

# Mapping intelligence oversight laws in Southern Africa

A baseline assessment of the status of current legislation pertaining to the state intelligence and security services and operations in the Southern African region

by **Brian Hungwe and Otto Saki**



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by **Brian Hungwe and Otto Saki**

**Intelwatch and The Media Policy and Democracy Project (MPDP)**

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**The MPDP** is a collaboration between the Department of Communication Science at University of South Africa (UNISA), and the Department of Communication and Media at the University of Johannesburg (UJ) promoting participatory media and communications policy in the public interest.

**Intelwatch** is a new research and advocacy organisation, based in the global South, dedicated to supporting research, policy work and activism to strengthen public oversight of state and private intelligence agencies around the world.

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# INTRODUCTION

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This legislative summary provides a baseline assessment of the status of current legislation pertaining to the state intelligence and security services and operations in the Southern African region. Furthermore, we evaluate the extent to which relevant laws provide effective democratic oversight mechanisms that safeguards human and constitutional rights.

The underlying principles informing this study include democratic participatory rights, requiring citizens access to information, as well as transparency and public accountability (either direct or through parliamentary or judiciary processes). There is no single definition of what constitutes “effective democratic oversight”; however, the reports strives to provide a working definition of this multifaceted concept, without necessarily excluding certain interpretations.

More specifically, the report examines the nature and substance of the available legislation governing intelligence service operations.

The nature and type of intelligence gathered is further analysed with regard to the existence and/or lack of various types of oversight mechanisms. (Such mechanisms include internal, parliamentary and judicial/tribunal oversight interventions. In some instances, these oversight mechanisms might be executive or administrative in nature.)

The effectiveness of oversight structures is further evaluated by determining their constitutive composition, operational independence, as well as their proximity to and relationship with the executive. Parliamentary intelligence and security committees, how the members are appointed to such committees, and the implications of the single party domination over the opposition party members are also interrogated.

The research further examines the nature of intelligence operations oversight mechanisms, taking into account at which stage of the intelligence gathering operation such oversight occurs. These stages include prior oversight, ongoing oversight or post facto oversight. In this regard, we look at internal oversight mechanisms (i.e. within the intelligence agencies themselves) and the extent to which these internal methods allows inquiries into members suspected of misconduct.

This is juxtaposed against the capacity of the public to utilise remedial procedures, as well as the availability of legislation to obtain remedies outside the framework of the intelligence service.

# FRAMEWORK

This assessment examined publicly available laws governing intelligence services, including constitutions, decrees and other legislation authorising the establishment of intelligence services operations. For comparative purposes and to guide assessment, the authors utilised specific questions to interrogate the laws applied in the various SADC countries under scrutiny. The following questions were formulated:

- Is there a law authorising intelligence services or intelligence service operations?
- What is the nature of the intelligence gathered?
- What are the oversight mechanisms and levels of oversight? (These could include internal mechanisms (inspectorate of intelligence or a designated judicial officer) a parliamentary committee or commission, or judicial oversight.)
- What are the levels of independence of the oversight mechanism? (This examines how the oversight mechanism is constituted, responsibilities, and methods of operation. It also examines constitutive independence and operational independence.)
- What is the nature of oversight? (In other words, is it prior oversight, ongoing oversight, or post-facto oversight?)
- What are the remedies provided in the law for any violation of the fundamental right to privacy, and/or freedom of expression as espoused in the constitution?



# LIMITATIONS

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This study is not without limitations. They are discussed below.

In one country, eSwatini, no public record of legislation pertaining to intelligence could be obtained. While it is possible that such laws exist, researchers were not able to source such legislation.

In Tanzania, certain intelligence laws (such as the intelligence regulations that are drafted by the minister of state security emanating from the Tanzania Intelligence and Security Service Act, 1996 (TISSA) are not available for public scrutiny, being strictly reserved for the intelligence community.[1]

During the course of our research, we found certain countries to have constitutional provisions, statutes or regulations for intelligence service bodies that operate as departments or offices *within* other state departments or security service divisions (such as the military, air force or police). The research questions were designed for the national civilian intelligence agencies, and not for the separate branches of intelligence within such security force divisions/agencies.

In the two countries, Angola and Mozambique, the laws were available in Portuguese, and the Democratic Republic of Congo (DRC) in French. Basic translations were made.

Finally, the research did not examine intelligence operations as they relate to the interception of communications or surveillance, since there is already ample research material available in the public domain on this subject.

[1] The Tanzania Intelligence and Security Service Act, 1996 s 9(3). Available at [https://www.vertic.org/media/National%20Legislation/Tanzania/TZ\\_Intelligence\\_Security\\_Services\\_Act.pdf](https://www.vertic.org/media/National%20Legislation/Tanzania/TZ_Intelligence_Security_Services_Act.pdf).



# OVERVIEW

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This assessment revealed several formulations of oversight of intelligence services, and the research clusters these into four broad categories. These include:

**Executive oversight:** This is the predominant form of oversight across the countries we examined. It rests largely on executive control of the intelligence services. A salient feature of this type of oversight, is that the appointing authorities normally administer the oversight process from within their own offices (for instance, a directorate that focuses on resourcing and tasking the intelligence services).

**Judicial oversight:** This form of oversight is usually established in terms of the intelligence services act or as an ad hoc court. Judicial oversight is normally effected by a judge or magistrate presiding over a designated intelligence oversight court, with the court having powers to implement oversight processes before intelligence operations commence (for instance, the issuance of warrants prior to or during operations).

**Independent oversight:** This type of oversight usually takes the form of an entity appointed through public interviews (such as constitutional commissions or independent complaints commissions), and reports directly to Parliament. Members of such an entity can also be appointed by the executive after consultation with Parliament, and such appointees normally have varying backgrounds (including legal, intelligence and accounting backgrounds). Such commissions are normally independently resourced from the treasury, (as opposed to being funded by a ministry or other division of the executive).

**Parliamentary oversight:** This is usually effected through a constitutional or standing committee of Parliament. In countries with a multiparty democracy, such committees are normally composed of a number of different parties' parliamentary representatives. The parliamentary oversight approach is designed for after-the-fact evaluation of intelligence operations and is generally not suited to the summoning of intelligence officials before or during intelligence operations.

The remit of this research is not to provide arguments in favour of any particular one oversight mechanism, especially since there is no univocal definition of what constitutes effective democratic oversight. However, we assume that there are certain known parameters of what constitutes effective democratic oversight in terms of policy and in practice. The research therefore proceeds on the basis of a potentially wide-ranging interpretation of the definition of “effective democratic oversight” as the existence of independent mechanisms that provide the public with access to information on the conduct and operations of intelligence services (including financial and administrative information). For there to be public trust in such oversight mechanisms, they need to be independent of the intelligence services' appointing authority, and must operate with sufficient autonomy to immunise their decisions and investigations from such an appointing authority.

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In constitutional democracies, the final appointment authority for oversight mechanisms is usually the executive. However, these appointment powers are not necessarily accompanied with the authority to remove or interfere with oversight processes. Even if the executive appoints the persons administering oversight mechanisms, the oversight mechanism should ultimately be accountable to the judiciary. Ideally, there should also be oversight over oversight-appointing authorities and processes.

In this research, effective democratic oversight is not conceived as necessarily requiring that intelligence services share sensitive details of their operations with oversight authorities; indeed, such requirements may prove counterproductive in relation to intelligence services' legitimate goals and activities. However, effective democratic oversight can be hampered should the veil of secrecy be abused by intelligence services to evade accountability. Intelligence services must engage, through lawfully established mechanisms, with oversight authorities in order to manage classified information as required during the oversight process. Thus, an effective democratic oversight framework requires legislation in place to grant the oversight authorities access to classified information as the need may arise.

While the effectiveness of democratic oversight does not necessarily depend on the public nature of the oversight process nor on the direct involvement of the ordinary citizen, transparency is still a key element. Maintaining transparency might mean that, after the processing of classified information during the oversight process, the parliamentary committee or judiciary mechanism releases a public report indicating the corrective or remedial measures taken, and follow up on measures undertaken, as needed. Such reports can be submitted and released on an annual basis.



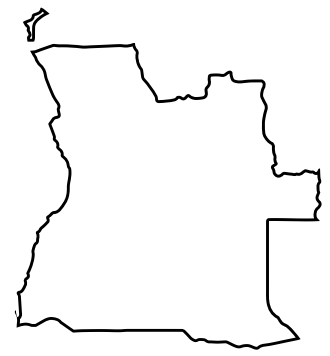
# COUNTRY COMPARISON

	Is there a law	Are there provisions for oversight in law								Nature of oversight			Remedies provided
		Parliament	Inspectorate	Judicial	Executive	Administrative	Prior	Ongoing	Ex-post facto				
Angola	Y	Y	Y	Y	Y	Y	N	N	Y	Y	Y	Y	
Botswana	Y	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	
DRC	Y	Y	Y	N	Y	N	Y	N	Y	N	Y	Y	
eSwatini	N	N	N	N	N/A	N/A	N	N	N	N	N	N	
Lesotho	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	
Malawi	Y	Y	N	Y	Y	Y	Y	N	Y	N	Y	Y	
Mozambique	Y	Y	Y	N	Y	Y	N	N	Y	N	Y	Y	
Namibia	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	
South Africa	Y	Y	Y	Y	Y	Y	N	N	Y	N	Y	Y	
Tanzania	Y	Y	Y	N	Y	Y	N	N	Y	N	N	N	
Zambia	Y	N	N	N	Y	Y	N	N	Y	N	N	N	
Zimbabwe	N	N	N	N	Y	Y	N	N	Y	N	Y	Y	

# COUNTRY FINDINGS



# ANGOLA



## **Is there a law authorising intelligence services or intelligence services operations?**

Angolan intelligence services are regulated by a number of presidential decrees and laws. The Law on National Security (Law 12/02) sanctions intelligence operations. The main intelligence body, the Service of Intelligence and State Security (SINSE), operates in collaboration with the Services of Military Intelligence (SIM), and the Services of Foreign Intelligence (SIE) under the Presidential Decree-Law 1/10, Ch. VI, known as the Diário da República – DR, I, Presidential Decree-Law 1/10 (March 5, 2010).

The SINSE provides supporting roles to the ministry of the interior and police in their roles, under Articles 71, 72, 73, and 74 of the Presidential Decree-Law 1/10. In addition, there are laws that were enacted to govern the operations of the intelligence community, namely the Law on State Secrets (Law 10/02),<sup>[2]</sup> the Organic Statute of the SIE (Decree-Law 13/02).<sup>[3]</sup> and the Regulation on the functioning of the Intelligence Community (Decree 80/02).<sup>[4]</sup>

## **What is the purpose of the intelligence gathered?**

The Law on National Security (12/02) establishes the SINSE and other Intelligence services for the state's protection against internal and external threats to state security. The scope for presidential decrees is provided under the Constitution's Article 125(1) (2). The work of the intelligence services is also guaranteed and provided for under the Constitution's Article 212(1) (2) providing for State intelligence and security bodies that "shall be entrusted with producing intelligence and analysis and adopting state intelligence and security measures required to preserve the democratic state based on the rule of law and public peace. The law shall regulate the organisation, functioning and oversight of the intelligence and security services".

## **What are the oversight mechanisms and what are the levels of oversight?**

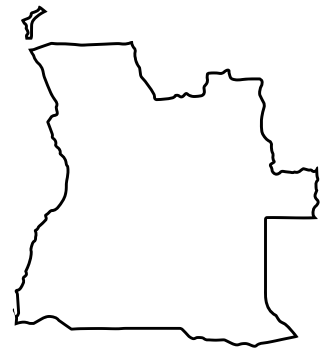
The intelligence services' internal misconduct discipline resolution mechanisms are not public. Accountability mechanisms are initiated mostly in the absence of by

2 Diário da República – DR, I, Law 10/02 (August 16, 2002).

3 Diário da República – DR, I, Decree-Law 13/02 (December 6, 2002).

4 Diário da República – DR, I, Decree-Law 14/02 (December 6, 2002).

# ANGOLA



the executive, with the President in particular taking executive actions (which include dismissals). Law enforcement interventions often result in due process and imprisonment terms. In some instances, SINSE would leak and detail its own internal service members' misconduct, resulting in extensive investigations and accountability measures. [5] There is an expectation that the National Security Council will provide effective oversight measures and advisory service powers (as provided under Article 136 of the Constitution). The Council is a consultative body to the President in matters pertaining to national security policies, strategies on state intelligence, and security bodies. Council members include the Presidents of the Constitutional Court and the Supreme Court, as well as the Attorney General. Its composition includes various layers of the judiciary tasked with providing checks and balances to the executive.

Angola's National Assembly is elected through a system of proportional representation and direct and regular elections. The Committees of the National Assembly have oversight mechanisms to follow up on the activities of related state governance areas.

The Inquiry Parliamentary Committees are mandated to evaluate government administration. The National Assembly house rules also grant the UNITA opposition and other parties limited roles and opportunities for input. The judiciary's 2013 narrow interpretation of constitutional law has further weakened the parliamentary oversight role by limiting the scope of parliament's oversight powers to conduct public inquiries.[6] The court held that parliamentary oversight provisions to conduct public inquiries and question the executive were unconstitutional.[7] The oversight challenges are compounded by the conflated role of the MPLA ruling party, executive and the intelligence services which operate under the direct control and direction of the President.

The Constitution's Article 34(1)-(2) provides for judicial oversight in the issuance of interception directives relating to private correspondence and communications.

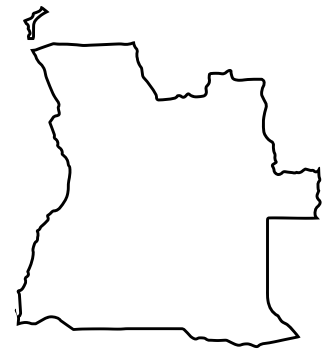
The President chairs the National Security Council, with oversight and advisory powers conferred on it by Article 136(2) on national security policies and strategies. The Council

5. Elias Isaac 'In Angola, a Brutal Silencing of Dissent' Open Society Foundations, 23 November 2013.

6. Republic of Angola, 'Law No. 13/17 "Lei orgânica que aprova o regimento da Assembleia Nacional"', 6 July 2013, Acórdão do Tribunal Constitucional 319/2013.

7. Rafael Marques de Morais, 'O Tribunal Constitucional e o golpe contra o MPLA', Maka Angola, 4 November 2013.

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is comprised of the following members: the Vice-President; President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court, the Attorney General of the Republic, the Ministers of State and other Ministers nominated by the President of the Republic, as well as other entities nominated by the President. (The inclusion of the specified judicial appointees aim to guarantee that the operations of state intelligence and security bodies conform to constitutional parameters.)

Oversight concerns may arise around the Council having to operate on a presidential decree defined by President, as provided under Article 136(3) of the Constitution. The judicial and parliamentary oversight mechanisms over the intelligence community are provided for in what is arguably a convoluted legal framework. This is so because the intelligence community operates directly under the President's control. While the President can be removed from office by parliament, parliament can only do so with the approval of the Supreme Court, of which some judges are appointed by the President. (Supreme Court judicial appointment

powers are shared between the President and the Superior Council of the Judiciary.)

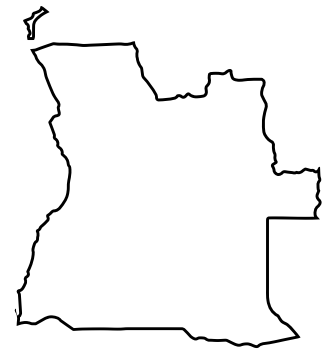
The Law on Access to Documents held by Public Authorities under Article 35(1) authorises the head of a public body to withhold national security related information upon certifying that its disclosure would cause harm to national security. However, such certification is not subject to any judicial review except by parliament.

## **What is/are the level/s of independence of the oversight mechanisms?**

Angola is a multiparty democracy with powers separated between the executive, judiciary and a 220-member legislature. Under Article 66 of the Constitution, the President can dissolve the national assembly, with few restrictions provided under Article 95. The MPLA ruling party, headed by the President, has an absolute majority in parliament. The relevant parliamentary committee overseeing intelligence, is the Committee on Defence, Security and Internal Order. How the intelligence community exercises internal discipline procedures is difficult to ascertain given the secrecy surrounding its operations.[8]

<sup>8</sup> However, in a rare instances, the SINSE has allowed for the investigation into and arrest of its members involved in the torture and murder of activists, with the President firing the intelligence head who presided over the service. See 'Angola's rival spy agencies on trial' Mail Guardian, 10 April 2015.

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The oversight role of the parliamentary Committee on Defence, Security and Internal Order is weak, as it operates under a framework of a Constitution granting excessive presidential powers. The Committee has few powers to check on and restrict presidential powers. The committee is appointed by the national assembly under article 160 (c) of the Constitution. The committee must have representation proportional to the representation of the parties.

Research findings show that, on the question of whether real political decisions were taken in Parliament or outside of it, the majority of Angolan legislators indicated that the main decisions are made by either the President/Government or by the ruling party (MPLA), with committees holding little influence.[9] Scope for the committee to operate independently and provide effective oversight exists, given that the president and the parliamentary members are elected in separate elections, and legislators cannot simultaneously be ministers of government (thus giving parliament a degree of independence and autonomy, at least on paper).

## **What is the nature of oversight?**

Article 35(1) of the Law on Access to Documents Held by Public Authorities

2002 authorises the head of a public body to withhold national security information upon certifying that its disclosure “would be almost certain to cause serious harm to national security”. While such a certification can be subjected to a parliamentary review, there is no judicial review process. Parliament, however, is dominated by the ruling party, creating the risk of a lack of effective oversight since Parliament is not necessarily independent of political influence (as opposed to the judiciary, which is appointed in a framework involving the judicial council and the President).

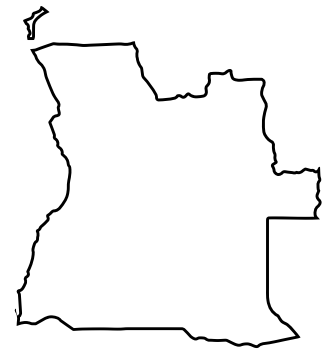
## **Is the oversight effective and what are the remedies provided in the law for any alleged rights violation?**

Parliamentary oversight mechanisms are watered down by excessive presidential powers, which subordinates parliament's oversight role and inhibits effective oversight. Thus, excessive presidential powers prevent parliament from serving as an independent and autonomous oversight body.

The constitution under Article 125(1) (2) gives the president the power to issue presidential legislative decrees, and the president competes with parliament to initiate and pass legislation. This in turn limits the



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framework for guaranteed remedies. While the president must be held to account by parliament for acts of commission or omissions of the intelligence services that report directly to him, it becomes problematic for parliament to enforce accountability in an environment with such excessive presidential powers. The state security services operate under the direction and at the behest of the president, as well as through his or her presidential decrees.

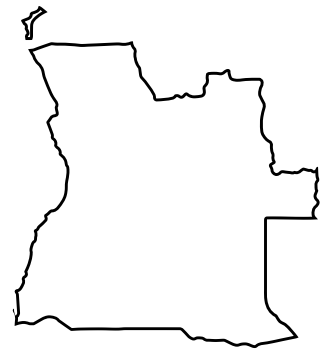
An overall assessment of both Angola's internal and parliamentary oversight mechanisms for intelligence services is that they are not satisfactory. This is primarily because oversight legislation is a convolution of both presidential decrees and statutory frameworks.

The intelligence services' internal misconduct discipline resolution mechanisms are not public, and this raises concerns for potential cover-ups, especially where politically sensitive issues arise. However, there have been previous instances where public pressure was exerted on the executive to account for intelligence excesses, which then resulted in the state deliberately responding with public investigations, arrests, and due process (which ultimately resulted in imprisonment of offenders). Furthermore, the constitutional

provision under Article 136 for the establishment of the National Security Council could potentially provide for effective oversight measures. This is so because the Council consists of independent judicial officers who could provide for independent – and therefore potentially more effective – oversight. However, while this approach is commendable, the fact that its functions are defined by presidential decrees makes it beholden to the interests of the incumbency.

There are strong concerns in Angola that significant political decisions are made by the ruling MPLA party outside the framework of both parliament and executive. Furthermore, attempts to force the intelligence service to release any particular information can be denied under Article 35(1) of the Law on Access to Documents Held by Public Authorities 2002. If the responsible public official is of the opinion (whether it is justifiable or not) that information disclosure “would be almost certain to cause serious harm to national security”, it is within their power to deny the release of said information. Such a denial cannot be legally challenged, since there is no legal framework compelling public officials to disclose their reasons for such decisions.

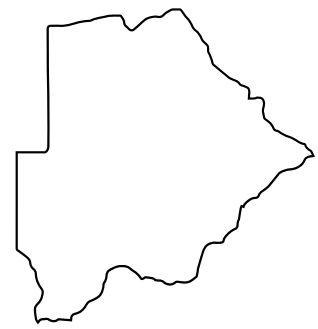
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This situation has been compounded by a court ruling which held that parliamentary oversight provisions to conduct public inquiries and question the executive were unconstitutional. Such a judgment is problematic and contrary to international best practice advocating for the doctrine of separation of powers and the need for parliament to hold the executive to account. However, the constitution does provide for judicial oversight in the issuance of interceptions. While such a judicial function is progressive, it is only significant if the independence of the judges can be guaranteed.

# BOTSWANA



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## **Is there a law authorising intelligence services or intelligence services operations?**

The Intelligence Services Act (IS Act) of 2007 provides for the establishment of the Directorate of Intelligence and Security Services (DISS) and its functions, in addition to several other committees such as the Central Intelligence Committee (CIC).

## **What is the nature of intelligence gathered?**

The Act defines intelligence as any information which relates to or may be relevant to any internal or external threat or potential threat to national security in any field. Section 8 of the IS Act creates internal and external intelligence branches.

## **What are the oversight mechanisms or what are the levels of oversight?**

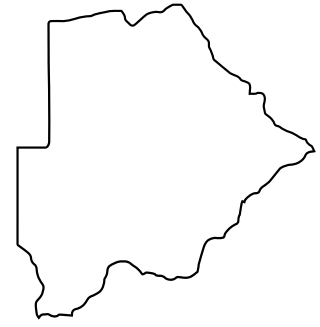
The IS Act provides for internal disciplinary procedures for delinquent members not abiding by the disciplinary code under s15(1). The IS Act s 38(1) provides that “there is established a Parliament Committee, to be known as the Intelligence and Security Parliamentary Committee, to examine the expenditure, administration and policy of the Directorate”.

In conducting searches, the Director General can apply for a warrant before a senior magistrate or judge of the High Court in terms of s 22(1). The Act also authorises the obtaining of warrants for search or seizure, or interception of communications through an ex parte application before the Senior Magistrate or above, or a Judge of the High Court in terms of s22(4). The individual targeted by the ex parte search warrant may also be required by a Magistrate to surrender their travel documents. There is legal scope to challenge the request to surrender travel documents in terms of s 22(11).

## **What is/are the level/s of independence of the oversight mechanisms?**

The President appoints nine parliamentary committee members after consultation with the Speaker and Leader of the Opposition in the National Assembly. Disclosure of classified information to the committee occurs only after the Director General and Central Intelligence Committee has certified that such a release of information is not prejudicial or injurious to the national security or public interest. This makes legislative oversight subject to executive approval, thus compromising the independence of the parliamentary committee.

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A decision not to release the relevant information can be appealed against in the High Court in terms of s 20(3). The parliamentary committee is constituted to reflect the numerical strengths of the political parties represented in the National Assembly under s 39(4). This means that if one party has a super majority, the committee will reflect that number, potentially removing any form of effective oversight, as partisan interests will carry decisive weight.

The parliamentary committee has limited operational independence as its mandate is to “to examine the expenditure, administration, and policy of the Directorate” to the exclusion of its operations. The committees in the National Assembly, such as the Public Accounts Committee, are not able to ask questions that have implications for the operations of the intelligence directorate. This inadvertently provides the intelligence services with some latitude to operate without accountability mechanisms, thus insulating them from parliament’s ordinarily inquisitive posture.

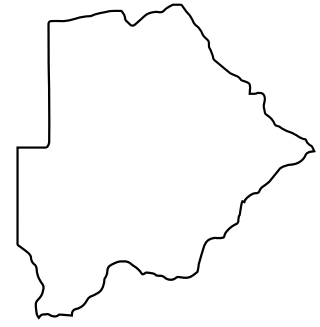
Section 31 of the ISA establishes the intelligence Tribunal for purposes of receiving complaints from the public or any person aggrieved by the conduct, omission or commission of

an intelligence officer under the Directorate. Under s 31(3) the President, after consultation with the Leader of the Opposition in the National Assembly, appoints the Tribunal members, thus potentially ensuring some degree of impartiality in the adjudication process. The President determines the Tribunal allowances in terms s31 (4).

## **What is the nature of oversight?**

Prior oversight occurs when courts are approached for issuing search warrants, as stipulated in terms of s22 of the IS Act. The magistrate or judge who receives an application for a warrant must be satisfied that there are reasonable grounds to believe that there is evidence of a commission of an offence, or that an offence is about to be committed. National security crimes can be serious or non-serious and include, under s2 of the Act, sabotage, terrorism, subversion, and treason. In addition, an ex parte application processes can be invoked, but this is also before a judge or magistrate, without a judge advocate or adversarial process to proffer an alternative view to existing facts. (Ex parte applications by their very nature undermine natural right common law principles.)

# BOTSWANA



Post facto oversight occurs when the Tribunal considers complaints from members of the public (in terms of s 31(1)) about the conduct of officers in the intelligence directorate. To date, there have been concerns surrounding the conduct of the country's intelligence services, with allegations that it has been weaponised against political opponents.[10] While reports on the record of Tribunal complaints and adjudication are scant, the government has responded to allegations of arbitrary or unlawful interference with privacy, free expression, and unjustified arrests by its intelligence services, and has taken steps to prosecute officials who committed abuses.[11] It would appear that, in Botswana, a culture of impunity within the intelligence services is minimal. [12 ]

## **Is the oversight effective and what are the remedies provided in the law for any violation of rights that one might allege?**

The IS Act criminalises the disclosure of the identities of intelligence officers in terms s19 (a)-(b), and this means that the lodging of a complaint with the police against an intelligence officer is impossible. This is also problematic if the public decides to

refer the matter to the Tribunal. In terms of s32 (3) the Tribunal must, before commencement of complaint proceedings, submit the complaint to the Director General. The Tribunal applies the High Court rules of procedure, and appeals against the Tribunal's decision must be made to the Court of Appeal within 30 days. The Tribunal shall in terms of s 35(1) notify the President, the Minister responsible for intelligence and security, the Director General, and the complainant of the results of the proceedings. The IS Act allows for the Tribunal to issue orders for compensation or an order for specific performance (such as discontinuation of an act or omission in terms of s35(2)-(3)).

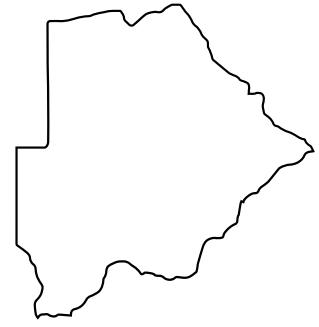
The mandate of the parliamentary committee is vague and unclear. Its oversight role largely pertains to administration and expenditure, and not to operational intelligence matters. Section 40(1) of the IS Act requires the parliamentary committee to present an annual report on the discharge of their functions to the President, and it may at any time report to him or her on any matter relating to the discharge of those functions.

10 Michelle Gavin 'Botswana's Intelligence Agency Hangs Over Presidential Rivalry' Council on foreign relations, 24 March 2022.

11 United States State department '2022 Country Reports on Human Rights Practices: Botswana'

12 Ibid.

# BOTSWANA



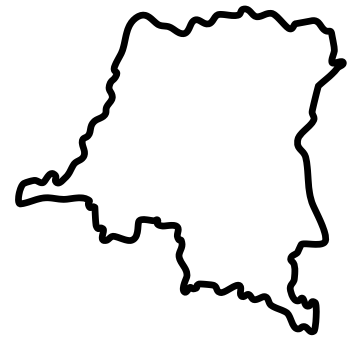
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The overall assessment of the oversight mechanisms in Botswana is that while such mechanisms exist to hold the intelligence service accountable, there are also claw-back provisions that water down the effectiveness of oversight procedures and processes. For example, the judiciary provides oversight mechanisms in ex parte applications for the interception of communications, but available remedies do not allow the public to disclose identities of intelligence officers who may have committed crimes.

Moreover, the parliament is not allowed to interrogate parliamentary committees around matters that could have implications for the operations of the intelligence directorate. To create safeguards against human rights violations, parliament should be provided with greater latitude to question the intelligence services' actions. In addition, in order to promote accountability, legislation should allow for the disclosure of the identities of intelligence officials that may have violated the law.



# THE DEMOCRATIC REPUBLIC OF THE CONGO



## **Is there a law authorising intelligence services or intelligence services operations?**

Article 1 of the January 11, 2003, Decree - Law No. 003-2003, establishes the National Intelligence Agency (ANR) and grants it administrative and financial autonomy. Article 2 of the decree places ANR under the authority of the President, while Article 10 provides for the creation of three departments, namely the department of internal security, external security, and the support department. The President may, by decree, create several more intelligence departments.

## **What is the nature of intelligence gathered?**

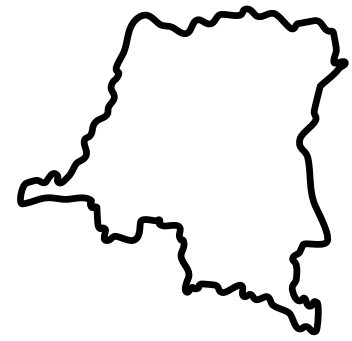
Article 3 of the decree No. 003-2003 provides for its wide mandate to involve research, centralisation, interpretation, exploitation and dissemination of political, diplomatic, strategic, economic, social, cultural, scientific and other information of interest to the internal and external security of the State, among other functions. The decree's Article 4 provides for the National Intelligence Agency to carry out its activities throughout the national territory and outside the country.

## **What are the oversight mechanisms / levels of oversight?**

Article 2 of the decree places the ANR under the authority of the president, and not parliament. Article 7 of the decree provides for internal disciplinary mechanisms for misconduct. The general administrator of ANR coordinates all the activities of the Intelligence Agency and must ensure compliance with laws and regulations, ethics and discipline within the Agency. The administrator has full disciplinary powers over all personnel of the Agency. Furthermore, Article 20 provides that the president may issue, by decree, administrative regulations determining, in particular, the disciplinary procedure and avenues of appeal.

The parliament has two chambers: the National Assembly and the Senate. Parliamentary oversight over the executive is provided through hearings held in committees. Article 117 provides for the National Assembly and the Senate to establish their own investigating committees and make inquiries into government departments. The separation of powers is not effective as section 100 of the Constitution provides Parliament with legislative authority, and the President duplicates such

# THE DEMOCRATIC REPUBLIC OF THE CONGO



legislative authority under s79 with powers to issue ordinances. Such legislative functions are overlapping, and s130 specifically provides that the right to initiate legislation belongs concurrently to Cabinet, each member of the National Assembly and each member of the Senate.

## **What is/are the level/s of independence of the oversight mechanisms?**

Some opposition party members serve on the Committee on defence and security overseeing intelligence entities, including the ANR. The work of the committee is sent to the national assembly and debated in a plenary session. The committee has operated independently, summoning and making state security inquiries to hold accountable the security sector's leadership through inquiries. Committees have also tackled allegations of corruption and the misappropriation of funds.[13]

The parliamentary committee has operational independence, often taking the executive to task over several state security matters, especially where allegations of abuse of office in the state security sector have taken place. The committee members belong to various political

parties and collectively they often deal with sensitive state security matters to ensure accountability and effective oversight mechanisms.

## **What is the nature of oversight?**

The oversight mechanisms relating to ex parte applications for search warrants or interception of communications are determined by both the judiciary and executive. Articles 54(a) and 55 of the Framework Law on Telecommunications provides for the interception of communications by judicial authorities, where authorisation has been granted by the Attorney General and, furthermore, by the Minister of the Interior.[14] However, there is no clear provision on oversight of the intelligence operations, either prior, during or post facto.

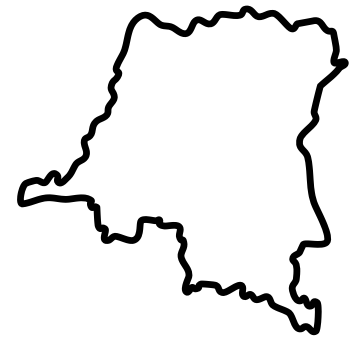
## **Are the oversight mechanisms effective and what are the remedies provided in the law for any violation of rights that one might allege?**

Parliament implements oversight mechanisms to ensure that the intelligence agency operates within legal parameters, and can table its findings in the plenary. There are also internal controls within the

13 Africa Center for Strategic Studies 'The Role of Parliamentary Committees in Building Accountable, Sustainable, and Professional Security Sectors' 3 April 3, 2023.

14 Articles 54(a) and 55 of the Framework Law No. 013-2002 of 16 October 2002.

# THE DEMOCRATIC REPUBLIC OF THE CONGO



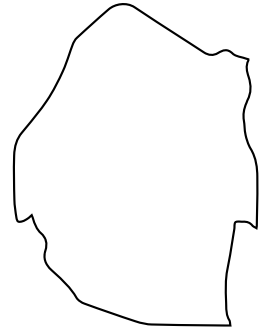
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intelligence agency to ensure that there is discipline, and any form of misconduct can be dealt with internally.

Article 7 of Law No. 003-2003 provides for a general administrator responsible for coordinating all the activities of the ANR in accordance with the laws and regulations in force, and to ensure compliance with laws, ethics and discipline within the agency. Furthermore, Article 20 of the Constitution provides that the President may also issue, by decree, disciplinary procedures and avenues of appeal for intelligence agency members. Remedies are available if the litigant can demonstrate that such violations of the decree have occurred.

However, our overall assessment of the oversight mechanisms is that they are not satisfactory. This is so because there are both executive and judiciary oversight interventions. Such a duplication of oversight functions is not necessary; besides, the executive from various regional legal precedents is not considered an impartial arbiter of interception applications. This role is best left to the judiciary.

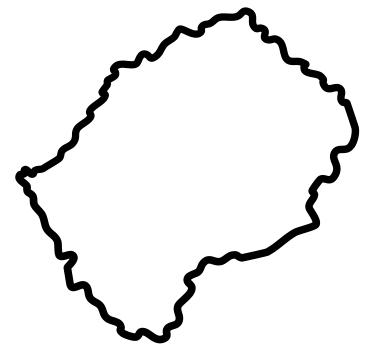
# ESWATINI



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There is no law establishing an intelligence service in eSwatini. There have been media reports in 2019 that a National Intelligence Agency was being considered, however there is no evidence to that effect.

# LESOTHO



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## **Is there a law authorising intelligence services or intelligence services operations?**

The National Security Service Act (NSSA) 1998 Act No. 11 of 1998 regulates the continuation, organisation and control of the National Security Service, also known by its acronym NSS. Section 148(1)-(3) of the Constitution of Lesotho establishes the National Security Service responsible for the protection of national security under the command of the Director-General of the National Security Service appointed and/or removed from office by the Prime Minister.

## **What is the nature of intelligence gathered?**

The NSSA provides in s5 that the function of the NSS shall be for the protection of national security, against threats of espionage, terrorism or sabotage, and also against activities of agents of foreign powers and from actions of persons that are intended to overthrow or undermine democracy.

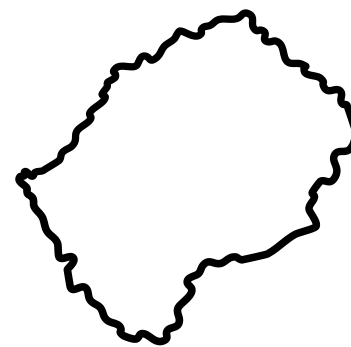
## **What are the oversight mechanisms or what are the levels of oversight?**

There are internal controls against indiscipline or misconduct which may

result in demotion, transfer and discharge of members. Section 10(1) of NSSA provides that the minister may, acting in accordance with the advice of the Director-General, demote, transfer or discharge a member. The Director-General is bound to act in accordance with the recommendations made by the Staff Board. Section 11(4) also provides that a member who has been discharged from the Service may within 14 days from the date of discharge appeal to the Minister (who may set aside or confirm the discharge). There is also a provision for an internal inquiry to determine the fitness of a person under s14(1), which may also lead to discharge for inefficiency.

An annual internal audit of the administration of NSS funds is provided for under section 30. The minister is obliged to draft regulations under s41(1) to provide a framework for NSS organisational good governance, including discharge, dismissal, suspension or demotion of members. The new prime minister has assumed overall control of both the defence and national security ministry under the pretext of creating a lean service. Both entities, the army and NSS are collapsed under the ministry of defence, operating under the administrative headquarters of the Lesotho Defence Forces (LDF).

# LESOTHO



The Ministry of Defence – which is also under the presidency, has been actively involved in restructuring NSS in terms of their roles in regional and international co-operation.[15]

The parliamentary portfolio committee on the Prime Minister’s Ministries and Departments, Governance, Foreign Relations and Information Cluster provides oversight of the NSS. Parliamentary committees, once established, appoint their own chairpersons, and not the Prime minister or speaker. This is important for them to play an effective oversight role. Section 70 of Lesotho’s Constitution provides that legislative power shall be vested in parliament, which can delegate such authority. The parliamentary committee is expected to produce reports on NSS operations that are laid before the House for discussion and decision-making.

Membership of the committees (which may have fewer than five or more than 25 members) is determined by the Business Committee, and its membership shall reflect the gender, proportionality and diversity of political parties in Parliament. However, the effectiveness of the Committee, which is often

dominated by the ruling party, is debatable because the Prime Minister has direct authority over the LDF and NSS as minister of defence and national security.

However, in July 2023 the Lesotho Constitutional Court declared s26 (2) of the NSS Act unconstitutional, stating that the law violated the right to privacy and that there were no safeguards against the abuse of power to issue warrants, as this was done by a minister without external independent supervision (thus providing scope for arbitrariness and the risk of abuse).[16] Furthermore, the court ruled that the NSS is not mandated to investigate criminal activities as it is the domain of the police. Parliament shall now have to consider amending the Act in accordance with the constitutional court judgment. The law is yet to be amended to reflect this judgment.

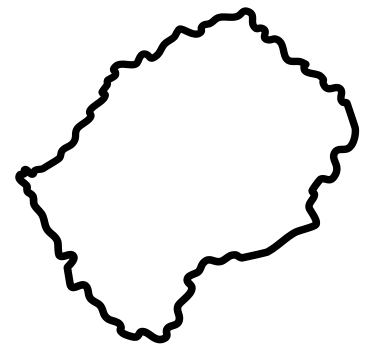
## **What is/are the level/s of independence of the oversight mechanisms?**

The parliamentary committee is comprised of a majority ruling party members and few opposition members. The committee appoints its chairperson. The committee produces and distributes reports (meant to be

15 Diane Philander ‘Security sector reform in Lesotho: Observations from a three-day dialogue series’ Institute for Security Studies Occasional Paper No 45 - July 2000.  
16 Mofomobe and Shale v. The Prime Minister and Others Constitutional Case 7 of 2023; Constitutional Case 9 of 2023 [2023] LSHC 125. See also Staff Reporter ‘NSS Doesn’t Have Powers To Investigate and Prosecute Criminal Cases’ – CJ Lesotho Tribune, 11 June 2023



# LESOTHO



debated in parliament) on the operations of defence and security.

There is scope for providing disciplinary measures for NSS members' misconduct under s20 of NSSA. Section 21(1) of the NSSA sets out the procedure in case of alleged misconduct of members in which the Director General may charge a member for misconduct. The Director General may appoint a board of inquiry to investigate the charge, and this includes issuing a subpoena of witnesses. There is scope for appeal against the internal findings for misconduct to the Minister. The minister also retains powers to discharge a member for misconduct under s10(1) of the Act. The evidential law as applicable in criminal proceedings in the magistrate court shall apply. An independent court of law under s21 (5) may charge an NSS member. There is, however, no independent complaints mechanism.

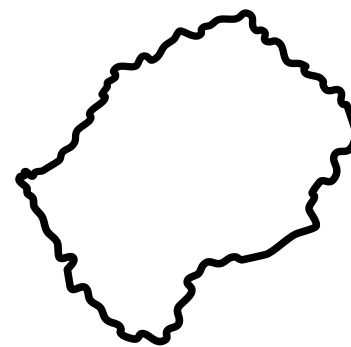
## **What is the nature of oversight?**

Section 26 of the NSSA provided the minister with powers to issue interception warrants without independent oversight. This creates oversight complications as the minister is a member of the executive. As the ministry is now operating

under the thumb of the President, this further heightens the need for a robust oversight structure independent of the executive (given the direct interest and overbearing powers of the office). The finding of the Constitutional Court in Mofomobe and Shale v. The Prime Minister case that s26 of the NSSA was unconstitutional provides an opportunity for parliament to revisit the Act and make appropriate oversight amendments that create an independent judicial function in the issuance of the warrants.

Ministerial regulations anticipated to be issued by the Prime Minister provide scope for addressing grievances against intelligence officers. The regulations are obliged to carry into effect the provisions of the Act for the good governance and organisation of the Service relating to the instruction, discipline and control of members, the charging of members for misconduct, and appeals in terms of this Act. The grievances structures provided under s41 only relates to service members, without any reference to public grievances against NSS members. There is scope for utilisation of the regulations to charge service NSS members for misconduct arising from criminal activities directed against the public.

# LESOTHO



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## **Is the oversight effective and what are the remedies provided in the law for any violation of rights that one might allege?**

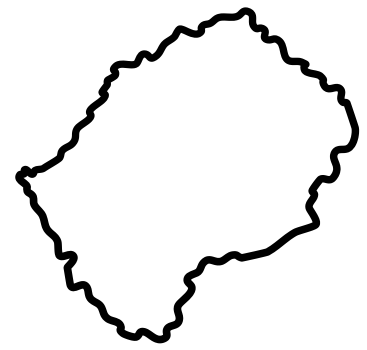
The oversight role is mainly internal, with members being charged for misconduct under the Regulations. However, s20 of the NSSA provides that nothing in the Act should be construed as indemnifying a member against prosecution in or conviction by any court of law in respect of an offence. It therefore follows that NSS members may be charged for offences directed against members of the public, with an internal judicial mechanism provided for such eventualities in which criminal evidence procedures are followed. If the misconduct by an NSS member is directed against the political opponents, it is difficult to determine the extent to which an internal board of inquiry can exercise its independence given that it is operating under the direct control and direction of the President. There is a limit to which the public can find recourse through an internal inquiry.

Internally, under section 20(1), the Director General may charge a member with misconduct and request him or her to respond to the alleged misconduct.

Furthermore, under s20 (2) the Director General may appoint a board of inquiry to investigate the charge. The board of inquiry has powers to subpoena witnesses. Section 20(6) also states that after considering the evidence before it and affording the member or any other member representing them in a hearing, the board can make a determination based on the facts before it, and make known its findings. There is scope for the member found guilty of misconduct to appeal against the finding of the board of enquiry to the Minister.

The overall assessment of the oversight mechanisms in Lesotho is that they are not satisfactory. However, there are internal controls against indiscipline or misconduct which may result in demotion, transfer and discharge of intelligence officers. In this respect, the minister may, acting in accordance with the advice of the Director General, demote, transfer or discharge a member. Furthering such internal oversight, the relevant minister is obliged to draft regulations to provide a framework for NSS organisational good governance, including discharge, dismissal, suspension or demotion of members. This is expected to act as a deterrent

# LESOTHO



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against abuse of power by officers.

A positive aspect of parliamentary committee oversight structures is that they themselves (and not the speaker or the executive) appoint their own chairpersons. This is important for them to play an effective oversight role. This would enable them to provide well-articulated annual reports on the NSS operations for the parliament to consider. Importantly, a committee is also comprised of members of the opposition, even though this is determined by the proportionality and diversity of political parties in Parliament. A different political voice that is neutral and effective is always important in this regard.

Regrettably, the interception of communications following ex parte applications is adjudicated by a minister, without judicial oversight structures. This is against existing norms where an impartial judicial officer should ordinarily exercise such a function. It is important to note that the Constitutional Court in *Mofomobe and Shale v. The Prime Minister* has already declared s26 of NSS Act unconstitutional, thus providing parliament with an opportunity to amend the law by providing appropriate oversight amendments.

# MALAWI



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## **Is there a law authorising intelligence services or intelligence services operations?**

The National Intelligence Service (NIS) Act No 30 of 2018 regulates the intelligence service operations.

## **What is the nature of intelligence gathered (domestic and foreign)?**

The Act indicates that intelligence is any information collected and processed by an intelligence officer, and that information has a bearing on the security of the interests of Malawi. Such a definition provided under s2 of National Intelligence Service (NIS) Act is broad in scope and vague, making anything classifiable as 'intelligence' (including newspaper clippings collected by an intelligence officer). There is need for the legislature, or relevant ministry or department to revisit the definition.

## **What are the oversight mechanisms or what are the levels of oversight?**

Sections 11-12 of the NIS Act provides that every member of the intelligence service abides by a code of conduct which prohibits engagement in any political activity and use of torture. The Act is silent on how these provisions

are actualised. The President administers the Act, but can delegate to a Minister some or all of his powers under the s3 (3) of the Act. This means the intelligence service is located and operates administratively under the direct auspices of the presidency. This is not unusual in several SADC jurisdictions. The NIS Act provides that the Minister shall annually submit a report on its activities to the Defence and Security Committee of Parliament (s20). The Defence and Security Committee of Parliament is established in terms of s162(1) of the Constitution of Malawi. Section 40(1) of the Act provides for the Defence and Security Committee to receive an annual report of the Service (which would then be submitted to the President). The Act provides for a Complaints Tribunal in terms of s26 (1), whose mandate it is to investigate complaints under the Act. In terms of s26 (2) (a)-(c), the Tribunal, which is appointed by the minister (delegated by the President), is chaired by a serving or retired High Court judge (nominated by the Chief Justice), one person who has worked for at least ten years in intelligence (nominated by the Director General), and one human rights advocate (nominated by the Human Rights Commission).

# MALAWI



## **What is/are the level/s of independence of the oversight mechanism?**

The Defence and Security Committee of Parliament is constituted based on parliamentary representation, which limits the scope of opposition members getting appointed to create a balance in the representation. The terms and conditions of service are independently established in terms of the parliament privileges law. The Tribunal appears to have compelling constitutive independence as the appointments of two out of three are by independent actor (the Chief Justice and the Human Rights Commission) in terms of s26(2).

The Defence and Security Committee of Parliament submits an annual report of the operations of the services to the President. The President has powers to specify that some of the activities be included, in terms of s40(2), meaning the President can order certain information to be excluded. The Tribunal cannot commence hearing any complaints before informing the Director General under s29 of the Act. There is no provision safeguarding the Tribunal from not taking directions from anyone (including the Director General).

## **What is the nature of oversight?**

To obtain a warrant, the Director General applies to a resident Magistrate in terms of sections 22-23. The warrant adjudication by the lower courts can be extended upon application before the magistrate. An aggrieved person, who might be the person targeted by the warrant extension, can approach the High Court on appeal against the warrant in terms of s24 (5). The Act in terms of s20 requires the Minister to submit a report on the activities of the intelligence service to the Defence and Security Committee of Parliament.

However, the mandate of the committee as spelt out in the Defence Act s11 does not include oversight of intelligence operations. The Defence Act (s12) provides that members of the Defence and Security Committee of Parliament shall take an oath of secrecy (in terms of s11B) not to disclose or discharge any information brought to their attention. This suggests that the Minister's report might contain intelligence information. In terms of s40(1), the Service shall provide a report to the President, and the same report will be submitted to the Defence and Security Committee of Parliament.

# MALAWI



This provision is silent on what will happen with the report and whether the committee invokes the provisions of its mandate (as provided for in the Defence Act).

## **What are the remedies provided in the law for any violation of rights that one might allege?**

Section 33 lists some of the remedies that the Tribunal can order. The Tribunal can dismiss the complaint; order information relating to the complainant in respect of the complaint be destroyed; quashing of an improperly obtained warrant; and awarding of compensation if there is proof of loss or damage. Any appeal against the Tribunal rests with the High Court and must be lodged within 30 days of being rendered.

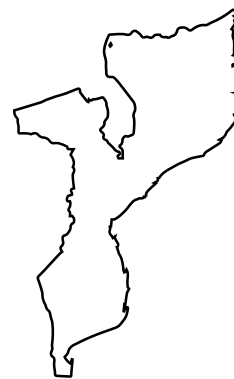
The scope of oversight effectiveness is debatable. On one hand, the Act fails to provide a meaningful definition of intelligence, which is problematic in the interpretation of emerging disputes under the Act. The NIS is placed under the presidency, yet s40(1) of the Act provides for the Defence and Security Committee to receive an annual report from the Service (which it shall submit to the President). Furthermore, the Act provides for a Complaints Tribunal with a mandate

to investigate complaints under the Act (the Tribunal is appointed by a minister delegated by the President). The progressive aspects are that the committee is chaired by a serving or retired High Court judge nominated by the Chief Justice, while the Director General and a human rights advocate nominate another.

The problem remains, however, that the Committee is constituted based on parliamentary representation, and thus fewer opposition member voices might be heard. Furthermore, the President has powers to specify that some of the activities be included or excluded. Such powers are dangerous as they give the President some latitude to suppress important information of public interest. Ultimately, the law itself weakens the capacity to provide effective oversight measures.



# MOZAMBIQUE



## **Is there a law authorising intelligence services or intelligence service operations?**

Mozambique's Defence and Security Act of 1997 provides for the establishment of SISE (the State Information and Security Service) which is the intelligence agency responsible for national security through detecting and combating threats to the security of the state. In addition, the Constitution of Mozambique (2004) s268(1)-(2) provides for the setting up of a National Defence and Security Council presided over by the President, including two members appointed by the President and five members appointed by the Assembly of the Republic. In terms of s270, a law shall provide for the organisation and functioning of the National Defence Security Council.

## **What is the nature of intelligence gathered?**

The Defence and Security Law 1997 [17] provides for SISE as an institution of state security, with a mandate to collect, research, analyse, and evaluate information threatening the security of the state, preventing acts that threaten the constitution, the security

of the state, espionage, sabotage, and terrorism.[18] The law requires intelligence coordination with other security arms, namely the police and the military. The SISE works under and reports directly to the President. The Law calls for obedience to the President as commander-in-chief, and encourages security services to defend internal and external threats to the state. It is also geared towards fighting drug trafficking and other organised criminal activities.

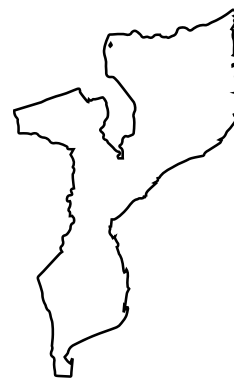
## **What are the oversight mechanisms or what are the levels of oversight?**

The relevant committee for intelligence oversight is the Committee for Defence and Public Order. The Committees have a predominant role of debating and originating legislation. The allocations of seats, and the chairs of the committees, are based on political party seats in the plenary. The National Assembly also has a working committee, known as the Petitions Committee. Parliament, through the petition committee, receives communication from the public addressed to the Speaker concerning public grievances of public officials' abuse of power. Petitions must be

17 Defence and Security Law, 17/97 of 07/10.

18 Ibid at article 14: The intelligence agency retained the responsibility to prevent acts against the Constitution and the functioning of the state organs, and to combat espionage, sabotage and terrorism

# MOZAMBIQUE



read and tabled for parliamentary consideration.

Parliamentary oversight of the budget and government conduct is weak, which is attributable to the Defence Portfolio Committee's lack of technical knowledge and expertise. The parliament's Defence and Public Order Commission have limited resources to undertake oversight security measures. Limited attention has been given to discussions around intelligence matters (which are never discussed in parliament).[19]

## **What is/are the level/s of independence of the oversight mechanisms?**

The Constitution provides that the President is the commander of the defence forces and security forces. The Constitution also provides for the National Council for Defence and Security to act as a consultative body for the President. The parliament is dominated by the ruling party, FRELIMO with the opposition having limited influence. The allocations of seats, and the chairs of the committees, are based on each political party's proportion of seats in the plenary. The relevant oversight committee for intelligence is the Committee for Defence and Public

Order. The parliamentary committee for Defence and Public Order has limited oversight effective measures as it is largely beholden to the primary interests of the President and the ruling FRELIMO party (to whom they owe primary allegiance). There is also limited financial, budgetary and technical support.

## **What is the nature of oversight?**

Prior oversight mechanisms are a mixture of judicial interventions and discretionary administrative measures outside the scope of judicial authority. Article 68 provides for the inviolability of home and correspondence except when ordered by a competent judicial authority. A gamut of telecommunications interception laws require ex parte applications to be confirmed by judiciary authority. Administrative decisions by state security agents operating outside the framework of judiciary oversight are possible.

## **Is the oversight effective and what are the remedies provided in the law for any violation of rights that one might allege?**

Where the intelligence agencies operate outside the law, law enforcement agents have often

# MOZAMBIQUE



intervened, with due legal processes being initiated.[20] Article 70 of the Constitution gives members of the public the right to appeal to the courts should they believe that intelligence agencies acted in any manner that violated their rights and interests (as recognised by the Constitution and law).

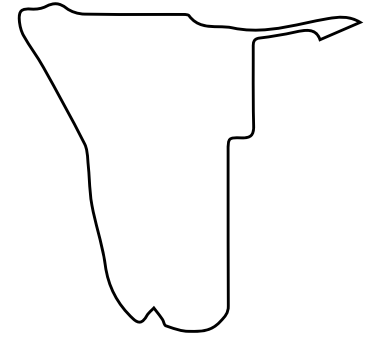
The overall assessment of Mozambican judicial, internal and parliamentary oversight mechanisms is not satisfactory. At parliamentary level, the relevant intelligence oversight committee is the Committee for Defence and Public Order. The committee composition depends on the proportional number of parliamentary seats acquired, where the ruling FRELIMO party also dominates. However, the National Assembly provides for a working committee that is mandated to receive public grievance petitions. It is commendable that such grievances are received and then debated in parliament with recommendations being made for redress. Nonetheless, even if such petitions could be received, the challenge remains around weak technical capacities and competences to carry out effective analysis of budgets, intelligence and state security matters. There are also

noticeable concerns around limited public resources for effective travel, investigation and inquiries.

Another concern arising is the blurred line between ruling FRELIMO, executive and parliamentary functions. It appears the primary interests of the ruling party come first. This distorts the oversight allegiances of the parliamentary committee members. Furthermore, prior oversight mechanisms are a mixture of judicial interventions and discretionary executive administrative measures operating outside the scope of judicial authority. This hybrid approach creates confusion. There is therefore need for a coherent approach, and certain judicial functions which cannot be appropriated by the executive in providing interception oversight functions.

20 Al Jazeera 'Mozambique ex-president's son, 10 others jailed over corruption: Nineteen people, including state security officials, went on trial for a 'hidden debt' scandal that crashed the country's economy' 7 December 2022,

# NAMIBIA



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## **Is there a law authorising intelligence services or intelligence service operations?**

The Namibia Central Intelligence Service Act (NCIS) Act 10 of 1997 establishes and defines the powers, duties and functions of the Namibia Central Intelligence Service. The NCIS Act regulates the administration and control of the Service, providing for issuance of directions authorising certain actions to be taken by it if national security is threatened.

## **What is the nature of intelligence gathered?**

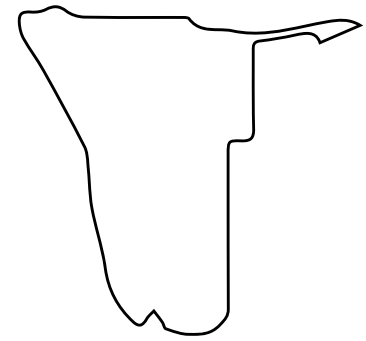
The NCIS Act in s1 defines threat to the security of Namibia. The Act, suggests that a “threat to the security of Namibia” means “any activity relating to espionage, sabotage, terrorism or subversion or intention of any such activity directed against, or detrimental to the interests of, Namibia, and includes any other activity performed in conjunction with any activity relating to espionage, sabotage, terrorism or subversion, but does not include any lawful advocacy, protest or dissent not performed in conjunction with any such activity; any activity directed at undermining, or directed at or intended to bring about the destruction or overthrow of, the

the constitutionally established system of the Government; any act or threat of violence or unlawful harm that is directed at or intended to achieving, bringing about or promoting any constitutional, political, industrial, social or economic objective or change in Namibia, and includes any conspiracy, incitement or attempt to commit any such act or threat; .. any foreign influenced activity within or related to Namibia that - (i) is detrimental to the interests of Namibia; and (ii) is clandestine or deceptive or involves any threat whatever to the State or its citizens or any other person lawfully resident in Namibia.” Section s5(1) provides the Service with the powers to investigate, gather, evaluate, correlate, interpret and retain information, whether inside or outside Namibia, for the purposes of detecting and identifying any threat or potential threat to the security of the country.

## **What are the oversight mechanisms or what are the levels of oversight?**

The NCIS Act under s8(1) provides for the discharge, demotion and transfer of staff members by the Director General for misconduct. The Director General may also, in accordance with the Act, discharge or reduce in rank

# NAMIBIA



(or grade), service members for misconduct.

Namibia has two chambers of Parliament, the national council and the national assembly. On paper, both houses have committees of the Parliamentary Standing Committees on Foreign Affairs, Defence and Security (PSCFDS) which provides oversight on the security sector including the intelligence service. The Namibian Parliament establishes parliamentary committees under the Standing Rules and Orders (SRO). Every committee established in terms of Article 59 of the Constitution shall have the power to subpoena person(s) to appear before it to give evidence on oath in its mandated role to oversee the affairs and operations of the security ministries and agencies.

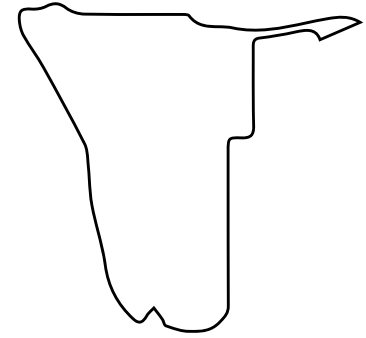
The NCIS Act provides under s32(1) that the Director General of the intelligence services may be requested by the Parliamentary Committee to disclose any information to the Committee (subject to each member of the Committee having received a security clearance pursuant to a security vetting investigation by the Service). The parameters of the security vetting are not clearly set out, and this may provide an opportunity for the service to deny opposition

politicians access to information that may be detrimental to the political interests of the ruling party. This is so because the security vetting is conducted under a cloak of secrecy, without any guaranteed provision of reasons to justify refusal to grant access.

Such oversight may also be limited under s 32(2) if the President is reasonably of the opinion that it is not in the national interest that the information sought be disclosed by the Director-General to the Committee.

If the President decides against disclosure, his directive is followed without question for a period of six months from the date of determination. The information may be disclosed after six months to either the full Committee, the chairperson and/or a member of the Committee who should belong to the opposition party (as the President may determine). However, there is extensive involvement of the President in determining when and how such information could be disclosed, and to whom. This limits oversight effectiveness because the president has such extensive discretionary powers. While genuine reasons might exist for non-disclosure, there are no

# NAMIBIA



clear parameters as to the extent to which the President may exercise their discretionary non-disclosure powers. Where political considerations that are prejudicial to the President's interests arise without any bearing on national security, temptations exist to lean towards non-disclosure.

Namibia follows a dual approach of executive and judiciary authorisation of interceptions. In some instances, surveillance takes place without any clear legal basis. Applications for interception warrants are provided under s25 of the Act, and warrants are issued by a judge following a written application from by the Director General. If the judge is convinced that there is scope for threats to national security warranting a proper investigation, he or she shall issue a direction authoring the interception. There is a provision for the extension of the interception period (not exceeding three months at a time). Section 27 also provides that the Judge-President of the High Court of Namibia may, after consultation with the Director General, issue interception directives in the manner and procedure set out under ss19(1)-(4), 25(1)-(4).

Furthermore, a judge under s19(1) can

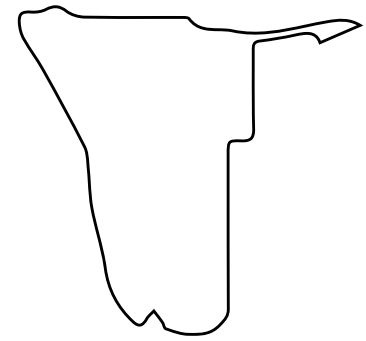
direct the Service to intercept the communications of individuals exploiting bank accounts to conduct financial transactions that constitute a threat to national security. In terms of the law, there appears to be some provisioning for independent judicial oversight, even though the extent of this oversight is questionable given the use of ex parte provisions, and the lack of a transparency mechanism.

## **What is/are the level/s of independence of the oversight mechanisms?**

The last general election offered a significant number of opposition voices in parliament. The oversight committee members are appointed through parties' respective caucuses, promoting some degree of independence. However, it has been observed in recent research that Namibian parliamentarians and committees of parliament face a plethora of challenges in their bid to exercise scrutiny on the budget, ranging from inadequate skills and competencies, political interference under the political party whip system, inadequate institutional support, as well as lack of relevant information delivered on a timely basis.[21]

21 Sheuneni Kurasha 'Legislative oversight and economic governance in Namibia: An evaluation of the role of parliament in the budget process' (Master in Leadership and Change Management, Harold Pupkewitz Graduate School of Business, Namibia Polytechnic, July 2013) 91.

# NAMIBIA



The President is mandated under s33(1) of the NCIS Act to provide for regulations relating to the discharge of staff members (in the public interest). There is a procedure set out on the investigation of alleged misconduct of service members, as well as the appointment of boards of inquiry and appeals against such findings. There is provision for the attendance of witnesses at boards of inquiry and such findings may result in suspension of staff members.

Article 59(3) of the Namibian Constitution provides that, for the purposes of exercising its powers and performing its functions, any committee of Parliament shall have the power to subpoena persons to appear and give evidence on oath. It can request the production of any documents required by it. The relevant committee for intelligence services is the Standing Committee on Home Affairs, Security, Constitutional and Legal Affairs. In terms of Article 74 (2) of the Namibian Constitution, the National Council may, as it considers necessary for the exercising of its powers of review and investigation, establish parliamentary committees to conduct hearings and to collect evidence. In law and practice, Parliament is supposed to be an autonomous institution that

establishes and appoints its own committees and committee members, free from external executive control or influence. Committee membership composition ordinarily reflects the numerical strength of each party in the National Assembly.

## **What is the nature of oversight?**

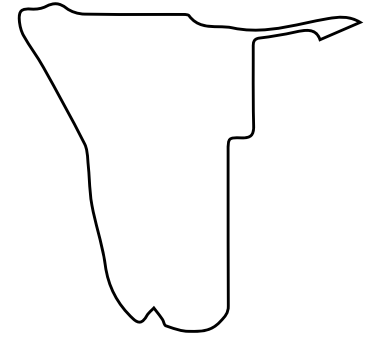
There is prior oversight in that applications made by the Director General for interception are considered *ex parte*, containing affidavits before a judge under s25 of the Act. If the respective judge is convinced that the gathering of information concerning a threat or potential threat to the security of Namibia is necessary, he or she will grant the application.

Section 27 provides that the Judge-President of the High Court of Namibia may, after consultation with the Director-General, issue directives in the manner and procedure of applications in terms of s19.

However, while the *ex parte* applications provide the subject without the benefit of providing alternative facts, it is expected that the judiciary will be robust in its assessment of the application and facts contained therein.



# NAMIBIA



## **Is the oversight effective and what are the remedies provided in the law for any violation of rights that one might allege?**

The Regulations made by the President under s33(1) provide for the transfer or discharge of staff members on account of public interest, and outlines the procedure with respect to the investigation of alleged misconduct of staff members, and the appointment and composition of boards of inquiry. The proceedings procedure and resultant appeals against the finding of boards of inquiry is provided. There is scope for the attendance of witnesses at boards of inquiry and for the representation of staff members.

The security committees' members are appointed by their party's respective caucuses in parliament. However, a recent High Court judgment in the Director-General of Namibian Central Intelligence Service (NCIS) and Another v Haufiku and Others held that the Intelligence service is not above scrutiny and could be investigated in the public interest where acts of corruption and misconduct occurred. The case also showed that the parliamentary committee had been severely lacking in its oversight function, as the NCIS

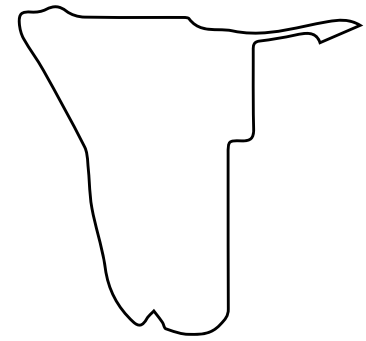
had never submitted reports to the committee and seems to never have been called to appear before the committee, or simply did not show up. [22]

The Director-General of Namibian Central Intelligence Service and Another v Haufiku and Others judgment implied that the service members cannot operate with impunity against public interest considerations. In Director-General of Namibian Central Intelligence Service and Another, the intelligence service sought to rely on the Protection of Information Act 84 of 1982 (PIA), read with the provisions of the Namibia Central Intelligence Service Act, to contend that there existed statutory, constitutional powers and duties to, in the interest of national security, protect sensitive information from being published. The court held that the submission that publication of information relating to the NCIS must, without exception, be suppressed (even if doing so would expose a crime) was unsustainable. In an appropriate case, relief will be refused if the conduct being exposed is unconscionable. [23]

While the effectiveness of the oversight mechanisms in Namibia remains in doubt, the intelligence

22 Director-General of Namibian Central Intelligence Service and Another v Haufiku and Others (SA 33 of 2018) [2019] NASC 7  
23 Director-General of Namibian Central Intelligence Service and Another v Haufiku and Others (SA 33 of 2018) [2019] NASC 7 at 106.

# NAMIBIA



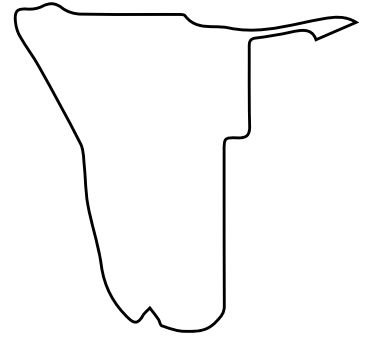
services are provided with mechanisms to conduct inquiries that may lead to the discharge, demotion and transfer of staff for misconduct. Both chambers of parliament have Parliamentary Standing Committees on Foreign Affairs, Defence and Security (PSCFDS) which provides oversight of the security sector (including the intelligence service). The committees have powers to subpoena persons to give evidence on the operations of the intelligence service. This demonstrates that the intelligence service is not above scrutiny, and therefore cannot operate with impunity.

There appears to be an increased number of opposition legislators in parliament who can occupy oversight roles in the established committees. However, one of the significant barriers to effective scrutiny is low competence levels, and accompanying inadequate skills to scrutinise technical issues, state security aspects and budgets. The security committees' members are appointed by their parties' respective caucuses in parliament. However, the demand for intelligence information requested by a parliamentary oversight committee to be vetted by the senior intelligence officers or the President before it is tabled in the

House may provide room for manipulation of facts. Important information can be deliberately withheld under partisan political considerations, even if disclosure will not compromise national security. The law simply says the President can withhold information if he is reasonably of the opinion that it is not in the national interest that the information sought be disclosed by the Director-General to the Committee. This provision ignores the fact that the President, as head of the executive, may have vested political interests that may have nothing to do with national security considerations.

However, the interception of communications oversight function is carried out by both the executive and the judiciary. It would have been preferable if such a role had been carried out solely by judicial officers, without executive involvement. There are instances demonstrated in court proceedings where the state would try to avoid scrutiny under purely unprofessional considerations. This was observed in the High Court judgment of Director-General of Namibian Central Intelligence Service and Another v Haufiku and Others, where the court held that the Intelligence service is not above scrutiny and could be investigated

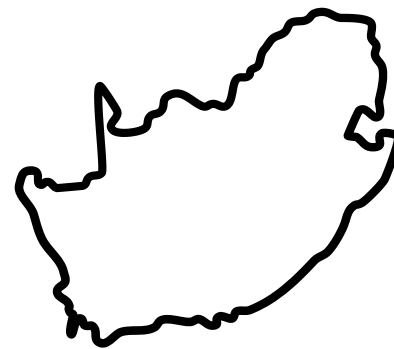
# NAMIBIA



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in the public interests where acts of corruption and misconduct would have occurred. This judgment sets a precedent and provides scope for the public to mount court litigation against errant intelligence officers.

# SOUTH AFRICA



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## **Is there a law authorising intelligence services or intelligence services operations?**

Section 199(1) of the Constitution of the Republic of South Africa provides that the security services consist of a single defence force, a single police service and any intelligence services. Further, s209 (1) provides for the establishment and control of intelligence services other than any intelligence division of the defence force or police service. This intelligence service may be established only by the President, as head of the national executive, and only in terms of national legislation. In addition, the President must appoint the head of each intelligence service. In terms of s210 a national legislation must regulate the objects, powers and functions of the intelligence services.

The Intelligence Services Act (ISA) of 2002 regulates the establishment, administration, organisation and control of domestic and foreign intelligence services. The National Strategic Intelligence Act of 1994 defines the functions of members of the National Intelligence Structures, establishing and defining the National Intelligence Co-ordinating Committee's functions in respect of intelligence relating to the security of

South Africa. It also provides framework for the appointment of a Co-ordinator for Intelligence as chairperson of the National Intelligence Co-ordinating Committee.

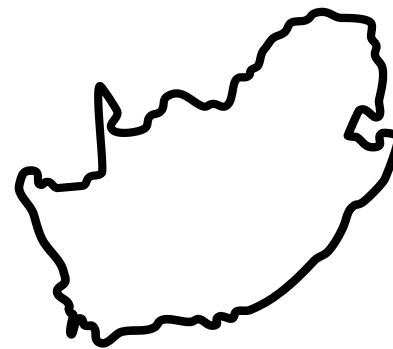
## **What is the nature of intelligence gathered?**

The National Strategic Intelligence Act of 1994 provides under section 1 that "national security intelligence" means "intelligence which relates to or may be relevant to the assessment of any threat or potential threat to the security of the Republic of South Africa Republic in any field." The nature of the intelligence is also both domestic and foreign as provided in s2(2) of the Act.

## **What are the oversight mechanisms or what are the levels of oversight?**

The Constitution under s210 requires civilian monitoring of the activities of intelligence services by an Inspector appointed by the President, and approved by two thirds supported resolution adopted by the National Assembly. The parliamentary oversight role is provided under s 2(1) of the Intelligence Services Oversight Act of 1994.

# SOUTH AFRICA



The Intelligence Services Oversight Act 40 of 1994 establishes a Committee of Members of Parliament on Intelligence and defines its functions and that of the appointment of Inspector-General of Intelligence. The Committee on Intelligence consisting of eleven legislators, subject to the Constitution, is empowered to perform the oversight functions in relation to the intelligence and counter-intelligence functions of the Services and report its activities to Parliament.

The internal controls mainly relate to misconduct, with scope for demotion or discharge after an inquiry under the Intelligence Services Act (ISA) for committing a crime or an offence. Such powers are conferred upon the minister under section 18(l) of the Act, except for the post of a Deputy Director-General or equivalent, which may only be effected in consultation with the President. However, other service members, upon disciplinary findings relating to misconduct or inefficiency, are dismissed under ISA's section 17(1) by the Director-General or the Chief Executive Officer, as the case may be. There is an important public interest consideration provided under section 19(1) of ISA relating to discharge of members, where, if it is in the public interest, the Minister may

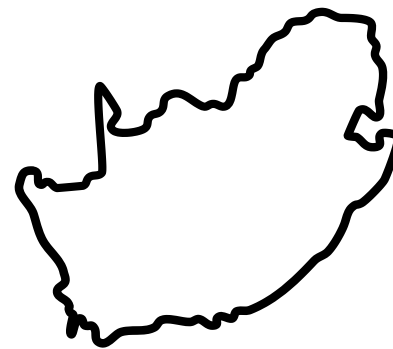
transfer any member from a post.

Section 11 of the Intelligence Services Act grants powers and duties of members to obey all lawful directions received from a person in such authority. Upon authorisation from a designated judge, an intelligence officer under s11(2) can enter and search premises for the purpose of obtaining information which is of substantial importance and is necessary for the proper discharge of the functions of the Intelligence Services.

## **What is/are the level/s of independence of the oversight mechanisms?**

The President's intrusive powers are discernible in the appointment of eleven members of the Parliament's Committee on Intelligence under s2(1) of the Intelligence Services Oversight Act, where parliament standing orders acting through the speaker could have done to maintain its autonomous and independent domain. However, the President appoints nine members of the Committee based on the proportional representation principle after consultations and agreement with the leaders of the political parties. The leaders of the parties' members are also entitled to representation on

# SOUTH AFRICA



the Committee with the remaining members appointed with the concurrence of the party or parties holding seats in Parliament, but which are not represented on the Committee.

Furthermore, the President appoints one of the members as chairperson of the Committee. There are internal parliamentary oversight mechanisms to deal with misconduct. If a member of the Committee's misconduct is, in the opinion of the President with the concurrence of the Committee, a threat to the national security, he or she may be substituted with another member of his or her party with the concurrence of the leader of that party, or may resign by notice in writing to the President. The parliamentary committee's independence is only limited to the extent that the majority members emanate from the ruling party, with the chairperson appointed by the President, and with limited members from other political parties.

## **What is the nature of oversight?**

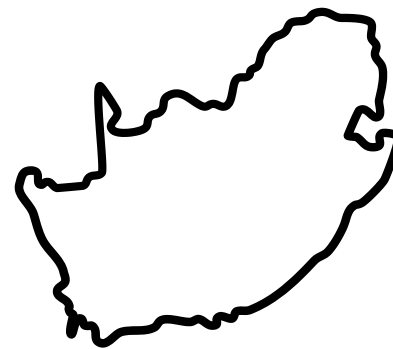
The Committee's oversight reports in relation to the intelligence and counter-intelligence functions of the Services are reported back to Parliament. This also includes making,

under s15(c), recommendations on all proposed Bills affecting the Intelligence Services and its related activities, and reviewing its regulations made under s6 of the National Strategic Intelligence Act. Section 3(1) (f) of the Intelligence Services Oversight Act empowers parliament to order an investigation following complaint/s received by the Intelligence Committee from any member of the public. This is important to safeguard public trust in the intelligence service.

Under s3(1)(g), the Committee can refer matters relating to intelligence services brought to its attention with a direct bearing on the protection of human rights under s15 of the Constitution. Furthermore, the Committee may receive a report from such a Commission concerning the matter and under s3(1)(h) make recommendations. The Committee also has powers to summon service officials to explain any aspect of a report and make deliberations, conduct hearings, call witnesses and make findings and recommendations on the operations of the intelligence.

Additionally, the Committee under s6(1) of the Act must within two months after 31 March in each year submit to the President and to each

# SOUTH AFRICA



Minister concerned a report on the preceding year's activities, findings, and recommendations. The President shall cause the report's tabling in Parliament.

The Committee's oversight role is further buttressed by the appointment of an Inspector-General under s7(1) of the Act. While the Inspector-General shall be responsible to the President, his function is specifically to review the activities of the Services, and monitor its outlined policy compliance.

## **Is the oversight effective and what are the remedies provided in the law for any violation of rights that one might allege?**

There is an internal process to hold service members to account for misconduct, which can be initiated within and from outside by parliament itself. The reports from the Committee are provided to the President,

The Constitution, under s210, provides for the civilian monitoring of the activities of intelligence services by an Inspector General appointed by the President, approved by two-thirds supported resolution adopted by the National Assembly.

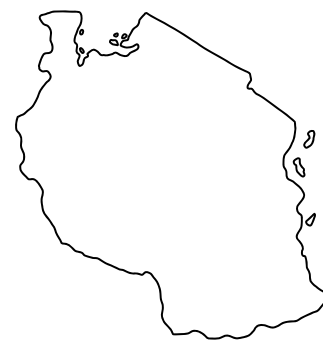
While this approach is important, the neutrality of the Inspector is tainted because he is appointed by an interested party, the President, even though he is subsequently approved by a two thirds parliamentary majority resolution.

Another important oversight mechanism that could be exploited is the role of the legislature, which under s 2(1) of the Intelligence Services Oversight Act establishes a Committee of Members of Parliament on Intelligence. Its functions are to provide oversight functions in relation to the intelligence and report its activities to Parliament.

There are important internal controls against misconduct of intelligence officers which can lead to demotions or dismissals. This is designed to curb a potential culture of impunity, and to act as a deterrent against abuse of office. Importantly, parliament can order an investigation following complaint/s received by the Intelligence Committee from any member of the public. Powers to summon intelligence officers and conduct hearings ensures that the intelligence officers are beholden to both the parliament and the internal control oversight mechanisms.



# TANZANIA



## **Is there a law authorising intelligence services or intelligence services operations?**

The Tanzania Intelligence and Security Service Act (TISSA) of 1996 s4 (1) establishes an intelligence department within the office of the President, namely the Tanzania Intelligence and Security Service (TISS). While the TISSA provides scope of its establishment, structure and duties, the National Security Act (NSA) defines the scope of various offences that could be investigated by TISS, and the role of state security in such investigations. However, ministerial regulations emerging from TISSA are not subject to public scrutiny, although the Act itself is readily available both in print and online.

Section 5(1) (a) of TISSA empowers TISS 'to obtain, correlate, and evaluate intelligence relevant to security, and to communicate any such intelligence to the Minister and to persons whom, and in the manner which, the Director-General considers it to be in the interests of security.'

The National Security Act (NSA) of 2002 under s15 makes provisions relating to state security and collaboration with police in providing relevant information for investigation and prosecution. The NSA makes

provisions relating to state security to deal with espionage, sabotage and other activities prejudicial to the interests of Tanzania.

## **What is the nature of intelligence gathered?**

The TISSA provides, under s5(1)(a), that TISS's functions are to "to obtain, correlate, and evaluate intelligence relevant to security". The key phrase emerging is matters 'relevant to security', which is broad in scope and not elaborated upon within the Act.

Furthermore, s14(1) of TISSA provides that it shall be the duty of TISS to collect (by investigation or otherwise, and to the extent that it is strictly necessary), analyse and retain information through intelligence operations relating to any activities that constitute a threat to the nation's security. The nature and form of the activities are not defined as well as the supposed scope of the threat. The meaning of 'otherwise' has not been specified.

Furthermore, TISSA, under s15 (1), provides TISS with powers to investigate any person or body of persons it reasonably considers to be a risk to national security.

# TANZANIA



## **What are the oversight mechanisms or what are the levels of oversight?**

TISSA provides, under s9(1), internal control mechanisms relating to operational misconduct. Under the provision, the minister must create regulations providing for the TISS's conduct, discipline, ethical standards and general directions that must be adhered to in its functions and exercise of its conferred investigatory powers. However, the ministerial regulations constituting the code of conduct for the Service are not available for public scrutiny. Such regulations, under s9(4), are available only to members of the Service and in the manner which the Minister determines. This limits the scope for members of the public to exploit internal the TISS grievance structure and to seek remedies for the misconduct of TISS members. The current intelligence Bill under consideration shall transfer the overall management of the Act under the Presidency, and the current ministerial powers in formulating intelligence regulations will be transferred to the President, who shall be empowered to make regulations relating to the conduct of the service members.[24] The minister will be entrusted with

existing ministerial powers which could be administratively executed on his behalf, likely by the TISS Director General.

Tanzania's Constitution under Article 4(2) and 63(2) recognises the legislature as the only branch of the government empowered with legislative functions, including advising and scrutinising government performance. Thus, it is the watchdog of the executive.

Furthermore, the Constitution provides for the establishment, composition and functions of parliament's standing committees under Chapter 3. Of the presently constituted 15 varying committees, the relevant Defence and Security Committee comprises 23 members with only two members from the opposition. The Speaker of the national assembly appoints the members of the standing committees, having taken into consideration political party representation, regional representational scope, and gender, among other factors.

The extent and effectiveness of the parliamentary committee oversight role over defence and security matters in Tanzania largely depends on its

# TANZANIA



intertwined structural relationships with its operational intelligence security heads, the ruling Chama Chamapinduzi (CCM) party, and the government. [25]

The parliamentary committees are subject to the influence and control of the executive (creating challenges in providing rigorous independent scrutiny), and to that of the intelligence services.<sup>1</sup> The continued influence of the ruling party, in both the executive and parliamentary structures, subtly obstructs effective oversight.[26]

The executive power curtails and overshadows legislative power, blurring the separation of powers. Therefore, such influence limits the extent to which a parliamentary committee mandated to provide intelligence checks and balances can genuinely operate in the public interest and remain unaffected by ruling party interests.

The committee and parliament, in further discharging its functions, may put any question to the Minister of intelligence and security in the promotion of transparency and accountability.[27]

New proposed amendments to TISSA reportedly remove parliamentary oversight over intelligence operations, and has provoked a national outcry. [28]

The search warrants are granted by the judiciary under chapter 47 of the National Security Act (NSA). Section 13(1) of NSA provides that a magistrate may grant a search warrant authorising any police officer or other persons who may be authorised by such named police officer, at any time, to enter any premises. There is scope for intra-state security operations involving both the police and TISS. This is so because other persons provided for within the Act are not defined, and presumably, given the scope of the envisaged surreptitious activity, could include members of the intelligence service.

## **What is/are the level/s of independence of the oversight mechanisms?**

The Constitution's Article 4(1) vests the legislature with supervisory powers over the conduct of public affairs. The parliament's committee on Foreign Affairs, Defense and Security, is dominated by the ruling CCM party,

<sup>25</sup> Mwesiga Baregu 'Parliamentary oversight of defence and security in Tanzania's multiparty parliament' guarding the guardian  
<sup>26</sup> See McGill University 'Parliamentary Oversight and Corruption in Tanzania Policy Brief, Presenting Key Issues & Lessons Learned'

<sup>27</sup> Article 63(2) of Tanzania Constitution.

<sup>28</sup> The Chanzo Reporter 'What's Up With Tanzania's Proposed Intelligence and Security Service Act? The proposed amendments have been described as a blow to Tanzania's "young and vulnerable" democracy' thechanzo.com, 31 May 2023.

# TANZANIA



with just two members from the opposition. The country's National Assembly's committee structure obstructs effective oversight, because the majority members are ordinarily beholden to the interests of their ruling party, which plays a significant role in political domestic affairs. Where the ruling party's interests are threatened there is a tendency to close ranks.

The Executive power in the legislature limits effective oversight.[29] However, parliament periodically produces an annual report of the activities of the Parliamentary Standing Committee on Foreign Affairs, Defense and Security. Given the influence of the executive, the quality of the report in challenging excesses and promoting accountability within the intelligence services is debatable.

The internal control mechanisms relating to operational misconduct is provided under s9(1) of the TISSA, where the minister is empowered to make regulations in relation to the conduct, discipline, presentation, considerations, ethical standards and general directions to be adhered to in the carrying out of the functions and exercise of the powers conferred on the TISS. The regulations constituting the code of conduct for the Service

are not available for public scrutiny because, under s9(4), they are accessible only to members of the Service and in the manner which the Minister determines.

The identities, names and membership of TISS are not published in terms of s16 of TISSA. It also prohibits disclosure of information from which the identity of confidential sources or persons employed in covert operations can be revealed or inferred. The parliamentary committee's effectiveness in scrutinising the operations of TISS are limited by the blurred relations between the ruling party, the executive and the intelligence service itself. It appears TISS remains insulated from public scrutiny and is designated as a strategic state security entity operating outside common sanctions and without legal authority.

## **What is the nature of oversight?**

Given the secretive nature of the laws and operations of TISS, it is difficult to ascertain the extent of the exploitation of the prior oversight judicial mechanism.

# TANZANIA



## **Is the oversight effective and what are the remedies provided in the law for any violation of rights that one might allege?**

TISSA's s 19(1) provides that the Director-General and all officers and employees of the Service shall, in the performance of their duties and functions, not be held liable for damages resulting from any act committed or omitted in connection with the duties and functions of the Service. An internal mechanism is available for the TISS Director-General to sanction errant officers who act unlawfully in the performance of their duties and functions. There is however no external remedial mechanism.

The Director General, under the Act's ss19 (2)-(3), shall also cause a report in respect of that matter to be submitted to the Minister and the Attorney General. Notwithstanding this internal oversight, it is further difficult for the public to scrutinise internal accountability mechanisms because, under TISSA s20(1), the disclosure of information obtained in the course of performance of intelligence service functions is prohibited. The penalties for non-compliance or violations of TISSA have a chilling effect.

The mandate of the Parliamentary

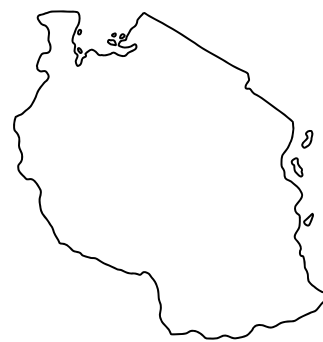
committee is vague and unclear (whether it is confined to administrative and expenditure issues and not operational intelligence).

Section 10 of the TISSA allows the Director-General of the Service the command, control, direction, superintendence and management of the Service. However, the Director General's powers are subject to any orders issued by the President, unless the minister directs otherwise. Any remedies proposed or suggested are ineffective as TISSA is immune to civil and or criminal liabilities.

The overall assessment of oversight mechanisms in Tanzania, is that there is a lack of strong and effective parliamentary and internal oversight structures within the intelligence service. External oversight mechanisms are also weakened by the deliberate withholding of ministerial regulations that support the intelligence legislation from public scrutiny.

Any analysis or scrutiny of the ministerial regulations is therefore difficult. However, there are internal control mechanisms relating to

# TANZANIA



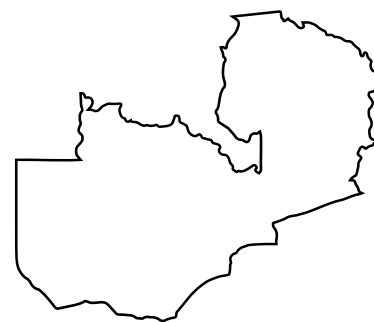
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operational misconduct by intelligence officers. This is important to curb a potential culture of impunity.

Another challenge arising is that the current intelligence Bill places the intelligence service under the Presidency, and thus the ministerial powers in formulating intelligence regulations will be transferred to the President. In a country where the ruling party's control of both executive and parliamentary functions is pervasive, it will be difficult to provide effective oversight of an intelligence service under the control of the President.

In parliament, the relevant standing committee of Defence and Security is comprised of 23 members, with only two members from the opposition. The influence of the opposition on providing an independent and robust oversight mechanism is therefore numerically thwarted. This is also partly because of the continued influence of the ruling party, in both the executive and parliament structures, which subtly obstructs effective oversight. However, it is important to note that the judiciary does retain an oversight function in granting interception warrants.

# ZAMBIA



## **Is there a law authorising intelligence services or intelligence services operations?**

The Zambia Security Intelligence Service (ZSIS) Act No 14 of 1998 provides for intelligence services and for constituting the National Intelligence Council. The Constitution of Zambia (Amendment No 2 of 2016), in terms of s193(1)(b), provides for the establishment national security services.

## **What is the nature of intelligence gathered (domestic and foreign)?**

The ZSIS Act is silent on the nature of intelligence gathered, and only defines intelligence as any information collected and processed by an intelligence officer which has a bearing on the security interests of the Republic. Section 2 of the Act makes reference to sabotage, and treason, and also refers to security as a means to protect from espionage, subversion and sabotage. In terms of the Constitution of Zambia s193(3), the functions of the Zambia Security Intelligence Service include ensuring national security by undertaking security intelligence and counterintelligence; preventing person/s from suspending,

overthrowing or illegally abrogating this Constitution; and performing other functions as prescribed.

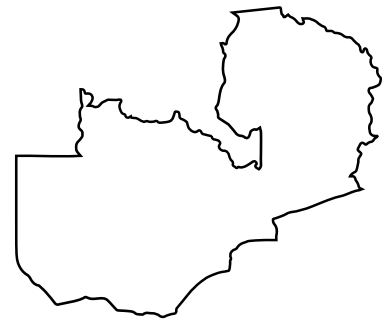
## **What are the oversight mechanisms or what are the levels of oversight?**

The ZSIS Act constitutes the National Intelligence Council under section 15(1), chaired by the President and three other persons appointed by the President. The Director-General is an ex-officio member. The functions of the National Intelligence Council also include an oversight role (including to formulate and review intelligence policy as well as to review intelligence activities). Parliament constitutes the Committee on National Security and Foreign Affairs, which is responsible for oversight on defence, foreign affairs and home affairs. This oversight assumes intelligence is part of defence. The expanded terms of reference of the committee are silent on intelligence oversight.<sup>[30]</sup> Intelligence officers are required to apply for warrants before a court of competent jurisdiction in terms of s13(1). The warrant authorises entering premises, examining any materials, documents or information being held by the persons identified in the warrant, and the intelligence office is allowed to seize such materials.

30 See the Report of the Committee on national security and foreign affairs for the third session of the twelfth national assembly appointed on Wednesday, 20th September 2017, available on Zambia Parliament Website.



# ZAMBIA



## **What is/are the level/s of independence of the oversight mechanism?**

The President chairs the council, and appoints the other three members, who all serve at the President's pleasure in terms of s15(3). The Act suggests that there is voting in the National Intelligence Council, as the Director-General, as secretary to the National Intelligence Council, shall 'not have the right to vote' (per s15(2)). The parliamentary committee is constituted of representatives in terms of the Standing Rules and Orders provisions, rule 131. The judiciary is independent in its composition, and the court's consideration of warrants are not specified in the Act (which might suggest that any court with competency to consider the matter as per their jurisdiction is acceptable).[31] Parliament enjoys operational independence; however, the National Intelligence Council has no operational independence, since the President is in control.

## **What is the nature of oversight?**

There is limited, restricted or insubstantial prior oversight on issuances of warrants for investigations. There is no ongoing

oversight or post facto oversight in terms of the Act.

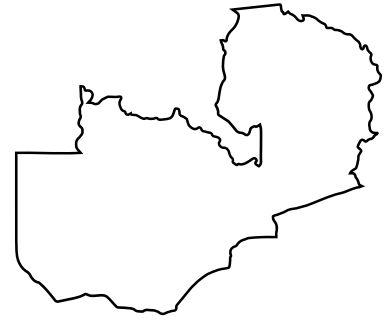
## **What are the remedies provided in the law for any violation of rights that one might allege?**

The Act has no complaints mechanism, and no mention of any remedies. The ZSIS Act fails to define and provide for the nature of intelligence to be gathered by the intelligence service, making a blanket reference to any information collected and processed by an intelligence officer which has a bearing on the security interests. This again is problematic in terms of statutory interpretation, which requires certainty or clarity of law whenever a legal dispute arises.

Parliament constitutes the Committee on National Security and Foreign Affairs, which is responsible for oversight of defence, foreign affairs and home affairs. The expanded terms of reference of the committee are silent on intelligence oversight. Progressively, intelligence officers are required to apply for warrants before the judiciary, which authorises interceptions and seizure of documents or information. However, while the National Intelligence

31 This might be limited to the Magistrates and High Court with competent criminal law jurisdiction. The State Security Act provides for application of warrants of search before the Magistrates Court s11(1).

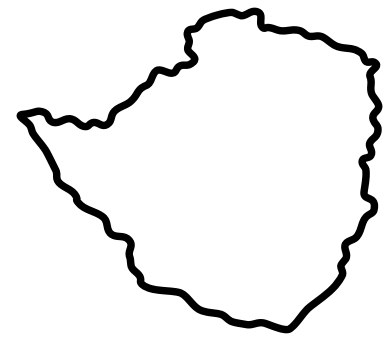
# ZAMBIA



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Council could provide oversight mechanisms, it is chaired by the President who has a direct vested interest in the affairs of intelligence. He appoints three members that serve at his pleasure. While parliament enjoys operational independence, the National Intelligence Council has no operational independence as the President is in charge.

# ZIMBABWE



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## **Is there a law authorising intelligence services or intelligence services operations?**

There is no law authorising the intelligence services, however the Constitution in terms of s207 (1) establishes the security services of Zimbabwe which includes the intelligence services. The Constitution further provides in s224(1) that the intelligence service (other than an intelligence division of the Defence Forces or the Police Service) must be established in terms of a law or a Presidential or Cabinet directive or order. There is no record of a law, and no presidential or cabinet directive or order (that is publicly available) for the establishment of the Central Intelligence Organisation (CIO) (also known as the President's Department).

## **What is the nature of intelligence gathered (domestic and foreign)?**

There is no mention of the nature of intelligence gathered. In the establishment of the police service, the Constitution requires under s 219(2) that the Police Service must exercise its functions in co-operation with any intelligence service that may be established by law. This would suggest that domestic intelligence is

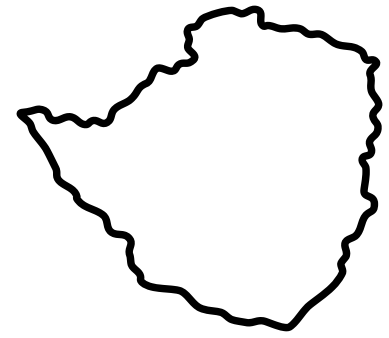
collected.

## **What are the oversight mechanisms or what are the levels of oversight?**

The Constitution of Zimbabwe s207(2) provides that the security services are subject to the authority of the Constitution, the President and Cabinet and are subject to parliamentary oversight. Section 210 of the Constitution provides 'for an effective and independent mechanism for receiving and investigating complaints from members of the public about misconduct on the part of members of the security services, and for remedying any harm caused by such conduct'. The Zimbabwe Independent Complaints Commission (ICC) Act provides for oversight for all security services, and it includes intelligence services.

The President must appoint a minister responsible for national intelligence service in terms of s225 of the Constitution. In addition, the Constitution requires, in terms of s226(1), that a national intelligence service must be under the command or control of a director general of Intelligence Services, appointed by the president for a five-year term (renewable once).

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The director general operates in terms of written policy directives given by the Minister responsible for national intelligence, under the authority of the President, according to s226(2).

The Constitution provides for the possibility of a national security council, under s209(1)-(3). The National Security Council (NSC) would consist of the President, Vice Presidents, minister and security services as may be determined by an Act of Parliament. The functions of the NSC include to develop the national security policy for Zimbabwe; to inform and advise the President on matters relating to national security; and to exercise any other functions that may be prescribed bylaw. In February 2023, the government passed the National Security Council Act which covers all national security matters. The President, in terms of s9 of the Act, in giving his State of the Nation Address (in terms of s140 of the Constitution) may also report on the state of security. The President is responsible for administering this Act. The current executive has no minister of intelligence; this function has been absorbed by the office of the President. In this regard, if the President is in charge of the intelligence, and thus any intelligence operations will not have neutral

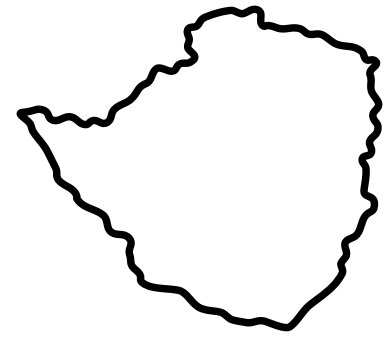
executive oversight.

## **What is/are the level/s of independence of the oversight mechanism?**

In terms of s6(1)(a) the person who chairs the Independent Complaints Commission (ICC) must be eligible to be a High Court judge and is appointed by the President after consultation with Judicial Services Commission (JSC) and four other members appointed from a list submitted by the Standing Rules and Orders of Parliament. The President is not bound by the decision of the JSC in his consultations as the process is a merely a formality, with the President having the last say regardless of whether the JSC agrees to his or her decision or not. The Chairperson invites the head of each security service to recommend a senior retired or serving member to sit with the ICC when hearing matters. In addition, the head of the security service [32] shall appoint observers to the ICC (who attend hearings on any complaints against the security service which she or he represents (s 6(7)).

In terms of s11, the ICC must submit to Parliament, through the President or the Minister (as the case may be), an annual report describing fully its

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The ICC's proceedings are likely to be affected by the powers of the President or Minister to produce certificates in terms of s15(10), to the effect that the disclosure of any information specified in the certificate is, in his or her opinion and subject to section 86(1) and (2) of the Constitution, contrary to the public interest as it may prejudice defence or internal security interests. This decision can be challenged before the Administrative Court.

## **What is the nature of oversight?**

Reports from individuals against the service may be made within three years of the date the act complained of occurred and the complaint should not be pending before the courts or an internal disciplinary process by the security service concerned (s13(2)).

## **What are the remedies provided in the law for any violation of rights that one might allege?**

The ICC has powers to render any decision in the form of orders or recommendations. The Act, however, does not stipulate the nature of orders. The Commission can recommend, for instance, the immediate release of any person from unlawful detention by the security services, or payment of

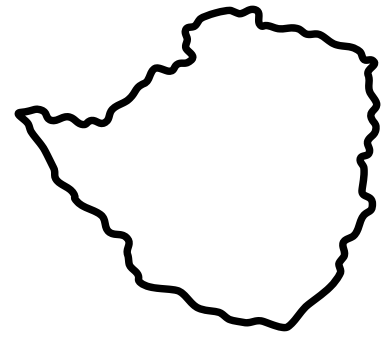
compensation, or for the complainant to approach the courts, or to refer the matter to the National Prosecuting Authority, or to recommend an appropriate internal disciplinary action.

In terms of s16(5), the report of the Commission produced after hearing a matter is admissible in court (criminal or civil) or disciplinary proceedings as prima facie proof of such facts. Decisions of the Commission can be taken for review before the High Court by any aggrieved person.

The main challenge in providing for accountability and oversight mechanisms, is that there is no law authorising the establishment of intelligence services. A legislative establishment framework would, in the very least, have provided a reference point to define mandatory provisions that promote oversight and accountability. However, the Constitution merely establishes the intelligence services and provides that they are beholden to the Constitution.

The President, who is in charge of intelligence and his Cabinet, is also subject to parliamentary oversight. This is an important oversight mechanism.

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Furthermore, s210 of the Constitution provides for an effective and independent mechanism to receive and investigate complaints about misconduct of intelligence officers (through the Zimbabwe Independent Complaints Commission (ICC)). This remedial mechanism also operates as a deterrent measure. However, challenges arise in that the President appoints members of the Independent Complaints Commission (ICC) after consultation with the Judicial Services Commission (JSC) (in which he is not bound by their reservations). While other members are appointed from the list submitted by the Standing Rules and Orders of Parliament, that list could be compromised because the ruling party members are in the majority of that committee, and they are beholden to the interest of the President who is the head of their ruling party. This undermines the effectiveness of their oversight role.

# SUMMARY OF FINDINGS AND OBSERVATIONS



There are mixed levels of regulation of the intelligence services, their operations and oversight in the SADC region. This is complicated by the history of most ruling parties within the SADC (especially South Africa, Zimbabwe, Namibia, Angola, Mozambique and Tanzania) whose independence was a result of a protracted struggles or wars of liberation, and whose intelligence services now have to operate serving both the interest of the ruling party and the national security interest.

Resultantly, convoluted legislative frameworks that undermine oversight mechanisms abound. In countries such as Lesotho and eSwatini, with mixed regimes (monarchy and elected officials) the intelligence services are either provided for by law (as in Lesotho), or not provided for at all (as in eSwatini (despite the existence of intelligence operations)). There is urgent need for intelligence services to undergo improvement in performance and accountability, as part of the entrenchment of democratic and constitutional standards.

## **Legacy of liberation movements**

The role of intelligence services in the SADC is primarily informed and shaped by the policies of ruling parties, which for most countries serve as the founding government. Where officers who were members of the ruling liberation war movements became politicians in the ruling party, their political roles became largely part of



# SUMMARY OF FINDINGS AND OBSERVATIONS



power retention schemes (as opposed to addressing actual national security considerations). This factor largely compromises judicial, parliamentary and even internal oversight mechanisms in circumstances where the vested political interests of ruling parties are at stake. Disentangling ruling party interests from intelligence operations is a difficult process, as they play a crucial role in electoral political power retention schemes using national resources, often undermining legitimate opposition interests.

This phenomenon is pronounced in Mozambique (through FRELIMO), Angola (through the MPLA), Zimbabwe (through ZANU PF), South Africa (through the ANC), Tanzania (through Chama Chamapinduzi), Botswana, and Malawi (especially during the late President Kamuzu Banda's reign).

In the majority of the countries assessed, there is pronounced public distrust of the intelligence services, given their partisan role in political affairs. As such there is little confidence that oversight mechanisms are effective when applications for interceptions are made through ministers (as opposed to the judiciary). This research recommends an urgent need to restructure and reorient the intelligence services towards being institutions that serve broader national interests in which they genuinely became a 'state within a state' clothed with operational laws that ensure and guarantee trust between stakeholders.

# SUMMARY OF FINDINGS AND OBSERVATIONS



## Presidential powers

In most SADC governments run by liberation movements, there are excessive powers entrusted in the presidency – supported by a constitution with provisions tailored to suit political objectives of an executive presidency that is omnipresent in the political and legal affairs of the country. Often, intelligence services are administered and given operational mandates through the presidency. This is so in Zimbabwe, South Africa, Tanzania, DRC, Lesotho and Mozambique. Overbearing presidential powers often eliminate objective adjudication of interception warrants where the ministers appointed by the President are mandated to carry out the role.

The situation is worse where the intelligence Director General is mandated to make interception applications reports directly to the President, as is the case in Zimbabwe, Lesotho and Tanzania. Placing the intelligence service under the presidency helps explain their crucial and often partisan (and indispensable) role in politics – to investigate, to shape the national discourse through deception, disinformation or propaganda, and to provide critical information that can help bolster the interests of the both the ruling party and the presidency. Despite the 1990s shift to multi-party governance and new democratic constitutions, political power in the SADC region remains executively controlled. Thus, intelligence services become subordinated

# SUMMARY OF FINDINGS AND OBSERVATIONS



structures within the presidency, serving partisan interests at the expense of genuine national security concerns.

## **Parliamentary oversight**

Parliamentary institutions are important mechanisms for accountability against unbridled executive power. Their oversight role should effectively promote and provide accountability mechanisms for intelligence services. In some jurisdictions, such as Angola, Mozambique, DRC, Tanzania, Zimbabwe, Botswana and South Africa, the ruling party has always enjoyed parliamentary majority. In most instances, intelligence committee composition reflects the electoral outcomes of proportional parliamentary representation. In this regard, where the ruling party has majority parliamentary seats, this is reflected in the composition of the intelligence committee (as in Mozambique, Angola, South Africa, Lesotho, Tanzania and Namibia).

The power imbalance within parliamentary committees creates weakened intelligence oversight committees. Therefore, the extent of the effectiveness of parliamentary oversight mechanisms over intelligence services will largely depend on the existing structural relationship between the intelligence service and the executive. Furthermore, the lack of requisite technical skills and budgetary constraints to advance oversight measures in most of the SADC countries, means that executive and intelligence



# SUMMARY OF FINDINGS AND OBSERVATIONS



failures go unchallenged or unpunished (because there skills needed to investigate such shortcomings are unavailable within parliament).

The result is a legislature that is often side-lined in the policy-making process and used only to rubber-stamp intelligence legislation or policies (a pattern that is especially visible within SADC countries). As an example, in Angola there is no room for real debate on national and intelligence issues and the MPLA reportedly restricts discussions.

## **Judicial oversight**

Arguably, judicial oversight mechanisms are potentially the most effective in adjudicating ex parte interception applications. This is so because they are an independent pillar of government (from both the executive and the legislature). Progressive constitutional court judgments within the SADC region (particularly in South Africa and Lesotho) have defined the separation of powers doctrine, and held that ministerial issuance of interception warrants subverts the rule of law, and constitute a threat to the right to privacy.

This is so because ministers are part of the executive, with potentially a vested interests in the adjudication of interception warrants. Prior to the Amabhungane judgment, South Africa had minister appointing the judiciary to adjudicate interception warrants. In Lesotho and Zimbabwe, ministers issue interception warrant applications

# SUMMARY OF FINDINGS AND OBSERVATIONS



lodged by the intelligence services. This is not recommended. However, other jurisdictions have both a dual judiciary and executive role in the issuance of interception warrants. This is unhelpful because, where the executive has vested interests, it could taint the fairness of the whole adjudication process. It is therefore important to leave such oversight roles to the judicial authorities.

## **Internal oversight**

This assessment found that some SADC countries' intelligence services have internal mechanisms to address intelligence officers' misconduct. This is provided through the relevant intelligence legislation, usually through ministerial regulations. In such regulations, often the head of the agency or the minister himself is given powers to set up a tribunal to probe misconduct, with penalties ranging from discharge to demotions.

Jurisdictions such as Zimbabwe, South Africa, Lesotho, Tanzania, Malawi, and Mozambique have a legal framework for addressing public grievances arising from the misconduct of intelligence officers. This is important to avoid a culture of impunity and safeguard intelligence professional standards, thus ensuring that intelligence officers do not abuse their enormous powers.

The significant setback of such internal processes, is that often ministerial regulations are not

# SUMMARY OF FINDINGS AND OBSERVATIONS



published to facilitate an understanding of how internal grievances could be exploited, or allow the public to have some understanding of the administrative scope of the intelligence. This is so in Tanzania, for instance.

In other countries, it is also illegal to publish the identities of intelligence officers. While the intelligence services operate in secrecy, there is a culture of impunity created if the publication of the names of service members indulging in criminal activities (that betray public trust and violate fundamental rights) is prohibited.

Nonetheless, public grievances for misconduct arising from the activities of intelligence service members are entertained in most jurisdictions. Even if this is the case, there must be loud and express legal provisions within the intelligence statutes or regulations that provides for public remedial mechanisms in response to the misconduct of its service members.

## **Ex post facto remedies**

Post facto remedies are largely available through either enacted legislation or ministerial regulations. However, there is a trend of insulating the intelligence service members from civil and criminal liability in some SADC jurisdictions. There are no specific provisions for prior approval or ongoing oversight for intelligence operations, with post facto oversight exercised by the judicial authorities or independent complaints mechanisms.



# SUMMARY OF FINDINGS AND OBSERVATIONS



Parliamentary oversight mechanisms in some countries are not sufficiently resourced, and legislators often lack technical skills to bring accountability to intelligence services. As earlier indicated, this is the case with both Angola and Mozambique.



# CONCLUDING REMARKS



In this assessment, the major task was to determine the nature of the legislation authorising intelligence services operations, the nature of intelligence gathered, oversight mechanisms and its levels, constitutive and operational independence of the intelligence agencies, and the effectiveness of available oversight mechanisms and remedies. Despite the fact that, in some instances, the intelligence agencies operate under the control and direction of the president, laws do exist to establish agencies' operations (with identical regional operational parameters relating to investigating internal and external threats to national security, terrorism, and espionage).

There is clear evidence that intelligence services frequently operate outside of the framework of their national security mandate. This is done to advance delineated political interests. Implied provision of political protection creates a culture of impunity resulting in unchecked, extraordinary interceptions, surveillance, and electoral power retention schemes. This therefore calls for creative litigation techniques, and for the capacitating of both parliament and civil society to create formidable oversight structures. The existing intelligence laws in the SADC require fundamental reforms relating to interception as well as judicial and parliamentary oversight mechanisms. For Southern African intelligence services to be effectively overseen, governments and parliaments must consider revising the many existing laws to incorporate transparency and

# CONCLUDING REMARKS



accountability provisions at the different levels of operations of the intelligence services. These reforms must occur at the institutional, executive, legislative and judicial levels, and must be designed to advance democratic oversight and accountability of intelligence operations.