [23, Art. 7]. These activities are carried out, for the most part, with the approval of the Director of the service, but may also be ordered at the request of the Minister or even the President, who chairs the National Security Council.

Regarding the arrest or detention of persons, the National Security Service Law provides that any person who attempts to commit, is caught in flagrante delicto, or is suspected of having committed an offense against the state [23, Art. 7] may be arrested by NSS officers without a warrant. This regulation is in total contradiction with Articles 73 and 75 of the CCPSS, which require the issuance of an arrest warrant by the Public Prosecutor or by a magistrate. At the same time, however, Article 76 of the same code allows police officers within the National Police to arrest persons without a warrant in certain situations. This legislative paradox is completely contrary to international standards in the field, which consider that arresting a person without a warrant represents a serious violation of the fundamental right to liberty and security [8; 2, Art. 5], a violation that also entails the non-observance of other related rights: the right to be informed, the right to be brought before a judge, the right to challenge the measure, and the right to a defense lawyer [2, Art. 5 §§ 2, 3, 4; 24, Art. 93 para. 2], as well as the right to inform the family [24, Art. 93 para. 4]. The case law of the European Court of Human Rights has consistently established that the existence of a valid warrant is not sufficient to justify an arrest; all other guarantees provided for in Article 5 must be respected, and their absence constitutes a serious violation of fundamental rights [8; 9].

Regarding the South Sudanese Anti-Corruption Law, although it should provide for the methods and investigative activities related to the Code of Criminal Procedure, there is no explicit mention regarding the use of special investigative measures. In the absence of such provisions, the president of the investigation committee who has reasonable suspicion that a corruption offense has been or is about to be committed may initiate the investigation and decide the concrete manner of its conduct [25, Arts. 24-25]. Regarding intrusive measures against private life and property, these are regulated in the Code of Criminal Procedure, and the lack of similar norms in the Anti-Corruption Law imposes the supplementary application of the Code of Criminal Procedure in carrying out specific activities.

II. Operational Reality. Although South Sudan has a formal legislative framework, the reality faced by the South Sudanese National Police is extremely difficult. Starting in 2011, the United Nations has carried out its mission in this country with the aim of consolidating peace, stability, and development, protecting civilians (considering that the state has no fewer than 64 ethnic tribes), monitoring human rights, and providing humanitarian assistance.

Regarding institutional capacity development, within the UN mission in South Sudan, UNPOL, the police division of the United Nations, operates. Here, experts from the police forces of several states works, participating in this mission based on inter-institutional collaborations between their home country and the UN, based on their professional expertise. Within UNPOL, there is a department dedicated specifically to professional training, and police experts conduct courses with the National Police on a variety of topics, some of the most important of which concern the field of special investigations.

Although the UN mission has been present in South Sudan for approximately 15 years and has provided the National Police with multiple training programs at various levels, the reality is that the latter still does not possess the necessary capacities to carry out its activities in a professional manner. To illustrate this situation, most police posts or stations do not even benefit from basic items such as chairs, desks, or vehicles. Some police stations literally operate under the shade of a tree, in sparsely populated areas or in some isolated villages. Under these conditions, it is certainly understandable that the National Police cannot undertake special investigations to prevent or combat crime.

Unlike the National Police, the National Security Service uses a wide range of operational methods and information-gathering tools to prevent and combat crimes against national security. Although there are no public documents describing in detail these special investigative techniques, the agency in practice resorts to phone tapping, digital surveillance, the use of a network of informants, physical searches, and the conduct of special operations. All these activities specifically target political figures with opinions contrary to the current regime, human rights activists, journalists, and various individuals within civil society [10].

The valorization of these special activities carried out by National Security Service personnel does not, however, have a purely preventive or probative purpose. On the contrary, their real objective is to diminish or eliminate criticism of the government, to prevent the publication of reports on human rights violations in this state, to discourage journalists from making independent publications, and to block any exchange of opinions among opposition members or civil society [11].

Under the legitimate pretext of conducting special investigative activities for national security, the National Security Service monitors and arrests individuals for long periods, without well-founded charges [12, p. 17], with the aim of maintaining constant monitoring to preemptively neutralize potential threats to the government [13]. In reality, through these means, the aim is to identify individuals who have contrary opinions or who wish to change the country's future for the better.

The National Security Service, although it has responsibilities in the field of conducting special activities, the valorization of these does not follow the required course, generating and maintaining a climate of fear through the practices carried out in recent years. The precise purpose of this strategy is to prevent the exposure of a reality marked by public insecurity, corruption, human rights abuses, the censorship of certain publications, and to discourage individuals who might reveal the weaknesses of the judicial or governmental system [12].

III. Comparative Analysis: South Sudanese Legal Framework and European Human Rights Standards on Special Investigative Measures. Although South Sudan does not currently have a clearly defined concept of special investigative measures, nor a coherent legislative framework specifically regulating such activities, this absence does not, of course, mean that the state cannot conduct investigations. Being the newest state to gain independence, in 2011, the regulation of investigations is found primarily in the Code of Criminal Procedure, which constitutes, metaphorically speaking, the "genealogical tree" for carrying out these activities, in close connection with the National Police Law and the National Security Service Law.

However, if we refer to international human rights law, and here we refer in particular to the European Convention on Human Rights, the International Covenant on Civil and Political Rights, as well as the case law of the European Court of Human Rights, we find that the current legislative framework in South Sudan presents numerous normative gaps in this field. While European law has evolved considerably, establishing clear rules regarding judicial control and the protection of individual rights, the South Sudanese system remains anchored in simplistic norms, inherited from the state from which it separated. Thus, although the Code of Criminal Procedure stipulates that police investigations may be carried out under the authority of the prosecutor or a magistrate, regarding the activities carried out by the other institution, namely the National Security Service, we observe that, although these activities are much more extensive and complex, any form of judicial control is completely lacking.

Referring to the investigative activities carried out by the NSS, a profound weakening of the functional relationship between investigation and criminal prosecution is evident, which represents one of the cornerstones of any rule of law state and a fair judicial system. The case law of the European Court of Human Rights clearly shows us that an institution that simultaneously authorizes, conducts, and monitors special investigative measures risks becoming arbitrary, which inevitably leads to a violation of Article 8 of the Convention. An eloquent example in this regard is the case of *Zakharov v. Russia*, in which the Court emphasized that secret surveillance can diminish or even destroy the fundamental values of democracy, precisely under the pretext of defending it, when there are no fundamental guarantees against abuse [14].

At the same time, from the perspective of the European Court of Human Rights and European law, the regulation of special investigative measures can be considered legitimate only if it cumulatively fulfills the four fundamental principles established by Article 8 of the European Convention on Human Rights, namely: legality, necessity, proportionality, and independent judicial control. These principles are mandatory, the European Court consistently establishing that any interference with private life must be provided for by law, pursue a legitimate aim, and be necessary in a democratic society. At the same time, case law has clarified the nature of the offenses that may justify interference with a person's life, the conditions under which interception of communications may be ordered, the duration of these measures, and the applicable oversight mechanisms [15; 16].

Referring to South Sudanese legislation, we find that these principles are not met. A relevant example is the fact that any person suspected of committing an offense against the state may be arrested without a prior warrant, with the theoretical obligation to bring them before a magistrate within 24 hours [23, Art. 54]. However, the practice documented by international human rights organizations demonstrates that this provision is systematically ignored or, in most cases, simply not respected.

Another major deficiency is the absence of a proportionality test. South Sudanese legislation does not provide any condition regarding proportionality in the application of special investigative measures, contrary to what the Strasbourg Court's case law clearly establishes. The latter emphasizes that any interference with fundamental rights must be proportional to the legitimate aim pursued and must not be extended beyond what is strictly necessary [17, pp. 129-152; 18].

Last but not least, the absence of independent judicial control constitutes a serious violation of European standards. EU Directive 2016/680 on the protection of personal data in the field of judicial cooperation in criminal matters expressly establishes that any surveillance measure must be subject to control carried out by an independent judicial authority [19]. In South Sudan, however, the authorization and cancellation of special investigative measures are carried out by the National Security Service, which is under the direct authority of the President and, implicitly, under the coordination of the director of this institution. There is no direct contact with the judicial authority nor any other form of effective oversight, as imposed by European norms and directives.

Conclusions. Special investigative measures, although not included as a concept in South Sudan's Code of Criminal Procedure or related legislation on investigative activities, remain a delicate subject. The paradox lies in the fact that these measures exist from an applicative perspective, but from a theoretical perspective, they appear only vaguely, not in their complex form. Researchers, specialized publications, and activists in the field of fundamental human rights protection emphasize that, although the purpose of these activities should have been the prevention and combating of serious crimes or the protection of national security, as well as the fundamental rights of the state and citizens, in reality, they follow a different course, totally contrary to the fundamental principles for which they were created.

The abusive use of special investigative measures can violate fundamental human rights, causing public insecurity and public distrust in state security. Specialists in the field emphasize that this concept must be integrated into national legislation in a clear and objective manner. Clarifications are needed regarding the method of use, the circumstances in which they may be applied, as well as the manner of their valorization within an effective judicial framework.

Although Article 6(c) of the National Security Service Law provides, as one of its principles, respect for human rights and fundamental freedoms, and Article 53(g) establishes as an important attribute respect for the dignity of persons and the protection of fundamental human rights, these provisions are violated in reality. Abuses are not investigated or, as we have stated throughout this research, investigations regarding the violation of duties or competences by NSS staff are usually closed, with only extremely rare cases in which the personnel guilty of producing these abuses have been convicted [12, p. 4, p. 27].

Furthermore, if we refer to the valorization of these special investigative measures, which should result in the outcomes of these activities becoming means of evidence used in criminal prosecution, we cannot find a clear definition of means of evidence in any of the legislative acts that are part of the investigative complex. The only source that offers a definition is the Evidence Code [21], a separate act from the Code of Criminal Procedure. It reveals that evidence "*denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved, and without prejudice to the foregoing generality, includes statements by accused persons, admissions, and observations by the court in its judicial capacity*" [21, Art. 4]. If we refer to Article 194 of the Code of Criminal Procedure, the admission of evidence in judicial proceedings to establish the truth in a case must be made without unfair treatment of the accused or witnesses. Evidence is not admitted if it does not tend directly or indirectly to prove or disprove the charge, and it must be administered in the specific circumstances of the case.

In reality, none of the laws provides a clarified chain of custody of evidence. Article 89(2) of the Evidence Code only specifies that evidentiary material must be kept in appropriate places by the person responsible, and improper custody represents either a failure to demonstrate a legitimate origin, or the circumstances prove the nature of a probable origin. These aspects raise the legitimate question of whether there truly a clearly defined chain of custody is, since most evidence that reaches the courts lacks proof of its legitimate origin.

As a final conclusion, this comparative analysis shows us that the South Sudanese system is a legalistic one, but incomplete. It can continue to focus on supplementing legislation regarding the valorization of special investigation results, referring to international human rights and European legislation in the field. Institutions must begin with a legislative reform in the field of special investigations, which would provide judicial guarantees and safeguards against abuses against the private lives of individuals. This must be followed by the development of institutional capacities to carry out these activities in a legal and professional manner.

Proposals and Recommendations. The analysis and research we have conducted show us that South Sudan faces multiple challenges regarding the valorization of special investigative measures. From this perspective, we suggest the following recommendations:

Inclusion of the concept in domestic legislation – It is necessary to include in domestic legislation, especially in the Code of Criminal Procedure and related legislation, the concept of special investigative measures, with a clear definition and exact parameters regarding the applicability of these measures, precisely establishing the manner of ordering them, the period of validity, and effective judicial control.

Adoption of the four fundamental principles – The inclusion of the four fundamental principles, namely legality, necessity, proportionality, and independent judicial control, in all activities related to special investigative measures.

Clarification of institutional responsibilities – Clearly establishing the duties and competences of the National Police and the National Security Service regarding special investigative activity, as well as introducing a unified procedure for obtaining, storing, processing, and disseminating to institutions with responsibilities in the field, emphasizing the chain of custody of evidence obtained from the valorization of these activities.

Strengthening institutional accountability – Developing and strengthening accountability by establishing an institution with clear responsibilities for monitoring and investigating abuses committed by institutions responsible for the applicability of special investigative measures.

Development of operational capacities – Developing the operational capacities of institutions with responsibilities in the field, in order to improve and access specific equipment for carrying out special investigative activities.

Specialized professional training – The United Nations Organization and/or the Ministry of Justice of South Sudan must emphasize the selection of specialists in special investigative measures within the mission in South Sudan, to provide training programs in this field for the National Police, the Security Service, prosecutors and magistrates, as well as designated personnel from institutions with responsibilities in the field, including to support legislative reform.

Allocation of additional resources for monitoring – Ensuring additional capacities, both in terms of human and financial resources, within international organizations such as the UN, NGOs, or other international commissions, to monitor human rights abuses in special investigative activity.

Promotion of institutional transparency – Promoting the transparency of institutions with competences in the field of special investigative activity, after the purpose and means have been achieved, by providing data and information intended for the public and the media, with the aim of improving inter-institutional collaboration and developing public trust in the operative-investigative institutions.

Requesting assistance from international experts – Requesting support from experts within the European Court of Human Rights and the United Nations Organization for support in the legislative reform process.

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