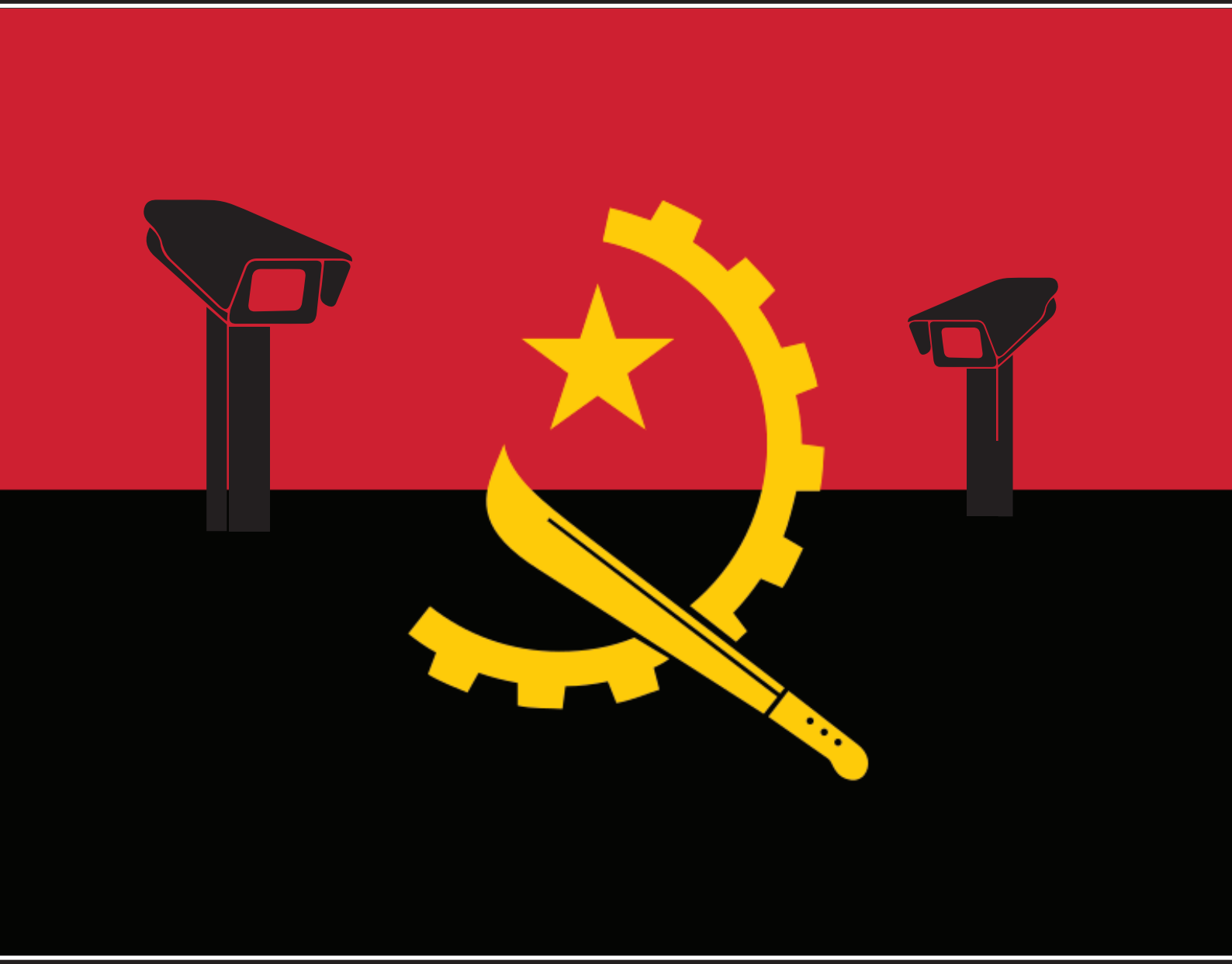
Words and actions: A realistic enquiry into digital surveillance in contemporary Angola



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Introduction: The pervasiveness of surveillance in Angola

In recent times, the Angolan event with the greatest global impact has been the news item, the "Luanda Leaks" (Freedberg et al., 2020), which made public a series of allegedly irregular actions of Isabel dos Santos, the richest woman in Africa and the daughter of Angola's former president. The official version was that the documents published in the report were obtained through a Portuguese hacker, Rui Pinto. However, Isabel dos Santos argued that the documentation was collected by Angola's security services through a digital surveillance operation (dos Santos, 2020). This is an example of the paramount relevance of electronic surveillance in today's Angolan political, economic and social life. In Angola, there is near paranoia about the issue of digital surveillance.

The development of a proper legal framework to protect people's civil rights and privacy has been extremely difficult in Angola. In a country ravaged by prolonged wars (liberation and civil wars from 1961 to 2002) and dominated by a single party since its independence in 1975, the *Movimento Popular de Libertação de Angola* (MPLA) [Popular Movement for the Liberation of Angola], the government has often resorted to digital surveillance to obtain intelligence about its enemies and the threats it considers relevant, without paying any special attention to complying with laws regarding privacy, as was the case of the "15+2" trial of supposed revolutionaries, or the surveillance of investigative journalist Rafael Marques, detailed below.

For a long time, pertinent legislation did not exist to any great extent or was anachronistic. In 2010, though, a new constitution was approved that contained restrictions on the use of digital surveillance. Afterwards, when new laws were promulgated to enforce the constitutional restrictions, they were in fact never obeyed, creating a huge gap between the law and its implementation. The culture of uncontrolled digital surveillance has proven stronger than any legal command.

In 2020, the National Assembly approved the Cellular Identification or Location and Electronic Surveillance for Criminal Prevention and Repression Act. Such an act can be said to be unconstitutional and even a step backwards. However, a few months later, new Penal and Penal Procedure Codes were approved. Their standards are promising, but their application in practice will have to be seen.

By delving into legislative history and facts, this paper analyses the evolution of digital surveillance in Angola since 1992, comparing the normative intentions and actuality. It examines two trends that are somewhat contradictory. On the one hand, there is a constitutional restriction on digital surveillance and some emerging legislation enforcing such restriction, but on the other hand such restriction is confronted by numerous and sustained cases of uncurbed digital surveillance. These conflicting realities indicate that there is a large gap between the legal norms in Angola and what is really happening on the ground. This survey has attempted to gauge the breadth of such a gap.

War and digital surveillance as a common practice

On 22 February 2002, in a statement read on the national radio, Angola's government announced the death of Jonas Savimbi. Savimbi was the leader of the *União Nacional para a Independência Total de Angola* (UNITA) [National Union for the Total Independence of Angola]. UNITA was one of the warring factions of the civil war, which had devastated the country since its independence. With the death of Savimbi, a peace agreement was rapidly concluded, and the war finally ended.

Savimbi was shot in the province of Moxico (East Angola) in an operation carried out by the Angolan Armed Forces (FAA). Governmental forces launched the operation with surgical precision, closely following Savimbi and combing the place where he was moving and from which he was launching attacks. It was well known that Savimbi's mobile and satellite phones were being tracked by the Angolan military, and that by evading the tracking systems that were being used by the government he had escaped several previous attempts by government forces to kill him (Carisch et al., 2017). Referring to the death of Savimbi, Jardo Muekalia, who headed UNITA's Washington office until it was forced to close in 1997, said, "The military forces that ultimately succeeded in assassinating [Jonas] Savimbi were supported by a commercial imagery satellite and other intelligence support provided by Houston-based Brown & Root, [Dick] Cheney's outfit" (Madsen, 2013: 73).

There is a widespread legend that Savimbi's death was the result of digital surveillance. The point to discuss here is not if Muekalia is right about the role of digital surveillance in the death of Savimbi but the evidence that digital surveillance was an exceedingly important element in the government's fight against Savimbi, and is a tool that is often used by the government against its enemies, a tool that is so important that a powerful legend regarding its role in Savimbi's death has emerged.

Surely, when fighting a war, it is normal to use tracking devices, satellites and various other mechanisms of digital surveillance. The question, however, is whether the war justified the far-reaching utilisation of such techniques and made it "normal" to employ them so extensively that their abusive use became pervasive in Angolan civil life during and after the war.

The legislation and its silence (1992–2010)

The first attempt to introduce democracy and the rule of law in Angola after its independence took place in 1991–1992, following the so-called Bicesse Accords, which was meant to end the civil war (Gouveia, 2014). The civil war did not end, but the agreement at least paved the way for a profound legal change (Gouveia, 2014; Machado et al., 2015). Consequently, before the resumption of the war, two Constitutional Laws were published and entered into force in the years 1991 and 1992, modifying the previous constitutional Marxist framework. The new laws were intended to establish a national consensual constitutional structure based on liberal democracy, guaranteeing fundamental rights and the rule of law.

First, there was Constitutional Law 12/91 issued on 6 May. Article 31 of this law stated that the homes and correspondence of all citizens were inviolable, and Article 28 stated that all criminal proceedings were subject to due process of law. This was reinforced by the subsequent Constitutional Law 23/92 issued on 16 September, which provided for an interpretation in accordance with the Universal Declaration of Human Rights and other relevant international pacts when adjudicating about fundamental rights. Also, like Constitutional Law

12/91, it established the principle of inviolability of correspondence and the need for due process of law in criminal proceedings, in Articles 44 and 36, respectively. Therefore, the need for due process of law and the inviolability of correspondence were established by Angola's former fundamental law.

The unusual aspect of this constitutional protection was that it extended its legal mantle only to correspondence. Apparently, phone wiretapping or any other intromission into people's communications apart from correspondence was lawful or at least not prohibited, creating a grey and discretionary area. The term *correspondence* was derived from an earlier twentieth-century law that was still in place at the beginning of the 1990s. Specifically, Article 210 of the Penal Procedure Code (adopted in Portugal in 1929 and still in force in Angola even after its independence) stated that searches and seizures of letters, parcels, telegrams and other correspondence could be conducted in post offices, telegraphs and telegraph stations following a reasoned order from a judge. This was to be the legal standard: correspondence (i.e. letters, parcels, telegrams, etc.) could be apprehended only with a judicial order. The legal restrictions, however, applied only to correspondence, leaving out a world of other communications; phone calls, and later, e-mails or any other form of interpersonal communication did not have any constitutional or legal protection.

Simultaneously with the adoption of the above-mentioned Constitutional Laws to promote democracy and the rule of law, and considering that the Penal Procedure Code was already outdated, and was a work of the colonial power, Portugal, a new law regarding searches and seizures was approved in 1992: Law 22/92, issued on 4 September. Article 18 of this law provided that the seizure of letters, parcels, telegrams or any other correspondence was authorised provided that such was to be decided by an authority, who was specified in the law. This article deserves two comments. First, it maintained the language of the 1929 Code, referring only to correspondence (perhaps an extensive interpretation of the norm could include items beyond letters and telegrams, and also telexes), but surely did not encompass phone calls or any digital communications. These were freely invaded by the State and others. The second comment refers to the authorities who were able to order the seizure of correspondence; contrary to the 1929 Procedure Code, which assigned such task to a judge. This law allowed prosecution attorneys as well chiefs of police to decide whether to conduct such infringements of civil liberties (see Articles 18, 14 and 3). The protection of personal communications (e.g. wiretapping and the then-developing digital communications) was extremely flimsy or even did not exist at all.

Consequently, from 1992 until 2002, there was a legal regulatory absence of what concerns wiretapping or surveillance over forms of communication other than correspondence. It was only in 2002, after the conclusion of the final peace agreement, that a new national security law provided for some sort of regulation. That would be Law 12/02, issued on 16 August. Article 24 provided that the organs of the national security system could control any form of communication, provided they obtained authorisation from a Supreme Court (criminal section) judge. Therefore, wiretapping and electronic vigilance by the security services and police were already admissible after 2002 provided there was a previous judicial mandate obtained from the Supreme Court. This was an improvement considering the preceding legal silence. Nevertheless, many observers contend that this law was never really enforced by the security services (Carlos, 2017).

A distinction should be made between the widespread massive digital vigilance of citizens and the targeted digital vigilance of elites and the government's potential enemies. The former was not possible because the Angolan security structures did not have the technical means to carry out such an undertaking on a large scale (Carlos,

2017). However, the security services opted to make use of a "psychological" device. On the basis of the sociological and cultural assumption that the Angolan society had a marked level of ignorance, the services disseminated information about the general use of wiretapping, causing people to panic and to hold back on expressing their thoughts about the government's actions. With the feeling that they were always under surveillance, citizens became extremely cautious and thought twice before engaging in social or political activities (Carlos, 2017).

While the aforementioned shrewd psychological device was being implemented with success by the security services on the general public (anonymous interview, 2020), advanced technology was being used to conduct surveillance over the elites and the real or potential regime opponents. Information about this came to light during the 2007 trial of Fernando Garcia Miala, the former powerful head of the foreign secret service.

General Miala's case as an example of widespread electronic surveillance

At the turn of the twenty-first century and in the early years of the new millennium, Fernando Garcia Miala was one of the most powerful men in Angola. He occupied several posts in the intelligence services: Deputy Interior Minister for Security, Director of the Domestic Intelligence Service and Director of the External Intelligence Service. Miala was one of the main individuals involved in the establishment of close economic ties with China, which became important to the country after 2002 (Burgis, 2016). He was also allegedly the sponsor of Pierre Falcone, the arms dealer and middleman who was at the centre of what came to be known as Angolagate (Matos, 2019).

Miala's role in the exercise of Angolan power was fundamental. In addition to taking the first and solid steps in approaching China for massive financial help after the civil war and coordinating the manoeuvres mediated by Pierre Falcone that ultimately allowed the MPLA to win the civil war and relaunch the economy in the post-war period, he was also the first to report to President José Eduardo dos Santos the corrupt business dealings that were occurring under the agreements with China. Perhaps it was this, and his power struggle with one of the main beneficiaries of such businesses, General Kopelipa, that led to his downfall.

What is curious, however, is that in the midst of all these affairs, there were always references to electronic surveillance, and the judicial case mounted against Miala was in part based on the abusive use of digital surveillance. It was alleged at the time that during Miala's term as head of the secret service, he had acquired the sophisticated machinery that made it possible to locate and consequently kill the UNITA leader in February 2002 (this is another version of the means that was used to locate and kill Savimbi) (anonymous interview, 2020). Then it was allegedly this same equipment that was used by Miala to discover the involvement of the former secretary of the Council of Ministers, Toninho Van-Dúnem, in influence peddling and other corrupt acts at the time that the first credit package was being negotiated by China and Angola (anonymous interview, 2020). According to some, during his time as security services director, Miala used the sophisticated surveillance equipment he had in his possession against the main power holders, ministers, and

collaborators of President José Eduardo dos Santos in Angola to discover and counter their corrupt practices, or according to others, to consolidate his power (anonymous interview, 2020; Carlos, 2017).

Ironically, Miala's opponents later turned the tide, using exactly the same surveillance equipment that he had used against them as "evidence" against the former boss of the Angolan secret services and his peers. It should be remembered that in this purge against the Mialists, one of the accusations made was the alleged conducting by the security services of a secret investigation against members of the government and the presidency of the Republic (VOA, 2007). Miala's downfall was the result of a plot blessed by President José Eduardo dos Santos and orchestrated by General Kopelipa. Wiretaps were among the essential elements of the accusation made against Miala in 2007, during the supposed judicial process that led to his conviction. Faced with the accusation of having set up an illegal wiretapping system in the country, Miala denied having knowledge about the installation and existence of digital mobile phone-tapping infrastructure in the country, reiterating this several times. Miala was also accused of stealing B-4 and M-17 recorders and seven phones intended for listening in. He replied in a peremptory way that he was unaware of the existence of the devices mentioned in the case file and had not seen them. In the end, Miala was convicted and sentenced to four years' imprisonment. Wiretapping and electronic surveillance were core elements in Miala's case.
Today, in another of the ironic twists of history, after serving his prison term, Miala again runs the secret services and is the main person responsible for the fight against corruption being promoted by President João Lourenço.

The sustained war climate and the need to consolidate the power of the winning regime across the country made the use of digital surveillance a constant. In light of much of the information obtained, both public and private (interview, 2020), it appears that the aforementioned surveillance indeed took place without judicial approval, which was required by the 2002 National Security Law. It was also noted, as mentioned earlier, that the security services employed the strategy of creating the impression that everyone was being watched to contain people's intention to revolt, and that they selectively used the digital surveillance equipment they had in their possession to obtain information about certain targets. The essential conclusion that can be made from this is that the existing law restricting electronic surveillance was irrelevant, and that it was enacted only as a political instrument and had no value in itself. As borne out by the facts that emerged in Miala's trial, a huge gap between law and practice existed then.

The 2010 Constitution

The enactment of the 2010 Constitution did not represent a watershed moment but merely institutionalised the 2002 regime in Angola. Nevertheless, it was hailed as a benchmark concerning the rule of law (Gouveia, 2014; Machado et al., 2015).

The section of the constitution regarding fundamental rights was inspired by the 1976 democratic Portuguese constitution, which in turn was based on the 1949 German Fundamental Law (Otero, 2010). That is why the 2010 Constitution contains a wide and diverse catalogue of fundamental rights duly protected and endowed with legal force. With respect to the interception of correspondence and communications, Article 34 is peremptory:

1. The confidentiality of correspondence and other means of private communication is inviolable, namely postal, telegraphic, telephone and telematics.

2. Only by decision of the competent judicial authority issued under the law, can public authorities interfere in correspondence and in other private means of communication.

This time, there are no doubts. All private means of communication, oral or written, by letter, phone or computer, are sacrosanct, and only an order from a judge can allow the interception of such communications. Legally, these provisions differ much from the previous norms, and the grey areas and doubts were apparently clarified. Now, all kinds of private communications are subject to the same regulation: they cannot be intercepted without a judge's warrant, competing with ordinary law to define the terms in which such warrants should be given.

It should be emphasised that this new Article 34 is not a mere proclamation or declaration of intention. In fact, according to Article 28, no. 1 of the Constitution, it immediately directs all state organs to abide by its provisions (Gouveia, 2014). The significance of this is that the said statement has a positive legal nature and is not merely programmatic. The 2010 Constitution stands by itself and prevails and binds the legislators and all the organs of the State. This means that an ordinary law is not needed to enforce the constitutional provisions; they are self-enforced (Andrade, 2012). This is important as the Angolan legal system absorbed the Romano-Germanic legal system, which generally encompasses a Kelsenian pyramidal organisation of the sources of law: the constitution is at the apex as a fundamental legal norm commanding social behaviour (Kelsen, 1967). The adoption of the system of enforcing the upholding of fundamental rights directly from the constitution created a shortcut in the pyramidal structure, giving additional strength to such rights.

Therefore, the question that was posed after the enactment of the 2010 Constitution was whether the strong constitutional affirmation of the inviolability of correspondence and private communication be it by phone or electronic means was to be upheld in reality or not. Has any practical change occurred?

Regulatory Law of Searches and Seizures (Law No. 2/14, 10 February)

The adoption of a new constitution that definitely intended to describe Angola as a state based on the rule of law implied the approbation of new legislation regarding the intrusion of police and public powers in people's lives. As such, the aforementioned 1992 legislation was revoked, and a new law, the Regulatory Law of Searches and Seizures, became effective in 2014 (Regulatory Law of Searches and Seizures, Law No. 2/14, 10 February). Its preamble clearly proclaims the following: "The publication of the Constitution of the Republic of Angola in 2010 expanded, reinforced and developed the constitutional premises of the Democratic Rule of Law and processed a broad recognition of citizens' rights, freedoms and guarantees". The fundamental aim of this law was to give judges the power to specifically intervene in all situations in which the fundamental rights, freedoms and guarantees of citizens may be endangered. At the time, the Angolan constitutional judge Raúl Araújo mentioned that the new legislation increased citizens' guarantees. The law, he stressed, obliges judicial authorities and prosecutors to be more rigorous regarding acts that may violate the citizens' fundamental rights, freedoms and guarantees. Araújo also emphasised that Law No. 2/14 regards the insufficiency of the search or search report as constituting a procedural

irregularity, and also outlines a set of procedural rules that must be observed to preserve or uphold the dignity of searched persons. In addition, searches must be carried out during the day and never at night, with certain exceptions provided for in the 2010 Constitution and Law No. 2/14 (Vasco & Bunga, 2014).

Regarding electronic vigilance, Article 17 of Law No. 2/14 provides for such, but its wording is not as comprehensive as the relevant 2010 constitutional norm. This article contains rules regarding seizure in postal and telecommunications services, stating that the seizure of letters, orders, telegrams or any other type of correspondence, even in installations or in post offices and telecommunications stations, is authorised under the condition that the seizure should be ordained by a judge. Additionally, some requirements were established for obtaining access to such judicial ordinance, the most relevant of which was that the crime under investigation in relation to which the seizure is to be made should be punishable by imprisonment for more than two years.

Although the wording of Article 17 of Law No. 2/14 is not as extensive as that of the constitutional text, the mention of "any other type of correspondence" and "telecommunications" makes it essentially similar to the text of the 1992 law that was considered not to involve electronic surveillance. However, if the wording is similar, the spirit of the law must be construed according to Article 34, n 1 of the 2010 Constitution, which very clearly guarantees the confidentiality of correspondence and other means of private communication, including telephone and telematics. Thus, the said article of the law should be interpreted in accordance with the 2010 Constitution. As such, the law should be construed as including all means of correspondence between or among people; that is, an extensive interpretation of the norm incorporating the constitutional command in it is compulsory. Therefore, accordingly, such law provides that in a criminal case all acts of interference with communications should be authorised or ordered by a judge, and that such authorisation or ordinance shall not be given for seizures in relation to crimes punishable by imprisonment for less than two years. If the seizure was conducted without a judge's authorisation, the evidence obtained therefrom would be considered inadmissible in court.

Consequently, as of 2014, the legal apparatus relating to electronic surveillance in Angola is based on three rules that should be construed together: the 2010 Constitution, the National Security Act of 2002, and the Search and Seizures Act of 2014. The legal regime established by these standards seems apparently simple: as a rule, electronic surveillance is prohibited; it can take place only under the strict conditions set out in the laws, which always point to the positive intervention of a judge. Thus, judicialisation of electronic surveillance was achieved; that is, be it in the interest of national security or in investigating a crime, authorisation from a judge is always needed.

If these are the legal standards concerning electronic surveillance, the practice is different. As will be shown from several recent, well publicised cases, electronic surveillance is clearly still widespread and is conducted without any judicial control.

Luanda Reading Club Trial (2015–2016)

The case of Angola 15+2, also known as the Luanda Reading Club case, went public when several arrests were made in June 2015, and it was brought to trial within the period from the end of that year to the beginning of 2016. Seventeen young people were indicted for material co-authorship of the crime of preparatory acts for rebellion and for an attack on the President, within the framework of a weekly training course that had been running since May 2015. These young people were Domingos da Cruz, Afonso Matias

('Mbanza Hamza'), José Gomes Hata, Hitler Jessia Chiconda ('Samussuku'), Luaty Beirão, Inocêncio Brito, Sedrick de Carvalho, Fernando Tomás Nicola, Nelson Dibango, Arante Kivuvu, Nuno Álvaro Dala, Benedito Jeremias, Osvaldo Caholo, Manuel Baptista Chivonde Nito Alves, Albano Evaristo Bingo, Laurinda Gouveia and Rosa Conde (*Frontline Defenders*, 2016). This famous Angolan case will not be discussed here in detail; its essential aspects will just be summarised.

Since 2014, Angola has been in an economic crisis caused by the abrupt fall of the oil prices. In this context, unemployment and youth dissatisfaction with the regime have increased exponentially, and the government began to fear a repetition of the Arab Spring. For this reason, the military intelligence, led by the infamous General Zé Maria, who also played a leading role in the Rafael Marques case, which will be discussed later, anticipated the arrest of some of the most well-known agitators in the country, creating a flimsy legal file against them (Maka Angola, 2016). Fifteen youths were detained in Luandan jails, accused of rebellion and the attempted assassination of President José Eduardo dos Santos, and two other similarly accused awaited trial while at large.

Among the books that were made the basis of the young activists' detention was *Tools to destroy the dictator and prevent a new dictatorship: Political philosophy of liberation for Angola*, by the Angolan academic Domingos da Cruz (2015), who was one of those arrested. Also among the detained activists was rap singer Luaty Beirão, who went on a 36-day hunger strike in protest against their continued detention beyond the term provided by Angolan law.

According to the order of pronunciation of the Provincial Court of Luanda, 15 October 2015, the fifteen activists were attending an eight-week seminar in the Angolan capital that aimed to hold research, debates and thematic discussions of the aforementioned book by Domingos da Cruz, constituting a kind of training for rebellion. To add density to the plot, the Angolan itinerant ambassador, António Luvualu de Carvalho, told the Portuguese Official News Agency that the activists wanted to provoke a NATO intervention in Angola that would lead to the overthrow of President José Eduardo dos Santos (LUSA, 2015).

After being placed in preventive detention with great propaganda, and presented as an example of what would happen to those who opposed President José Eduardo dos Santos's regime, the activists were put on trial. Among the pieces of evidence that the prosecution team presented in the trial were two videos, in the first of which da Cruz appeared to be demonstrating ways of motivating people to participate in demonstrations. The second video featured the alleged leader of the rebellion, Luaty Beirão, who appeared to be writing allegedly compromising words on a school board, followed by a dialogue between da Cruz and Beirão, with the latter saying that during the demonstrations there could be no interference from the army because if there were, it could start a coup, which they (the activists) would not defend (Ndomba, 2015).

Below, Joana Bárbara Fonseca contextualises very clearly the intervention of the secret services in this case, using electronic surveillance:

> *Maybe we can speak about "medium-tech surveillance" in Angola when referring to the presumably ex-KGB devices that Angolan Secret Services seem to use. This sipaio mentioned by Nito Alves [another accused] confessed that he has filmed and taped the activists' conversations the whole time through some devices that the Secret Services had given him and, as described, a video-recorder pen, and a tape recorder "that looked like a car's ignition"*
> *(Fonseca, 2017: 376).*

In fact, the videos were not impressive as evidence. Nevertheless, it was not specified how they were obtained, who recorded them, and who gave the judicial authorisation for their recording. They were referred to as the result of an intelligence

operation inside the group, but no judicial order for such operation was shown.

Luaty Beirão, whose defence included his discovery that several of the articles of evidence presented in court, including the videos, were obtained without any authorisation from a judge, tried to have such evidence nullified on the basis of the law, but without success (Oliveira, 2015). In the end, the 17 activists were convicted and sentenced to imprisonment for from two years and three months to eight years and six months. This decision turned out not to be good for President dos Santos because it showed that the country's judiciary was really under his control, and a country in which the judiciary is so deferent to the president is not a true democracy but a dictatorship (Verde, 2018). Consequently, dos Santos rushed to pass an amnesty law that released the activists from prison.

What is important to note with regard to this case is that unauthorised electronic surveillance means were used, and the videos obtained by such means were shamelessly shown in court without penalty and without being declared null and void, proving that there is still a gap between what is stated in law and what is happening on the ground.

The 15+2 case is not the only one that is absolutely reprehensible as it flouts the country's constitution and laws. The truth is that several cases and situations continued to emerge or develop showing that the law was really a mere instrument for propaganda and was not an effective remedy for the abuse of citizens' rights and liberties.

Rafael Marques under continuous surveillance

Rafael Marques de Morais is an Angolan investigative journalist, perhaps the most famous and incisive. For many years, he has been passionately denouncing the transgressions of the Angolan regime, especially in the areas of corruption and violation of human rights. Consequently, it is not surprising that he has always been an object of interest by the security services and the senior political or economic powers that be. He has been detained, arrested and sporadically assaulted, and he has been constantly under surveillance. What is most important is that over time the direct physical threat against him has diminished but the surveillance that has been conducted over him using sophisticated electronic means has intensified.

In Luanda, a few metres away from the quiet house where Marques lives, there is a very discreet blue villa where the headquarters of an anodyne commercial company was registered. It was in this space that an extended and sophisticated electronic surveillance apparatus was installed targeting Marques, intercepting his personal conversations, telephone contacts and other communications sometime in the 2010s. It was never exactly clear if the operation was officially set up by the Angolan state or by a mercenary in the pay of the main figures at the time, but it is certain that it existed and conducted surveillance work for a long time without any legal basis. Surveillance was also conducted over Marques' computers, and pirate attacks were launched on his Maka Angola website. Janet Gunter recounts that in 2013:

> *Security researcher Jacob Appelbaum spoke at the Chaos Communication Congress about Angolan investigative journalist Rafael Marques and his laptop. Marques […] approached Appelbaum with an all-too-common query: "There seems to be something wrong with my laptop; it's running slow". Appelbaum found what he described as the "lamest backdoor" he had ever seen, a spyware program that was surreptitiously taking screenshots of Marques' activities and attempting to send them to another machine (Gunter 2014, para. 4).*

Fonseca adds that "in 2013, it was reported that the Angolan Intelligence Services might

be implanting a monitoring system that could track digital communications. Complaints about technical attacks against independent and critical news websites, blogs, and opposition voices are common" (2017: 377). The same researcher reveals that "[Marques de] Morais' computer has been hacked in such a way [that] his activities [his open Facebook account] were being print screened and sent remotely – the surveillance expert who detected this pointed out how simple the system was" (Fonseca, 2017: 377).

According to certain information obtained on the spot, a well-known Israeli entrepreneur and philanthropist was instrumental in establishing the electronic surveillance system targeting Marques. This businessman became famous in Angola in the 2010s for purveying the military forces and intelligence services with surveillance equipment from Israel, mostly made by two autonomous entities, Israeli Military Industries (IMI) and Israeli Aerospace Industries (IAI) (*Africa Monitor*, 2020). Apparently, beyond the supply of equipment to official Angolan authorities, the Israeli entrepreneur also provided services to private individuals, and "sophisticated equipment surveillance was a central part of the 'offer'" (*Africa Monitor*, 2020: 3). It is in this context that the Israeli is held responsible for the assembly of the electronic espionage system that was used to conduct surveillance on Marques. The equipment is described as "sophisticated surveillance equipment ('military grade', U.S. technology) mounted inside a van in the backyard of a neighbouring house operated during several recent years" (*Africa Monitor*, 2020: 4).

Only after 2017 did Marques become aware of the existence of the large-scale operation against him. The available information pointed to General Zé Maria, the head of the military intelligence, Vice President Manuel Vicente and State Minister for Security General Kopelipa as the contractors of the services, although it was not an "official" operation but a private endeavour of such personages. The operation presumably ended in 2017 or 2018.

What is relevant in this case, as in the previous one, is the complete impunity with which people with high positions in the regime acted in their official capacity in complicity with various highly placed people (judges, foreign entrepreneurs, etc.) to exercise the most discretionary electronic surveillance without any respect for the law and people's rights. Nothing happened to them despite their apparent crimes, and the evidence they had illegally obtained was accepted in court in the Angola 15+2 case, as mentioned earlier.

Cellular Identification and Location and Electronic Surveillance Act (Law No. 11/20 23 April)

The 2020 Cellular Identification and Location and Electronic Surveillance Act (Law No. 11/20, 23 April) has several objectives and was enacted within the welcome context of the limited political opening that the current president of Angola, João Lourenço, was promoting in the country, which has allowed people greater freedom of expression and has more strongly upheld their right to demonstrate.[1] The objectives of the law involve updating and specifying the requirements for carrying out electronic surveillance and interception of the most modern means of communication. As seen above, such specifics were either absent or needed robust interpretation in the previous legislation.

One would think that the aforementioned law would be in line with the seeming political opening and would adequately develop the precepts of the 2010 Constitution. However, the reading of the legal text is surprising and appears to contain a normative setback: it is unconstitutional.

The scope of the law is overly broad, as it establishes the legal regime for the identification or

1 This view is not consensual, as several authors and opinion makers doubt whether any real opening is happening (see, for instance, Africa Center for Strategic Studies, 2020).

location of people by cellular phone and electronic surveillance over people and goods in public or private places (Article 1). There is no doubt about what the law aims to accomplish – an overall regulation of electronic surveillance – and that it finally directly addresses the various aspects of electronic surveillance that were unresolved by previous legislation.

The means of electronic surveillance provided to the authorities by the new law are extensive and include, in accordance with Article 12, the following: software for locating and accessing registration, telephone and telematic signals, and applications, and computer platforms for monitoring cellular signals; video surveillance cameras and audio surveillance equipment, installed in a fixed location or support, in mobile media or in equipment; satellite tracking equipment; equipment for tracking, surveillance and interception of telephone and telematic communications; and radio-listening equipment.

The law also permits the use of electronic surveillance in multiple and varied situations: in the investigation of any crime, regardless of the applicable prison sentence, and even in crimes that have not yet been committed but are imminent (Articles 3 and 4). However, it establishes some generic restrictions (Article 5), as it prohibits the use of electronic surveillance on a person who is not a suspect in the commission of a crime or a defendant in a litigation, did not act as an intermediary for the commission of a crime, and shows no clear indication of having collaborated with a crime suspect or defendant; and when the electronic surveillance is to be carried out with a discriminatory motivation due to the target's political, ideological, or religious convictions or for ethnic or social segregation; when there is a possibility of monitoring or locating the legitimate target by other means; and when there is no evidence of the target's authorship of or participation in a criminal offense.

It is too early to evaluate the effectiveness of these restrictions, but experience indicates that they will be useless, as the language is vague and the concepts are abstract, thus making it easy to skirt the prohibitions. It can be said that the law established a broad principle of admissibility of electronic surveillance, provided some meagre conditions are fulfilled.

What is most frightening about the law, however, is that the determination or authorisation for electronic surveillance practices, generally, is not dependent on a judge but on the prosecution office, or in specific cases on the police themselves. It is the state prosecutor who determines when electronic surveillance can be conducted and who thus authorises it, and in cases of urgency or other cases specified in the law, it may even be the police who authorise the act, although in this case the consent of the state prosecutor must be obtained within 72 hours of the authorisation (Articles 8, 3, 4 and 20–22). In other words, according to such law, electronic surveillance is divorced from judicial verification, and dependent only on the parties that will investigate and carry out criminal prosecution.

Apparently, the foregoing is unconstitutional, violating Article 34 of the 2010 Constitution, which protects all forms of private communication and requires that any interference with such be subjected to a judge's evaluation and authorisation. Using legal sophistry, the parliamentary legislator introduced Article 23 into the law, which states that the monitoring, tracing and interception of telephone and telematic communications is subject to judicial authorisation. Therefore, according to the law, two kinds of electronic surveillance can be undertaken: one regarding telephone and telematic communications that needs judicial authorisation and all the rest that just demand authorisation by the state attorney.

The question that arises is that despite the employment of cunning in draughting such a law, the problem of its unconstitutionality persists, as the constitutional provisions encompass all the

matters that the law covers (i.e. all forms of private communications) and the provisions of Article 23 of the law, which require judicial intervention, are restricted to telephone and telematics. To clarify, Article 23 of the law requires judicial intervention only for the interception of telephone and telematic communications, while Article 34 of the Constitution has a much broader scope, requiring judicial intervention for interceptions of all private communication, the reference to phones being a mere example. This constitutional detail will have gone unnoticed by the ordinary legislator.

Thus, looking at a specific case, the law allows the interception of a private oral conversation between two people with the authorisation of the state attorney, while the 2010 Constitution requires authorisation from a judge for interception of any private communication. There is thus an inconsistency between the new law and the Constitution that needs to be addressed, as discussed below.

As the law only came into effect in April 2020, it is too soon to carry out any assessment of its implementation. What can already be noted is its unconstitutionality; the law is quite generous in granting the State the power to carry out electronic surveillance because, as a general rule, State power only needs authorisation from the state attorney and sometimes even only from the police. In addition, there is no limit for the crimes under investigation; in fact, the crime need not have already occurred but can just be imminent. In sum, for the protection of people's fundamental rights against electronic surveillance, it is not a good law.

Meanwhile, doubts about the constitutionality of the State Prosecution Office's powers to authorise electronic surveillance were taken to the Constitutional Court by the Bar Association of Angola (Ordem dos Advogados), and in a strong decision on 15 December 2020, the Court declared Articles 6, no. 3, and 8, no. 3, and Articles 17, 18, 19, 20, 21 and 22 of Law no. 11/20 of 23 April unconstitutional and therefore inapplicable in the Angolan legal system. This decision occurred in judgement no. 658/2020, whose rapporteur was Judge Maria da Conceição Sango.[2]

The reasoning behind the Court decision is short and simple, occupying only five pages. The Court starts by stating that the penal procedural system chosen for Angola is based on the principle of the accusatory. According to this principle, the Public Prosecutor's Office is responsible for carrying out the indictment; therefore, it would be wrong to simultaneously give it powers to guarantee the rights and freedoms of the accused. In practice, those who want to accuse will not be particularly attentive to defending the freedoms of the accused, the Court reasoned. For this reason, it must be another entity, such as a judge, that will guarantee these freedoms. Consequently, Law 11/20 of 23 April, by empowering the Public Prosecutor to order, authorise and validate electronic surveillance, is giving it an appreciable advantage over the accused and has no impartiality in its decision.

Furthermore, this power to authorise electronic surveillance violates the separation of powers, as in practice it is conferring judicial powers to the prosecution service.

The decision put forward two strong arguments of a constitutional nature in this case. First, there is a need to respect balance and equality between the parties in the context of criminal proceedings. The principle of equality of arms between prosecution and defendants is enshrined in constitutional law and should be respected. The second constitutional argument raised in this case relates to the separation of powers and the need to understand the differences in functions between judges and prosecutors.

2 Yet to be published. However, a copy is in the personal archives of the author.

The New Penal and Penal Procedure Codes

On 11 November 2020, Angola finally adopted its own Penal and Penal Procedure Codes after decades of following ancient colonial provisions. Law 38/20 of 11 November approved the Penal Code, and Law 39/20, of the same date, approved the Penal Procedure Code. Both Codes will come into force in February 2021. Naturally, the Codes contain detailed provisions regarding electronic surveillance.

Regarding the new Penal Code, the essential aspect results in the criminalisation of electronic interceptions not permitted by law. Article 230 punishes with prison those who intercept, listen, capture, record or transmit words spoken privately or confidentially, as well those who intercept, record, record, use, transmit or disseminate telephone conversations or communications. Registering or transmitting the image of another person who is in a private place is also forbidden. Article 231 states that whoever, without consent, opens a letter or any other writing that is closed and is not directed to her/him or becomes aware, by technical processes, of its content or, in any way, prevents it from being received by the recipient is punishable by imprisonment. Finally, Article 236 provides punishment for those who record someone else's spoken words in public, or those photographing or filming, without consent, even at meetings or events in which they have legitimately participated.

With respect to the Procedure Penal Code, the fundamental provisions are held in Articles 241 and 242. Such norms established that to listen and record electronic conversations or communications is admissible within a criminal inquiry provided judicial authorisation was granted and the crime that is the subject of the investigation is part of a broad list included in Article 241, 1(c). Likewise, apprehension of correspondence is allowed under the supervision of a judge.

In summary, it can be said that the new codes meet modern trends in criminal law in terms of electronic surveillance. Such surveillance is admitted under strict conditions, provided there is the authorisation of a judge. In turn, the violation of these rules constitutes a crime.

Doubt arises at the level of the adequacy of the different regulations and their effect in actual practice. It has been seen in the past that practice and law have not gone hand in hand. Additionally, even after the declaration of partial unconstitutionality of the Cellular Identification and Location and Electronic Surveillance Act, it seems that this legislation does not possess the same strictness as the Codes, thus creating an area of ambiguity, not about who should authorise electronic surveillance – it is clear it should be a judge – but about the remaining conditions for surveillance.

Note on surveillance actors

Several situations of illegal electronic surveillance were identified in this report. Though the law was unclear and did not make univocal commands, this does not mean that everyone started watching each other and a popularisation of surveillance occurred. Monopolistic surveillance actors were identified, mainly security services and members of the dominant elite who acted privately and hired external agents. Of the cases that were surveyed, North Americans, Russians (or Soviets), and Israelis have been known to be used as external agents.

One of the security services identified in the text is the *Serviço de Inteligência e Segurança de Estado* (SINSE) [State Security and Intelligence Service]. SINSE is the main internal security service in the Republic of Angola and was known as the *Serviço de Informações* (SINFO) [Intelligence Service] until 2010. General Fernando Garcia Miala is the larger-than-life character who directed the SINFO in the early 2000s and now leads the SINSE after being

imprisoned. The *Serviço de Inteligência Militar* (SIM) [Military Intelligence Service] also plays an important role in relation to electronic surveillance operations in Angola. This military branch of security services was formerly commanded by General José António Maria, better known as General "Zé Maria," who was loyal to former President José Eduardo dos Santos. General Zé Maria conspired for Miala's imprisonment and is now under house arrest (Franco, 2013). Most of the SINSE security service material and training was provided by the former Soviet Union (Sukhankin, 2020). More recently, Israelis became purveyors of security service technology and training, including companies established by retired members of the Mossad or Shin Bet (Joras & Schuster, 2008). Reference should also be made to the help of private U.S. contractors, especially when it comes to the finalisation of the Civil War, as seen above.

Beyond the security services identified in the text, members of the dominant elite were also active in private surveillance operations. For example, investigative journalist Rafael Marques was specifically targeted by former Angolan Vice President Manuel Vicente, security chief General "Kopelipa," and others. The members of the dominant elite who were active in private surveillance operations tended to hire Israeli technology and operatives.

In sum, the main actors of the surveillance were the security services and some members of the elites in a private capacity. They targeted two types of persons: members of the government and power structure, which monitored themselves simultaneously; and relevant political activists, such as Marques or the 15+2.

Conclusions

The warring historical context of the formation of independent Angola (1961–1975) and the subsequent years of civil war (1975–2002) led to the widespread and permanent use of electronic surveillance without legal control. In a way, electronic surveillance has become a fact of Angolan daily life, with a clear difficulty of abandoning such a practice.

In the first attempt at democratisation and at establishing peace that took place in 1991–1992, the 1991 and 1992 Constitutional Laws were enacted and thus the principle of the inviolability of private correspondence and the need for due process of law if the citizens' fundamental rights are to be violated were established. In 1992, a law emerged that sought to restrict the checking of correspondence by law enforcement agencies, but by giving the power to authorise interceptions to the state attorney rather than the judge, it ended up giving fewer formal guarantees than the old rule that was supposedly in force derived from the 1929 Portuguese Penal Code, which required the intervention of a judge to authorise interference in correspondence. Regarding electronic surveillance, there was a total legal gap, prodding everyone to assume that everything was possible.

It was only in 2002, shortly after the end of the civil war when a national security law was established, that wiretapping and other interceptions of private communications by the security services were subject to prior authorisation by a Supreme Court judge. This, however, did not stop the uncontrolled use of electronic surveillance. The security services even disseminated the information that everyone was under surveillance to exert psychological pressure on the Angolan people and prevent any expression of discontent with the regime after the latter's victory in the civil war, even though in reality the technical means to conduct such large-scale surveillance did not exist.

The truth is that electronic surveillance was focused on individuals who were identified as threats to the regime and on people at high government levels, as demonstrated by the conviction of the then head of the secret services, General Fernando Miala, when he had fallen out of favour. A good part of the accusations that were hurled at him were based on the indiscriminate use of wiretaps.

In 2010, attempts were made to legally control any surveillance over people's private lives with the approval of the new constitution, which contains guarantees and rules for direct application. In 2014, a law on searches and seizures was enacted, which makes a judge intervene in the conduct of searches and seizures and limits the authorised conduct of such acts to people involved in crimes punishable by imprisonment for more than two years. Nevertheless, the meaning and scope of the law (i.e. the behaviours it covers) are not clear, requiring a robust interpretation based on the constitution.

The reality, however, is that the foregoing legal devices did not achieve anything relevant: the use of electronic surveillance by public entities or private interests linked to the powers that be has continued unchecked. The mentioned Angola 15+2 (Luanda Reading Club) case and the case of the sophisticated public/private surveillance operation over Rafael Marques, an investigative journalist, demonstrate the unabated conduct of electronic surveillance in Angola despite the relevant legislation.

The problem could have been aggravated by the 2020 Electronic Surveillance Law, which placed the power of surveillance authorisation largely in the hands of the state attorney. However, a recent decision of the Angolan Constitutional Court declared the unconstitutionality of such a scheme, i.e. according to the judges, the Constitution does not allow that the decision of electronic surveillance be dependent on the state prosecution office.

The same trend tending to legally control electronic surveillance is encountered in the new Penal and Penal Procedure Codes. The last one submits wiretapping and several measures of electronic surveillance to judicial authorisation and restricts its use to a list of crimes, and the Penal Code declares it to be a crime to make electronic interceptions not in accordance with the law.

To summarise, nowadays in Angola, the law is sending a robust signal regarding electronic surveillance. The Constitution controls and judicialises it, and the Constitutional Court declared electronic surveillance not approved by a judge to be unconstitutional. In the same mood, the new Penal and Penal Procedure Codes adopted a judicial approach regarding the authorisation of surveillance and criminalised any private endeavours.

However, the doubt rests, as persist some incongruencies between the new Electronic Surveillance Act and the, also novel, Codes. Moreover, in Angola, historically, a great gap separating law and fact was a constant, and it is not possible to foresee whether such a gap is closing. It also remains to be seen if law enforcement will continue to allow Angolan public and private interests to monitor individuals as they wish and without control.

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