

# **COVERT ACTION AND ITS CONTEMPORARY STATUS IN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF SOUTH AFRICA**

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## **ABSTRACT**

Covert action was an acceptable alternative to warfare during the Cold War. The end of the Cold War redefined the world as it was previously perceived, with the result that the need for intelligence services and the use of covert action were questioned. New threats also emerged that warranted new approaches to national security management and a reassessment of the use of covert action as a security instrument.

## **1. INTRODUCTION**

The end of the Cold War redefined the world as it was previously perceived. The bipolar world that developed after the Second World War, with well-defined enemies, East against West, capitalism *versus* communism, ceased to exist. Before 11 September 2001 the need for and continued existence of intelligence services came under pressure, due to the perception that the world was a less dangerous place than it had been a decade or two before. The traditional role of intelligence services was under threat and their existence questioned. The ongoing conflict in Iraq, the instability in the Middle East, the proliferation of weapons of mass destruction, as well as indiscriminate terrorist attacks against public targets reconfirmed the need for timely and accurate intelligence. Failures in intelligence, however, resulted in the questioning of the methods

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used by, as well as the effectiveness of traditional intelligence services. These developments, along with the perceived ineffectiveness of conventional military operations, resulted in the re-opening of the debate on the use of covert action to address threats such as international terrorism.

## 2. THE CONCEPT OF COVERT ACTION

Covert action or covert activities are security phrases used mainly by the North Atlantic Treaty Organisation (NATO) member states and in United States (US) literature, studies and official documentation. The former East Bloc countries referred to similar activities as 'active measures'. Literature studies and research also indicate that covert action is placed on par with covert operations and the terms are therefore often used as synonyms. The concept covert action is even more confusing due to a lack of distinction between the concepts 'covert' and 'clandestine'. Many authors, officials and academics make no distinction between the terminology, requirements and characteristics of covert operations and clandestine operations respectively. What is evident from the analysis of these definitions is that the decisive factor in classifying any operation as covert or clandestine, is whether the intention of the sponsor, service or government is to conceal its identity, to keep open the option of 'plausible deniability', and/or to conceal the operation for a limited period of time. Clandestine intelligence operations are usually also equated with the use of secret intelligence collection operations, namely espionage.

In the US covert action is currently defined by the *Intelligence Authorization Act, 1991* as "an activity or activities of the US government to influence political, economic, or military conditions abroad, where it is intended that the (US) role ... will not be apparent or acknowledged publicly".<sup>1)</sup> This definition was intended to clarify references to Central Intelligence Agency (CIA) 'operations' and 'special activities' designated in *Executive Order 12333*, signed by President Reagan in 1981. Furthermore, in order to distinguish between 'intelligence activities' and 'covert action', the Senate Select Committee on Intelligence (SSCI) described intelligence activities as consisting of "the gathering of information" while characterising covert action as "an instrument of foreign policy ...

that goes beyond information gathering".<sup>2)</sup>

During the 1990s the South African intelligence community, in an effort to limit confusion, defined and described 'covert' and 'clandestine' by emphasising the difference between the terms. Covert operations were defined as those operations that are planned and executed in a manner designed to conceal the identity of, or to permit plausible denial by the sponsor.<sup>3)</sup> Covert operations differ from clandestine operations in the sense that emphasis is placed on the concealment of the identity of the sponsor rather than on the concealment of the operation. Clandestine operations were defined as those activities designed to accomplish intelligence (gathering), (support) counter-intelligence and other similar activities sponsored or conducted by government departments or agencies, in such a way as to assure secrecy or concealment.<sup>4)</sup> They differ from covert operations in that emphasis is placed on the concealment of the operation rather than on concealing the identity of the sponsor.

Godson argues that covert action should not only be confined to governments and accordingly defines it "as an attempt by a government or group to influence events in another state or territory without revealing its own involvement".<sup>5)</sup> Lowenthal emphasises that although the (covert) actions are secret, the "most important point is that they are undertaken as one means to advance political goals".<sup>6)</sup> He also emphasises that covert action should not be undertaken on the initiative of intelligence agencies, but because policy-makers have determined that covert action is the best way to achieve the predetermined end. He contends that covert action, both in concept and practice, raises a host of issues of which the legitimacy of such action is a major problem. He states that there is no correct position and that the prevailing opinions can be divided into two schools, namely the idealist and the pragmatists. Whereas the idealist argue that one country cannot intervene in the internal affairs of another country as it violates settled norms of international behaviour, the pragmatists argue that the self-interest of a state occasionally makes covert action necessary and legitimate.<sup>7)</sup>

### **3. COVERT ACTION AS AN ELEMENT OF INTELLIGENCE**

From a US perspective covert action is by default associated with the elements of intelligence. Both Godson and Shulsky deal with covert action as one of the elements of intelligence.<sup>8)</sup> Shulsky argues that to confine the discipline of intelligence to knowledge only, is a too limited approach and that intelligence should include all aspects revolving around the security of the state that are secret in nature.<sup>9)</sup> Covert action, according to him, is one of the four elements that encompass the activity of intelligence. These elements are collection, analysis, covert action and counter-intelligence. Covert action differs conceptually from the other elements of intelligence. Whereas "the others are concerned with seeking and safeguarding knowledge, covert action seeks to influence political events directly. In terms of intensity, covert action can range from persuasion or propaganda to paramilitary action; it has been described as 'an activity midway between diplomacy and war'".<sup>10)</sup>

Arguments are advanced that covert action by nature does not fit the profile of 'pure intelligence' and that paramilitary units such as special forces also have the capacity to conduct or be utilised within covert tradecraft. It can, however, be concluded that covert action's association with intelligence services developed primarily from the need to be protected and to operate in the realm of covertness and secrecy. According to Shulsky, covert action therefore differs conceptually from the other elements (collection, analysis and counter intelligence). Whereas the other elements are concerned with safeguarding knowledge, covert action seeks to influence political events directly and has the characteristic of anonymity, namely that the role of the government is not readily or overtly acknowledged.<sup>11)</sup>

One of the main arguments for a separate covert action ability is the notion that the centralisation of the elements of intelligence, particularly collection, analysis and the implementation of policy through covert action in one organisation, will jeopardise objectivity. Shulsky argues that in reviewing the types of covert action it seems apparent that some aspects thereof, such as secret sup-

port to a friendly government, seem almost identical to diplomacy, whereas other covert activities equate with low-intensity conflict.<sup>12)</sup> However, secretly influencing the perceptions of others to manipulate them to take action to one's benefit or in one's interest, could be seen as similar to the way that counter-intelligence is regarded as an element of intelligence purely by the responsibility of protecting the secrets of a nation. Kerr, in reaction to Godson, argues that some of the activities currently categorised as covert action should be dealt with as "normal business of foreign policy".<sup>13)</sup>

Shulsky also emphasises that "(t)he question of whether covert action is a part of intelligence is intimately tied up with the question of what intelligence is",<sup>14)</sup> thereby suggesting that covert action is as part of intelligence as counter-intelligence, as both focus on the protection of national interests. The difference between pure intelligence activities and covert action is that in covert action the intelligence community is asked to help execute foreign policy.<sup>15)</sup> According to Lowenthal covert action is not just an alternative means of achieving a political objective, but also a way for the intelligence community to demonstrate its capabilities and value. He concludes that "covert action makes the policy and intelligence communities closer collaborators, as the separation between them diminishes".<sup>16)</sup> This results in a situation where the intelligence community will bear a greater burden from a political perspective for unsuccessful covert action than for example unsuccessful intelligence analysis.

The main difference between intelligence activities and covert action is "that the goal of covert action is not knowledge but is instead the direct furthering of national foreign policy objectives".<sup>17)</sup> In some cases it is difficult to distinguish between the nature of activities attributed to covert action or to pure counter-intelligence, thus confirming the existence of a grey area that influences the allocation of mandates and areas of responsibility. The distinction should be in the goal sought, namely political influence, rather than on the secrecy or openness of the means used. One of the main challenges for covert action is where a government uses irregular forces in a military conflict as secrecy cannot be maintained over a long period. A clear definition of what covert action entails, remains problematic and a challenge.<sup>18)</sup>

## 4. ADVANTAGES AND DISADVANTAGES OF COVERT ACTION

One of the main benefits of covert action is the freedom of action allowed for when acting covertly and in accordance with the notion of secrecy. Another is the advantage contained in the principle of plausible deniability. Covert action provides the opportunity to conduct firm silent diplomacy, influencing situations to achieve preferred circumstances and serving own interests with the minimum of risk. More problematic, however, is the exploitation of the notion of secrecy where covert action is directed internally against opponents of the state.

Covert action provides the opportunity to reinforce overt influencing activities or to increase prospects for their success. Hulnick emphasises that to be successful, covert action should form part of some larger scheme of foreign policy.<sup>19)</sup> Covert action provides the opportunity for a government to become involved in the affairs of a target state where overt commitment could be premature because of the internal situation in the target country or specific interest of the target country. Covert action in this situation provides the option of silent withdrawal or disengagement from the situation when it is evident that a continuation of involvement will not be in the interest of the country.

One of the main disadvantages of covert action is that, owing to its relative success in the past, it was overused and misused. According to Hilsman, covert action has in particular been overused as an instrument of foreign policy.<sup>20)</sup> The 'dirty tricks' associated with covert action are contentious, even for intelligence operatives working in the security environment, in that it creates unnecessary moral dilemmas. The danger exists that political leaders could use covert action as a substitute for well thought-out policy, and as a half-measure when they are unwilling to come to a decision to commit security forces to obtain an end-result or to force an issue. Covert action could enable heads of state or government and security advisors to feel that something is being done, even when it is not enough to achieve real results. The danger therefore exists that there is a high degree of probability that covert action can become what it is not, namely an alternative to foreign policy. Another risk is

that agents could lose control over covert activities and that these could escalate into real threats. Furthermore, governments could believe their own disinformation and develop strategies accordingly. Possibly the most obvious risk of covert action is the potential embarrassment of, or prospects of retaliation against perpetrators of covert action in the case of compromise or disclosure. The enforcement of the principle of 'plausible deniability' has, however, been exploited to cover up poor decisions and controversial activities.

## **5. COVERT ACTION IN THE UNITED STATES OF AMERICA**

After the Second World War covert action became an integral part of the national security mechanism and policy of the US. Based on a perceived threat of communism, the National Security Council (NSC) of the US authorised covert action programmes to contain the spread of communism in the non-communist world. The spill-over effects of the Cold War impacted on the post-Cold War era and laid the foundation for the continuation of covert action and a regulatory framework. More specifically, changes in the strategic environment and the domination of the US as a world power pushed the boundaries and created new challenges for the uses of covert action in the new millennium.

### **5.1 The Cold War era**

The initial success of covert action during the Cold War era ensured support from US officials who were initially sceptical about its uses. With the Cold War well under way, the US public also supported covert action as a measure to counter the communist threat. As a result, according to Isenberg, the success of covert action in the first one and a half decades of the Cold War gave the CIA a 'can do' reputation and president-after-president turned to the CIA precisely because of its perceived ability to accomplish tasks and projects successfully.<sup>21)</sup> Even the occasional negative exposure of such actions did not lead to public or congressional repudiation.

During this period covert action included the support of governments threatened by communist takeovers; strengthening non-

communist political and military forces; countering Soviet propaganda; weakening communist regimes by supporting resistance movements inside their territory; and weakening the loyalty of the targeted country's citizens through directed propaganda by means of radio broadcasts, leaflets and Western literature.<sup>22)</sup> From an East Bloc perspective, similar activities were launched to promote the interests of the socialist community.

Covert action was mandated by the *National Security Act, 1947* which established the CIA, and authorised its head, the Director of Central Intelligence (DCI), "to perform such other functions and duties related to intelligence affecting the national security as the President or the National Security Council may direct".<sup>23)</sup> In 1948 a new NSC directive — *NSC 10/2* — was mandated, which directed the CIA to conduct 'covert' rather than mere 'psychological' operations, and which defined covert activities as all activities "which are conducted or sponsored by this Government against hostile foreign states or groups or in support of friendly foreign states or groups but which are also so planned and executed that any US Government responsibility for them is not evident to unauthorised persons and that if uncovered the US Government can plausibly disclaim any responsibility for them".<sup>24)</sup>

President Truman also established the Office of Policy Coordination in the CIA to assume responsibility for, and manage covert action. President Eisenhower, by issuing a series of NSC directives, limited the scope of the CIA's mandate. For example, *NSC 5412/1* promulgated in 1954 reaffirmed the CIA's responsibility for conducting covert action abroad.<sup>25)</sup> The DCI was made responsible for co-ordination with the State and Defense Departments to ensure that covert actions were planned and conducted in a manner consistent with US foreign and military policies; and an Operations Coordinating Board was introduced to co-ordinate support for covert operations. *NSC 5412/2*, issued in 1955, appointed the Planning Coordination Group, the 'Special Group', as the executive body to review and approve covert action initiated by the CIA.<sup>26)</sup>

The Nixon, Ford, Carter and Reagan eras served as a transition between the Cold War and post-Cold War eras. The Nixon administration was tarnished by the Watergate scandal and this forced the US government to review control measures relating to the intelligence community. Ford,<sup>27)</sup> in an effort to obtain control



over covert action, promulgated *Executive Order [11905]* which mandated the CIA to "(c)arry out such other special activities in support of national foreign policy objectives as may be directed by the President or the National Security Council and which are within the limits of applicable law".<sup>28)</sup> The investigations into covert action by the US government in the 1970s directly resulted in Ford's Presidential Executive Order on intelligence that placed an explicit ban on "engage(ing) in, or conspire(ing) to engage in, political assassination".<sup>29)</sup> This provision was retained by the Carter, Reagan, Bush and Clinton administrations.

## **5.2. The post-Cold War era**

President Clinton as well as President George Bush (junior) adopted similar approaches to covert action in the post-Cold War era as those introduced by Ford, Reagan and Bush (senior). The essence of Reagan's Executive Orders was also included in the Orders of Presidents George Bush (senior) and Clinton.<sup>30)</sup>

### **5.2.1 Assassination**

Bin Laden's orchestrated attacks on US embassies in Qatar and Ethiopia in the 1990s provided ample motivation and reason for the CIA to increase special covert operations against Bin Laden and to change initial intentions from a "capture operation" to allow "tribals to be paid whether Bin Laden was captured or killed".<sup>31)</sup> Clinton approved a directive in December 1998, authorising the elimination of Bin Laden through covert action. The restriction on assassination, however, came under further pressure after the 9/11 attacks. International terrorism came to the fore as a major threat of the new millennium, but traditional methods could not deal with the threat. Hence the US Justice Department adopted the position "that under the law of armed conflict, killing a person who posed an imminent threat to the United States would be an act of self-defense, not assassination".<sup>32)</sup>

The events of 11 September 2001 therefore changed American perceptions regarding the need for intelligence and the emphasis on homeland security forever. Terrorist attacks exposed the vulnerabilities of the US and its interests, not only as previously

experienced in foreign countries but also in the US itself. As a result, national security priorities and measures were investigated and mandates redefined. What previously had been unacceptable became acceptable; idealism was replaced by pragmatism; and previous restrictions were pushed to new boundaries and suggested as workable solutions. As previously indicted, the terrorist attacks also had a direct impact on the perception of the legitimacy of assassinations as an option in covert action. Proponents of this position argued that assassinations might be the best method in some instances and depending on the nature of the target, morally acceptable. However, according to Lowenthal, the controversy over covert action — including the option of assassination after the September 2001 attacks — was avoided as Osama bin Laden and other terrorists were seen to be legitimate combatant targets.<sup>33)</sup> The US was now at war against terrorism and could legally target terrorist infrastructures, also considering that Bin Laden's main infrastructure was 'human'. Hence the debate over the assassination of terrorist leaders and terrorists became irrelevant as the US declared itself to be at war with terrorists, making these individuals legitimate military targets. Nonetheless, Lowenthal concludes that assassinations continue to be a 'sloppy tool' that provides no guarantee of solving the problem, and one that also raises the risk of reprisals.<sup>34)</sup>

### **5.2.2 *Mandate, oversight and control***

The required mandate, oversight and control measures regarding intelligence are directed by the requirements of the national strategy where, according to Negroponte, the US Director of National Intelligence, realism should prevail. He states that "(t)his strategy therefore accepts risks as intelligence's natural and permanent field of action and is based on the preposition that to preserve our security in a dangerous century, vigilance is not enough. US national intelligence must do more".<sup>35)</sup> According to him, intelligence should be used to aid diplomacy, influence potential adversaries prior to a crisis, help make war an instrument of last resort, and ensure victory when conflict is unavoidable.<sup>36)</sup>

This strategy not only acknowledges the existence of the different elements of intelligence, but clearly emphasises political

and legislative control over actions as evident in the mission statement, namely that the intelligence community should "(c)onduct the US government's national intelligence programme and special activities as directed by the President" and "(p)erform our duties under law in a manner that respects the civil liberties and privacy of all Americans".<sup>37)</sup>

An important control measure over the approval of intelligence activities is embedded in the responsibility of the President to approve the *Intelligence Authorisation Act* for a particular fiscal year. The importance of these *Intelligence Authorisation Acts* is that they mandate the expenditure of all the intelligence services' programmes, developments, projects and activities for particular financial years; promulgate changes to the *National Security Intelligence Act, 1947* and other security/intelligence-related laws; and indicate specific strategic reports that the intelligence community must submit to Congress.<sup>38)</sup>

The Commission on the Roles and Capabilities of the United States Intelligence Community concluded in 1995 that the US needs to maintain a strong intelligence capability, considering the contribution the intelligence community had made in the past and continues to make to the nation's security by informing its diplomacy and bolstering its defences.<sup>39)</sup> The Commission also emphasised that a capability to conduct covert action should be maintained in order to provide the President with an option short of military action when diplomacy alone cannot achieve government objectives. In justification, supporters of the notion of a continued covert action capability cited the need for action against potential targets; the need to disrupt the activities of terrorist groups; the need to hamper the efforts of rogue states to develop weapons of mass destruction; and the need to prevent narcotic traffickers from manufacturing drugs for shipment to the US.<sup>40)</sup>

That the US government is continuously revisiting the control and oversight of intelligence and intelligence-related activities is evident from the promulgation of the *Intelligence Authorisation Act, FY 2006*.<sup>41)</sup> This Act makes provision for the appointment of an Inspector-General of the Intelligence Community by the Director National Intelligence (DNI) with the aim of improving the operations and the effectiveness of the intelligence community; and with the aim of identifying problems and deficiencies within the intelligence

community. Rather than denying covert action as an option in national security management, as apparently the case in South Africa, the point is to ensure proper control over and oversight of covert actions by introducing new legislation and addressing loopholes for exploitation.

## **6. COVERT ACTION IN SOUTH AFRICA**

Before 1992 the South African government was often accused of 'dirty tricks' and underhand operations in the advancement of its foreign and internal policy, as well as in combating 'Soviet-supported threats' in Southern Africa. Although usually denied by politicians and government officials in the security community, it is evident that covert action and related activities in South Africa were mainly in support of a strategy to combat a perceived 'total onslaught' against the country. Owing to government policies and perceived threats, whether real or imagined, South Africa's use of covert action went through several phases. In some cases it was aimed at legitimate targets but in many instances, according to world opinion, it transcended the acceptable limits of covert action and legitimate targets. It was especially actions such as assassinations and the targeting of South African citizens that caused most international and national furore.

### **6.1. The pre-1994 era**

Prior to 1994, in an effort to counter the perceived onslaught against the country, the South African government instituted measures aimed at curtailing the conflict potential and at creating an environment conducive to evolutionary rather than revolutionary change. The intelligence community deemed the threat against South Africa to be multi-dimensional in nature and accordingly identified the need for the government to develop an integrated strategy to combat this threat with all the means at its disposal.<sup>42)</sup>

As counter-measure against the total onslaught against South Africa, a national security strategy was formulated in response. The contention was that a total onslaught could only be countered with a total strategy. During the period from 1961 to 1994, the security establishment in South Africa included the

Department of Defence; the various intelligence services, namely the National Intelligence Service (formerly known as the Bureau of State Security — BOSS), Military Intelligence, and the intelligence staffs of the Army (GS2), Air Force (AS2), Navy (NS2 and Surgeon General (MS2); and the special forces of the South African Defence Force (SADF) and the Security Branch of the Police. The Departments of Foreign Affairs and Information also played an important role as exponents of South Africa's security policy, especially during the 1960s and 1970s. Mandates and responsibilities were mainly regulated through the *Security Intelligence and State Security Act, 1972* (Act No 64 of 1972).

What is evident from an analysis of security related acts such as the *Security Intelligence and State Security Act*, are the obvious shortcomings in defining key concepts such as intelligence, counter-intelligence, clandestine collection, foreign intelligence, departmental intelligence and covert action, as well as shortcomings concerning clear limitations as to what is not allowed and/or restricted in terms of the Act. Mandates were broadly defined and no reference was made to the conduct of covert action or covert operations.

Research papers, legislation and policy papers covering the period from 1960 to 1994 also show that no clear distinction was made between security operations that respectively represented covert operations or clandestine collection. It was evident that in many instances confusion existed in distinguishing between clandestine and covert operations. It was also evident that in many cases operations originating as clandestine projects — where the sponsor was directly or indirectly implicated but where the what, when, how and where of the operation were concealed — changed into covert action where the emphasis was on the protection of the sponsor. Due to a changing regional and international political environment, this was mainly done to conceal South African government involvement. Examples of this changed environment that called for a new approach were the support of the Mozambique National Resistance (RENAMO) and the National Union for the Total Liberation of Angola (UNITA). Because of internal and external political changes, South Africa's continued support of these organisations was denied by the government.

It was evident that the covert operations of the South African

security services and some civilian departments were mainly conducted to influence international opinion in order to gain support for the policy of 'separate development'; to promote South African interests internationally; to limit the effectiveness of international boycotts and sanctions; to increase South Africa's influence as a regional power; to counter the threat of international communism and communist expansionism in Southern Africa; to counter the terrorist threat against South Africa; to create internal stability; and to ensure the survival of the government by strengthening the power bases of the state in the political, economic, military and social spheres, and by creating an environment conducive to evolutionary development.

## **6.2. The post-1994 era**

The approach and attitude of the post-*apartheid* South African government were mainly guided by the perceptions and experiences inculcated by the actions and activities of the South African security forces and intelligence community before 1994. Negative perceptions of covert action in the South African environment were reinforced by evidence presented to the South African Truth and Reconciliation Commission (TRC); by the findings reflected in its report on atrocities committed by the security forces, government institutions, or a 'Third Force' under the previous '*apartheid* dispensation'; and by the secretiveness involved in the conduct of intelligence. In addition, from a South African perspective, covert action was mainly perceived to be an activity conducted against citizens of the state. These negative perceptions played an important role in the development of a national security policy and a regulatory framework in post-*apartheid* South Africa. This is amply illustrated by the comment of Kasrils, the South African Minister for Intelligence Services, that "(w)e in South Africa know only too painfully what happens when the secret services operate without proper control and oversight, and become a law unto themselves".<sup>43)</sup>

The threat perception and reason for existence of the intelligence services were voiced by Kasrils in his 2004/2005 Budget Vote speech when he stated that the challenges of today's world, such as the impact of globalisation, development in communications and technology, pressure on resources and the deepening of

ethnic, religious and ideological differences, "affect everyone, especially a new and diverse nation like South Africa, with a range of domestic challenges and international responsibilities".<sup>44)</sup> He identified terrorism, organised crime, trafficking in people and drugs, the proliferation of weapons of mass destruction technology, and money laundering as the new global threats and stated that "(w)e need to develop our intelligence and security capability, to foresee the imminent threats, so we can more effectively deal with them".<sup>45)</sup>

President Mbeki, in an address at the Intelligence Services' tenth anniversary awards day in November 2005, emphasised several key issues that reflected the government's view on the conduct of intelligence.<sup>46)</sup> The most important aspects are:

- That accountability is an important and critical part of intelligence work.
- That mechanisms must be created that would avoid a repetition of the unacceptable practises of the past.
- That the lack of proper checks and balances could tempt the intelligence services to use notions of secrecy as a cloak to hide abuses.
- That it is of the utmost importance that intelligence services should perform their tasks in an impartial and professional manner, in accordance with the constitutional prescripts and the laws of the country.
- That public accountability of the intelligence services is fundamental to the manner in which they operate as instruments of the democratic order.
- That the regulatory framework and the institutions established to ensure good conduct and accountability be respected (Mbeki specifically emphasised the roles of the Minister of Intelligence, the Parliamentary Oversight Committee, the Inspector-General of Intelligence, and the Judge delegated the responsibility to authorise electronic intercepts).
- That all the activities of the intelligence community should be conducted in accordance with the Constitution, the Bill of Rights and the democratic ethos of our society.
- That to strengthen the rule of law, it is essential to educate the people thereby creating an understanding of and respect for the importance of the rule of law.

Mbeki emphasised that the intelligence community must be non-partisan and may not carry out operations that are intended to undermine, promote or influence any political party, faction or organisation at the expense of another. He also stated "that any action taken by intelligence services designed deliberately to interfere with the normal political processes of parties or organisations that are engaged in lawful activities are expressly forbidden".<sup>47)</sup> Intelligence services are expected to uphold the important values of integrity, objectivity and credibility, and to ensure the effective management of their activities. He furthermore acknowledged that the "need for professional, accountable and effective intelligence services is all the more important in today's context, given the difficult security challenges that are associated with an ever-changing and unpredictable global environment, the growth of trans-national crime, international terrorism" and that "this global environment constantly challenges us to improve the competence and quality of our services and operatives".<sup>48)</sup>

### **6.2.1 Regulatory framework**

The regulatory framework, which is mainly guided by the *Constitution of the Republic of South Africa*, *White Papers* and several acts relating to the conduct of intelligence, determines the mandates, tasks, roles and functions of the intelligence community, and provides control and oversight measures for intelligence-related activities. This regulatory framework also provides definitions and principles of intelligence, as well as codes of conduct for members of the security community.

#### **(a) *The Constitution of the Republic of South Africa***

In relation to the intelligence services, the *Constitution of the Republic of South Africa, 1996* (Act No 108 of 1996) stipulates in Chapter 11, Clause 210 that "(n)ational legislation must regulate the objects, powers and functions of the intelligence services, including any intelligence division of the defence force or police service, and must provide for; (a) the coordination of all intelligence services; and (b) civilian monitoring of the activities of those services by an inspector, appointed by the President, as head of the national



executive, and approved by a resolution adopted by the National Assembly with a supporting vote of at least two thirds of its members".

(b) *The White Paper on Intelligence*

The *White Paper on Intelligence, 1995* is one of the main documents defining the mandates, tasks, functions and activities of the South African intelligence community. As such it provides the basis for the formulation of an intelligence strategy for the South African intelligence community, bearing in mind the identified or potential challenges faced by the South African government in the management of security. It also aims to clarify the South African government's position on the conduct of covert action as an element of security management.

In explaining the meaning of intelligence, the *White Paper* states that there are various forms of intelligence, including political intelligence, economic intelligence, technological and scientific intelligence, military intelligence, criminal intelligence and counter-intelligence. Although counter-intelligence is emphasised as an element, no attempt is made to explain or totally prohibit covert action as an element of intelligence.

In the formulation of the mission, purpose and functions of national intelligence the *White Paper* states that "(i)ntelligence services are required to act in the interest of the country as a whole. In this respect intelligence should enhance national security, protect and promote the interests of the state and the well-being of its citizens" and "(n)ational intelligence functions shall include those of counter-intelligence, foreign intelligence (which includes special activities as defined by an Act of Parliament), and domestic intelligence". The reference to 'special activities', although not currently defined in an act of Parliament, as well as the reference to 'the promotion of the interests of the state', could be interpreted as a subtle reference to or at least the creation of an opportunity for the conduct of covert action and that covert action, although not specifically defined, is not negated as an option in security management.

With regard to covert action the *White Paper on Intelligence* states that "(m)asures designed to deliberately interfere with the normal political processes in other countries and with the internal

workings of parties and organisations engaged in lawful activity within South Africa, must be strictly forbidden". The *White Paper*, in defining concepts such as 'national strategic intelligence', 'counter-intelligence', 'national security intelligence', 'foreign intelligence' and 'domestic intelligence', however, fails to define covert action.

As part of the objective of political impartiality, the *White Paper* states that "(n)o intelligence or security service/organisation shall be allowed to carry out any operations or activities that are intended to undermine, promote or influence any South African political party or organisation by means of any acts (for example 'active measures' or 'covert action') or by means of disinformation". Again concepts such as 'active measures' or 'covert action' are not defined and this creates opportunities for personal interpretation or the assumption that the domestic usage is in accordance with international concepts.

The lack of a more specific description of covert action has the advantage that it supports the notion of plausible deniability, as covert action is not specifically sanctioned in legislation or could therefore by implication be interpreted as a viable option without specific restrictive guidelines. The latter, in particular, is a great disadvantage, as it creates opportunities for misinterpretation, exploitation and inadequate control and monitoring measures.

### (c) *Intelligence-related legislation*

The related legislation includes, amongst others, the *Intelligence Services Act, 1994* (Act No 38 of 1994); the *National Strategic Intelligence Act, 1994* (Act No 39 of 1994) as amended; and the *Intelligence Services Control Act, 1994* (Act No 40 of 1994) as amended. These acts define the management, mandate and responsibilities of the intelligence community, enabling it to address the requirements stipulated by the Constitution, the *White Paper on Intelligence, 1995*, the *White Paper on Defence, 1996*, the *Reconstruction and Development Programme, 1994* and the general guiding principles for the conduct of intelligence. The most obvious flaw in the intelligence-related legislation is the fact that the legislation makes no reference to covert action.

### 6.2.2 Control and oversight

As far as control and oversight are concerned, the intelligence services are regulated not only through legislation, but also through statutory institutions such as the Joint Standing Committee on Intelligence (JSCI) as well as the Inspector-General of Intelligence. The *Bill of Rights*, as embedded in the Constitution; the *Criminal Procedure Second Amendment Act, 1996* (Act No 85 of 1996) that specifically regulates the setting of traps and engagement in undercover operations; as well as the *Regulation of Interception of Communication-related Information Act, 2002* (Act No 70 of 2002) that, amongst others, regulates the interception and monitoring of communication and postal services, and prohibits the manufacturing, assembling, possessing, selling, purchasing or advertising of certain equipment, are further measures to regulate the conduct of the services. The services are thus regulated through parliamentary oversight (the JSCI, the Inspector-General, the Auditor-General, the Public Protector, and the Human Rights Commission); executive oversight (the President, Cabinet, Cabinet committees, National Security Council — NSC, Minister on Intelligence, National Intelligence Co-ordinating Committee — NICOC, and Office of the Presidency); and judicial oversight (courts, and judges of the High Court).

Although the *Promotion of Access to Information Act, 2000* (Act No 2 of 2000) aims at regulating transparency in terms of access to information, it also provides for the mandatory protection of records that could have an impact on the defence, security and international relations of South Africa. However, to promote transparency the Act allows for the release of certain official information if it came into existence more than 20 years before the request. The effectiveness of the Act was tested during the Hefer Commission Inquiry to investigate claims that a previous National Director of Public Prosecution was an *apartheid* era spy. *Subpoenas* against the intelligence services were withdrawn on the basis that the documents required related to the security interests of the country and were protected from disclosure in terms of the law. This, however, raised the question in the media whether South Africa's intelligence agencies are above the law.<sup>49)</sup>

Section 2 of the *Committee of Members of Parliament on and*

*Inspectors-General of Intelligence Act, 1995* (Act No 31 of 1995) established the JSCI, which should perform oversight functions in relation to the intelligence and counter-intelligence functions of the services and report to parliament. Control in terms of security-related aspects that could compromise intelligence operations as sanctioned by parliament, is regulated by the stipulation in Article 6 (1) that "(n)othing shall be included in any report of the Committee, the inclusion of which will be more harmful to the national security than its exclusion will be to the national interest".

The *Ad Hoc* Committee on Intelligence Legislation of the National Assembly, in a memorandum on the objects of the *Intelligence Services Control Amendment Act, 2002* (Act No 66 of 2002) stated that the *Intelligence Services Control Act, 1994* proved to be inadequate with regard to the functioning of the office of the Inspector-General. It did not indicate clear lines of accountability and the functions of the Inspector-General were vague, thus pointing to weaknesses and gaps in the legislation. One of the aspects listed in the Act is that it seeks to re-regulate the functions of the Inspector-General so that the Inspector-General will only monitor the intelligence and counter-intelligence functions of the services. The *Intelligence Services Control Amendment Act, 2002* in the substitution of Section 7 of the *Intelligence Services Control Act, 1994* stated that the Inspector-General is responsible, for example, for monitoring compliance by the service with the Constitution, applicable laws and relevant policies on intelligence and counter-intelligence; and for reviewing the intelligence and counter-intelligence activities. The Act also compels the heads/chiefs of services to submit reports on the activities of services during a specified period to the relevant minister and the Inspector-General; as well as to report any unlawful intelligence activity or significant intelligence failure of any service and measures instituted or intended to rectify the matter.

In order to address shortcomings and weaknesses in intelligence-related legislation, several amendment acts and bills were promulgated, related to the conduct of intelligence and the functioning of the intelligence community. This included the *Intelligence Services Control Amendment Act, 1999* (Act No 42 of 1999), the *National Strategic Intelligence Amendment Act, 2002* (Act No 67 of 2002), the *Intelligence Services Act, 2002* (Act No

65 of 2002), and the *General Intelligence Laws Amendment Act, 2003* (Bill B47B). Shortcomings such as clarifications of responsibilities, control, terminology and definitions were addressed but an obvious issue, namely clarification of covert action, was not addressed.

The need for adequate control measures was emphasised by the Minister of Intelligence after the National Intelligence Agency (NIA) Director-General, Billy Masetlha, and two other senior officials were suspended in October 2005 pending a continuing probe into claims of 'serious misconduct'. This allegedly related to the unauthorised surveillance of African National Congress (ANC) member and businessman, Saki Macozoma, as well as an investigation into bogus and defamatory e-mails supposedly circulated by NIA officials. After a report by the Inspector-General of Intelligence that the surveillance of Macozoma by NIA contravenes the NIA's operational policy, Kasrils indicated that he intends reviewing the legislation, internal regulations and operating procedures that currently govern the intelligence services to address shortcomings and ambiguities. He also stated that a civic education programme would be introduced aimed at entrenching a culture of political non-partisanship and constitutionalism throughout the intelligence services.<sup>50)</sup>

The Inspector-General for Intelligence raised his concern about the risk of the abuse of the intelligence apparatus by stating the following.<sup>51)</sup>

Although Project Avani was conceptually considered to be within the legal mandate of the NIA, the exclusion of the Minister for Intelligence Services in its conceptualisation, planning and execution resulted in a void in the requisite executive supervision and oversight of an extremely sensitive project. Furthermore, given the selective Project Avani clientele of the Director-General and the potential for crossing the line between intelligence collection in the interest of national security and intelligence collection camouflaged as counter-revolutionary threats (or for that matter threats against particular political interests), the risk of undermining constitutionally protected party political freedoms and of descending into the abyss of abuse of state resources and compromise of intelligence mandate integrity with a project of this nature calls into question the activity of Political Intelligence gathering that underpinned Project Avani.

In a young democracy such as ours, the questions it raises are whether it should be practiced at all, and if so, what the parameters should be that define and encompass national security interests.

The Inspector-General, amongst other things, recommended "the need for the appropriate superintendence and oversight of the conceptualisation, planning and execution of Political Intelligence Projects and to establish the defining parameters and a regulatory framework for its practice".<sup>52)</sup> This supports the view that intelligence legislation should be revisited in order to introduce proper definitions, mandates, restrictions and oversight procedures in line with the legislation, executive orders and oversight processes applicable in the US.

## **7. COMPARISON OF THE UNITED STATES AND SOUTH AFRICA**

A comparison of the US and South Africa during the pre-1994 period indicates that both states used covert action as an option to resolve security issues. It is also evident that both countries misused covert action at some stage and that a lack of proper control measures was evident in problems that occurred. The main differences between the US and South Africa were that covert action was institutionalised as an option in national security in the US, while South Africa did not have a clear policy regulating covert action; that the US, in contrast to South Africa, did not deny that the government was using covert action as part of foreign policy; and that in contrast to South Africa, covert action in the US was not directed against US citizens. A clear definition as well as interpretation of covert action existed in the US, while no clear definition or interpretation of covert action existed in South Africa. Covert action was also actively researched and studied in the US, while this was not the case in South Africa. Locally the topic was mainly attended to as part of the learning programmes in the training institutions of the intelligence services.

Changes in the political environment and the international security domain had a significant impact on the post-Cold War approaches to covert action. The US has applied the lessons learnt

during the Cold War era and introduced adequate control measures to authorise and monitor covert action. The experiences of the pre-1994 era in South Africa apparently motivated the South African government to adopt a position of denial or limited references to covert action. This can be interpreted as either silent consent of the conduct of covert action (with limited regulatory measures in place), or the absolute negation of an option in national security policy.

In summary, it can be stated that it is evident from the comparison of the US and South Africa that both countries did conduct covert action in the past and that there is a continuous need for covert action in future; that both countries experienced successes and failures in covert operations and will probably experience more successes and failures in future; and that owing to a lack of proper control measures covert action was abused by operatives and politicians of both countries but that in contrast with the US, South Africa did not promulgate security-related legislation with specific mandates, responsibilities and control measures to ensure political control and oversight of covert action. The US also emphatically stated, in contrast to the South African government, that covert action is an acceptable option in national security policy and will be conducted in support of foreign policy.

## **8. THE FUTURE USE OF COVERT ACTION**

The future use of covert action will depend on the circumstances for utilisation, the targets involved and the effectiveness of control and oversight measures implemented. An abnormal society with ill-defined enemies in an irregular war situation, will have to opt for irregular measures to counter the threat. One of the main challenges in the conduct of covert action is the lack of a universally accepted definition of the concept.

The future use of covert action in South Africa will depend on finding a balance between secrecy and transparency; on obtaining the trust of the South African electorate; on convincing the public that covert action will be used for a just cause; on acknowledging that it is neither the first nor the last option but part of an integrated effort to promote national security and to support foreign policy; on acknowledging that the conductors of covert action will have to be accountable for their actions; and acknowledging that proper control

and oversight measures mandated in an approved regulatory framework will have to be implemented. The circumstances under which the responsible state organ will opt for covert action and the conditions and purposes must be known, especially to own citizens. Citizens must, however, be assured that it will not be used against them to promote political interests; that it will be in line with acceptable norms and values; that it will be regulated by law; that effective control processes are in place; that covert action will only be authorised by the highest authority; and that it corresponds with stated national interests. It is thus recommended that South African legislation be adapted in accordance with the US approach, in order to formalise the mandates, responsibilities and oversight and control measures, as well as the conditions under which covert action will be conducted.

Barry argues that it is possible to establish criteria for making morally guided decisions about intelligence operations and suggests the use of criteria such as a just cause; just intention; proper authority; a last resort; the probability of success; proportionality; and discrimination and control.<sup>53)</sup> Lowenthal is of the opinion that although these criteria could pose a compelling challenge for political decision-makers when approving covert operations, the same criteria could be used to rationalise a decision to use covert operations once the decision has been made.<sup>54)</sup> Therefore the main factors to consider in whether or not to opt for covert action are the risk of exposure and the risk of failure. Covert action should also be a long-term project, thus providing ample time for regulatory approval processes.<sup>55)</sup>

## **9. CONCLUSION**

The dilemma for politicians and intelligence functionaries are accurately summarised by Lowenthal who states that "(i)ntelligence is not without its ethical and moral dilemmas, some of which can be excruciating. That these intelligence dilemmas exist also means that policymakers have choices to make that can have ethical and moral dimensions. Intelligence, perhaps more than any other government activity, operates on the edge of acceptable morality, occasionally dealing in techniques that would not be acceptable elsewhere in government or in private life. For most citizens, the



trade-off between ethics and increased security is acceptable, provided that the Intelligence Community operates with rules, oversight, and accountability".<sup>56)</sup>

In a democratic dispensation the following are imperative to the intelligence domain, namely proper legislation and a regulatory framework; adequate control and oversight; and lastly but not least, proper accountability. As long as decision-makers base their decisions on what is acceptable conduct, covert action will remain controversial as an option in security management. A conflict of opinion will remain between idealism and realism. The challenge will be to reach a pragmatic agreement that covert action has a role to play, but with due recognition of the requirement that a clear indication exists of what is acceptable and what is not and that proper control is exercised over covert action.

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