Intelligence and Security Legislation for Security Sector Reform

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Executive Summary

This study was undertaken on behalf of the United Kingdom's Security Sector Development Advisory Team. Its aim is to act as a basis for discussion and to provide an opportunity to learn from the successes and failures of intelligence and security legislation in various countries. Drawing on the body of academic work in this field and the knowledge of RAND staff, this report: provides a definition of intelligence; describes in detail how intelligence is produced; examines the role of intelligence in security sector reform; highlights the importance of control and accountability in intelligence structures; examines how six countries have developed and implemented intelligence legislation and associated reforms; and, finally, draws out a number of key lessons to be considered in any future security sector reform activity encompassing intelligence structures.

Intelligence in security sector reform

As the security sector reform (SSR) agenda has developed over the last decade, intelligence has been the most oft-overlooked element. Increasingly, however, intelligence is being included as a key element of SSR. Intelligence can both support SSR and be the target of reform activities. The most crucial task facing countries embarking on SSR processes is to build a nationally owned and led vision of security. This can be achieved through a national security review to elaborate an overarching policy on national security. Such a review allows a government to distinguish between legitimate and illegitimate security activity, and helps choose between competing claims for resources.

Intelligence services can make a significant contribution to this process through the provision of accurate intelligence on the range of risks and threats faced by the state. In addition to assisting the process of SSR, intelligence agencies and services themselves frequently require reform. There are numerous examples where the intelligence services of the state have been involved in serious human rights abuses and have colluded in maintaining a corrupt or tyrannical regime. Thus, there may be a requirement to evolve the intelligence agencies and structures of a transitional state through the SSR process, potentially through the development and implementation of reforming legislation.

Defining intelligence

Intelligence is a special kind of knowledge, a specialised subset of information that has been put through a systematic analytical process in order to support a state's decision and policy makers. It exists because some states or actors seek to hide information from other states or actors, who in turn seek to discover hidden information by secret or covert means.

Within a security sector reform context, intelligence has also been defined as the 'production of unbiased information about threats to the national vision'. Intelligence can be three things: a

process of gathering and analysing information; an **organisation** which undertakes the process; and a refined **product** that is delivered to policy makers.

Intelligence as a process

Intelligence is a process by which data is refined into a usable form for decision-makers. It is also a structure of organisations that collect and process information. It is the relationship between processes and structures that determines the successful outcome of the intelligence activity.

Intelligence as a structure

There are several considerations that influence the structures of intelligence services. Some of these considerations include:

- The roles and mandates adopted by one or more services (i.e. are there different agencies for both the domestic and foreign role?) – as well as understanding overlaps between intelligence agencies and other players (such as law enforcement) in the security community
- The shape of any central analysis and/or assessments mechanism to process collected intelligence
- The need to ensure central control and co-ordination of, and accountability for, the intelligence community
- The need to ensure public oversight of the intelligence community

The different but frequently overlapping categories of intelligence – for example foreign, domestic, criminal and military – have spawned separate intelligence services in different countries. In some (mostly authoritarian) states, one agency often undertakes both internal and external roles simultaneously (for example, the KGB in the former Soviet Union). The typical separation of domestic, foreign and specialist intelligence functions into separate agencies requires co-ordination of intelligence collection and analysis; this is especially the case when the cross-border aspect of threats such as terrorism leads to the collection of information on the same targets by a number of agencies.

Intelligence as a product

Intelligence services are responsible for the collection, processing and dissemination of information, in order to ensure the security of the society and the freedom of its citizens. Modern intelligence agencies generally provide three key services:

- intelligence on foreign or external threats
- intelligence on threats to internal security:
- intelligence-led advice on policy- and decision-making

Purpose of Security and Intelligence Legislation

Security and intelligence activities are increasingly subject to legislative frameworks which provide the mandate, co-ordination and control, and oversight and accountability guidelines for intelligence communities. Such legislation will only be effective if it takes account of the apparently competing requirements of secrecy and democratic oversight. Placing intelligence agencies on a legislative basis provides them with a clear set of operating parameters and a legal mandate for their work – it is only if security and intelligence agencies are established by law and derive their powers from legislation that they can enjoy legitimacy. Also less tangibly, a legal framework can help to reinforce democratic values and give them a symbolic status, which may encourage powerful actors to respect them.

However it cannot be assumed that legislation will result in a change in intelligence agencies' behaviour. Accountability mechanisms must be developed to ensure that intelligence services implement and adhere to the legal framework imposed upon them. Achieving lasting change within intelligence services that have an established history of autonomy or rogue activity requires long-term political will and effective oversight mechanisms, both internal and external. Placing security agencies within a legal structure also has important constitutional consequences, as intelligence oversight is shifted, at least partly, to the legislature and/or the judiciary.

Role of oversight and accountability

There is a distinction to be drawn between the concepts of 'control' and 'accountability'. Control is the set of constraints under which an intelligence agency operates, whereas accountability is an information process whereby an agency is under a legal obligation to answer truly and completely the questions put to it by an authority to which it is accountable (for example, a parliamentary intelligence oversight committee). The components of effective oversight and accountability include:

- **Executive accountability** - due to the inherent secrecy of their activities, effective control of intelligence agencies can only be exercised by the executive in the form of ministers. Ministers need to have sufficient powers to exercise control over intelligence services – including the right to demand information from those agencies.
- **Parliamentary oversight** - oversight by the legislature of intelligence services enhances their legitimacy and democratic accountability, while ensuring that these agencies are serving the state as a whole rather than a narrow political or other interest. The involvement of parliamentarians can also help to ensure that public funds are properly accounted for.
- **Legal compliance** – The principal mechanism for ensuring legal compliance is judicial review. Judges are often perceived to be independent of government and, traditionally, the role of the courts is to protect individual rights.

Case-Studies & Methodology

To better understand specific issues regarding intelligence processes, structures, and roles, it is useful to look at particular case-studies to demonstrate how individual countries have addressed the issues. The case-studies chosen cover a wide range of nations—from developed to developing nations, from different governance systems, and from different heritages. The six nations chosen for analysis were:

- United Kingdom
- Canada
- South Africa

- Argentina
- Germany
- The Czech Republic

These case studies were chosen, in agreement with the client, in order to achieve a balance between developed and developing world, and between those that have experienced evolutionary versus revolutionary reforms in their intelligence structures. These also offer a wide range of useful learning points for those utilising this report.

Lessons identified

From the above case-studies and the body of academic work in this field, it can be concluded that a number of key issues must be addressed to make intelligence and security legislation meaningful. These fall into four key areas from which lessons can be drawn:

- **Intelligence Mandates** - the agency or community that is being legislated for must be given a clearly-defined mandate for its activities; legislation also can be used to establish distinct agency boundaries between domestic, foreign and military intelligence activity, as well as the types of activities undertaken.
- **Central Co-ordination, Oversight and Accountability** - through central co-ordination, states can check that individual agencies do not overlap, become involved in rivalries, and ensure that complimentary collection and analysis paths are followed. Such centralised oversight also serves to assure the public that all capabilities and agencies are being watched over by one body, ensuring against duplication and that gaps are being filled. A further key requirement of intelligence legislation is to provide clear lines of accountability, while subordinating intelligence services to the control of democratically-elected leaders. The inherent secrecy that surrounds the activities of intelligence services makes it vital that both the executive and other oversight actors scrutinise the actions of these agencies.
- **Judicial Oversight** - in several of the cases above, the judicial system plays a role in regulating the activities of intelligence services in the domestic sphere. This primarily relates to instances when services wish to encroach upon the rights of individual citizens by means of intrusive surveillance or covert searches. Judicial oversight is required to set

limits to achieve the proper balance between the protection of individual rights and the collection of necessary information.

- **Parliamentary Oversight and Accountability** - Legislative involvement in the oversight of intelligence services enhances legitimacy and democratic accountability, while ensuring that security and intelligence agencies are serving the state as a whole rather than narrow political or other interests. There are many models of parliamentary oversight, with some being more robust than others.

In addition to these generic areas, it is also important to recognise differences between developed and developing countries when considering the implementation environment for security section reform. In the countries examined, there were a variety of factors influencing the environment in which intelligence legislation was developed and implemented. These factors exerted influence both from within the agencies and the executive as well as externally from parliament, the public, the media, foreign states and international bodies. Some or all of these pressures are likely to be felt in other developed and developing states which undertake intelligence reform.